No. 22-3176
(consolidated with No. 22-3666, 22-3794 & 22-3796)

In the

United States Court of Appeals

for the

Sixth Circuit

ELECTRIC POWER SUPPLY ASSOCIATION,

Petitioner,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PJM POWER PROVIDERS GROUP,

Petitioner,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On petition for review of orders of the
Federal Energy Regulatory Commission

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

As our opening brief explained, the Administrative Procedure Act and the Department of Energy Organization Act prohibit the Chairman of the Federal Energy Regulatory Commission ("FERC") from unilaterally directing FERC's attorneys to reverse course in litigation and seek a voluntary remand that reopens an otherwise final Commission order. Nor can the Commission conduct an abrupt about-face on policy without considering the damage to regulatory stability that such conduct would inevitably yield—a factor whose importance FERC itself has repeatedly emphasized.

But as we demonstrated, that is just what occurred here. The dissenter-turned-Chairman's *ultra vires* unilateral remand contradicted both statute and FERC's own longstanding practice by using the mechanisms of litigation to reopen an already final proceeding without holding a vote of the Commissioners as required. And that action ultimately produced two orders representing a substantial reversal of FERC's prior policy position, based not on new information or an augmented record, but on a change in leadership.

Petitioners' opening brief explained that this was contrary to law: "Actions of the Commission" require "a majority vote of the members present" (42 U.S.C. § 7171(e)), while the Chairman's authority to act

unilaterally is limited to ministerial administrative functions like hiring and supervising personnel (*id.* § 7171(c)). And even putting the *ultra vires* nature of the Chairman's action to one side, the Remand Order and Rehearing Order failed to consider regulatory stability or engage in reasoned decisionmaking on the merits of the rates at issue. Nothing in either FERC's or the Intervenors' brief casts doubt on that conclusion. FERC's actions must be set aside.

ARGUMENT

I. The Chairman's request for voluntary remand was *ultra vires*.

As we explained in our opening brief, FERC's Chairman lacks the power unilaterally to obtain remand of a majority-ordered Commission order from a court—thereby achieving a result that, absent the court's intervention, even the full Commission lacks power to bring about without meeting the procedural and substantive requirements of FPA Section 206. *See* Pet'rs Br. 23-41.

The governing statute requires "[a]ctions of the Commission" to be "determined by a majority vote" (42 U.S.C. § 7171(e)), a requirement that accords with the "almost universally accepted common-law rule that only a majority of a collective body is empowered to act for the body" (*Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) (quotation marks omitted)). *See* Pet'rs Br. 23-25. By contrast, the statute assigns to the

Chairman the power to act unilaterally "on behalf of the Commission" only with respect to "the executive and administrative operation of the Commission," and illustrates the scope of this authority with five obviously ministerial examples. 42 U.S.C. § 7171(c); *see, e.g.*, *id.* (empowering Chairman with respect to "the appointment and employment of hearing examiners"); *see* Pet'rs Br. 25-28. Moreover, if the statute *did* empower the Chairman unilaterally to claw back otherwise final Commission actions, as FERC claims here, that power would unconstitutionally vest the Executive Power in a single individual removable only for cause. Pet'rs Br. 35-41; *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2198 (2020).

The Commission and Intervenors raise a variety of objections to this straightforward statutory reasoning; several misunderstand or mischaracterize our arguments, and none has merit. They cannot defend the former Chairman's brazen decision to drastically change course in litigation without the consent of the Commission as a whole, resulting in a reversal of a final agency decision that had already been affirmed on rehearing.

A. FERC begins by half-heartedly invoking *Chevron* deference for its view that the Chairman can use the courts to reconsider a final Commission decision. FERC Br. 30-32. But *Chevron* deference is not due here, for multiple reasons.

First, it is black-letter law that "[i]f the statute is unambiguous, then the court applies it as-written; 'that is the end of the matter.'" *Arangure v. Whitaker*, 911 F.3d 333, 337-338 (6th Cir. 2018) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)). Here, as we have explained, the statute unambiguously requires a majority vote for Commission action and assigns to the Chairman individually only ministerial, administrative functions necessary for running the agency; clawing back an order that is otherwise beyond the power of the Commission to change without instituting a new Section 206 proceeding is plainly not of that type. *See* Pet'rs Br. 23-35; *infra* pages 12-17.

Second, even if the statute *were* otherwise ambiguous as to the precise question here, deference would still not be appropriate, because the "canon of constitutional avoidance trumps *Chevron* deference." *Nat'l Min. Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008); *accord, e.g.*, *Arangure*, 911 F.3d at 341 (noting that "the Supreme Court has repeatedly invoked" the "constitutional avoidance canon" at *Chevron* "step one"); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 172-173 (2001) (Court "would not extend *Chevron* deference" even if a statute were ambiguous, because "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such

construction is plainly contrary to the intent of Congress.") (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 588 (1988)). And as we have explained, the Commission's proposed construction of the statute governing the Chairman's authority does indeed present serious constitutional concerns. *See* Pet'rs Br. 35-41; *infra* pages 17-23.

Finally, should the Court disagree, Petitioners preserve here the argument that the *Chevron* deference doctrine should be overturned or substantially reexamined. *See, e.g.*, *Arangure*, 911 F.3d at 338 & n.3 ("Many members of the Supreme Court have called *Chevron* into question.") (collecting cases). Indeed, the Supreme Court has granted certiorari to resolve, at least in part, whether to overrule *Chevron*. *See Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S.).

B. Moving on from *Chevron*, FERC first argues that "[a]ctions of the Commission" under Section 7171(e) of the DOE Organization Act should be interpreted to be coextensive with "agency action[s]" under the APA, as defined in 5 U.S.C. § 551(13), and therefore exclude litigation filings. *See* FERC Br. 32-38. To begin, FERC's framing of this argument is a red herring: While it is true that "[e]xemptions" from the APA's terms "are not lightly to be presumed" (*Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1144 (6th Cir. 2022); *see* 5 U.S.C. § 559), here no "[e]xemption[]" from the

APA is required, because the APA's "agency action" definition does not purport to apply here in the first place—both because the definition is expressly limited to "this subchapter" (5 U.S.C. § 551) and because Section 7171 does not use the defined term "agency action" in any event. *Cf., e.g.*, *Mann Constr.*, 27 F.4th at 1144 (heightened showing required when an agency claims authority to "deviate from" the APA's "consistent processes," such as by "regulat[ing] without the protections of the notice-and-comment process"). Far from *our* argument requiring an exception from an APA provision that would otherwise apply, it is *FERC's* argument that attempts to extend the APA's "agency action" definition beyond its stated scope.

Nor is there any reason to think that is what Congress intended. Quite simply, "agency action" under the APA is a legal term of art, and when Congress wishes to import the associated doctrinal baggage to a new context, it does so explicitly—at the very least by using the entire defined term "agency action,"[1] and frequently by expressly cross-referencing the APA's statutory definition. *See* 26 U.S.C. § 9041(b) (Federal Election Commission) (discussing "any agency action, as defined in section 551(13) of title 5, United States Code, by the Commission"); 42 U.S.C. § 2231 (Nuclear Regulatory Commission) ("[T]he terms 'agency' and 'agency action'

[1] A Westlaw search for the complete term "agency action" returned 207 results within the text of the U.S. Code.

shall have the meaning specified in section 551 of Title 5."); 15 U.S.C. § 2053(i)(2) (Consumer Product Safety Commission) (referring to "any agency action (as defined in section 551(13) of Title 5)"); 5 U.S.C. § 3348(a)(1) (Federal Vacancies Reform Act) ("[T]he term 'action' includes any agency action as defined under section 551(13).").

In other words, "[i]f Congress had wanted" to incorporate the APA's definition of agency action when specifying which FERC actions require a full vote, "it knew exactly how to do so" (*SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018))—but it did not. Congress's choice not to cross-reference the APA, or even use the APA-defined term "agency action," indicates that no such limitation on the Commission's responsibility to act by majority vote was intended. *See also, e.g.*, *Jama* v. *ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply."); *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation [of a statute] is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").[2]

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[2] Moreover, even if Congress *had* used the full term "agency action" in Section 7171(e) of the DOE Organization Act, that would not be dispositive. *See Yates v. United States*, 574 U.S. 528, 537 (2015) ("[I]dentical language may convey varying content when used in different statutes."); *Sanders v. Allison Engine Co.*, 703 F.3d 930, 938 (6th Cir. 2012) ("[A] court should not

FERC's own regulations provide further confirmation that the statute's mandate of a majority vote for "[a]ctions of the Commission" is not limited, *sub silentio*, to actions that qualify as "agency action" for purposes of the APA's review provisions. For example, the Commission's determination that a meeting must be called "with less than one week's notice" explicitly requires a majority vote. 18 C.F.R. § 375.204(a)(2). So does the decision to hold a closed meeting. 18 C.F.R. § 375.206(a). Like litigation decisions, neither of these actions can be categorized as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" (5 U.S.C. § 551(13))—yet a majority vote is required.

In perhaps the closest parallel to the situation here, the regulations assign to "the Commission" the power, after an investigation, to "institute administrative proceedings, [or] initiate injunctive proceedings in the courts." 18 C.F.R. § 1b.7; *see also id.* § 385.209(a) (similarly giving "the Commission" the power to "initiate a proceeding" either by "issuing a notice of tariff or rate examination" or "issuing an order to show cause"). By providing this authority to "the Commission," the regulations plainly contemplate that action will take place by a majority vote, since "[a]ctions of the Commission" require such a vote by statute. 42 U.S.C. § 7171(e);

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presume that a term defined by statute carries the same meaning every time it is used in a statute.").

compare, e.g., 18 C.F.R. § 1b.13 (by contrast, empowering "[a]ny member of the Commission or the Investigating Officer" to take certain actions during an investigation). Yet the initiation of administrative proceedings is plainly *not* an "agency action" within the APA's definition: That definition encompasses only "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" (5 U.S.C. § 551(13)), with "order" being further defined narrowly to mean "the whole or a part of a *final* disposition . . . of an agency in a matter other than rule making" (*id.* § 551(6) (emphasis added)); *accord, e.g.*, *City of N.Y. v. U.S. Dep't of Defense*, 913 F.3d 423, 431 (4th Cir. 2019) ("[T]he definition of 'agency action' is limited to those governmental acts that determin[e] rights and obligations.") (quotation marks omitted).

And it makes complete sense that "[a]ctions of the Commission" requiring a majority vote under the DOE Organization Act are not coextensive with "agency action" under the APA, because the two provisions serve very different purposes. The APA's definition of "agency action" is directed towards defining the actions that may be challenged in court. *See* 5 U.S.C. § 706(2) (empowering "[t]he reviewing court" to "hold unlawful and set aside *agency action* . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (emphasis added). It would be nonsensical for the APA to enable judicial review of actions that

are themselves taken within the context of existing litigation or non-final administrative proceedings, and the definition of "agency action" is therefore limited appropriately—but FERC has provided no substantive reason to think that "[a]ctions of the Commission" requiring majority vote under Section 7171(e) should be similarly constrained.[3]

That is particularly so in the context here, where the remand order had the effect of reopening a final Commission order—something that, without a court's involvement, even the whole Commission cannot do. *See* Pet'rs Br. 30-35; *infra* pages 15-17. As we have explained, absent a "statutory specification to the contrary," "[c]ollective action is a prerequisite to any alteration of a preexisting order." *Pub. Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 776-777 (D.C. Cir. 1974); *see also id.* at 777 ("If an agency proceeding could be reopened by the unilateral action of a [single] member," that would "wreak havoc on the stability of the agency's decision."); Pet'rs Br. 24-29; *cf.* FERC Br. 35-36 (failing to distinguish this authority). And "[i]n order to abrogate a common-law principle" such as this one, "the

[3] FERC is wrong that our "argument suffers from an internal conflict" because (it says) we advocate "internal polling" as an alternative to a Commission vote. FERC Br. 37-39. Our position is that a vote of a quorum of Commissioners is required by statute; we take no position on whether internal polling is a sufficient substitute for a vote—a question that is not implicated here in any event, because no vote or internal polling ever occurred. Pet'rs Br. 26-27, 29 (not making the argument FERC supposes).

statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). This statute does not.

In sum, the text is plain: "[a]ctions of the Commission" require a majority vote, unless the action in question falls within the ministerial, administrative duties "for the executive and administrative operation of the Commission" the statute assigns to the Chairman acting alone. 42 U.S.C. § 7171(c), (e).[4]

C. Contrary to FERC's arguments, clawing back and reopening a final Commission decision not to the Chairman's liking by means of a remand

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[4] We do not understand FERC, by invoking the "agency action" definition, to contend that the action here is unreviewable—but if that argument were present, it would fail. Petitioners challenge the Rehearing Order, which is indisputably final agency action under the APA. *See Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330 (D.C. Cir. 2006). The Rehearing Order ruled that the Chairman had authority under 42 U.S.C. § 7171(c) unilaterally to direct a voluntary remand and thereby reopen the proceeding. Rehearing Order ¶¶ 105-07, JA __-__. The lawfulness of the orders on review hinges on that ruling; if, as Petitioners argue, the proceeding by which FERC reinstated the demand curve was unlawfully reopened, then the orders issued in that proceeding are "not in accordance with law" and must be set aside. 5 U.S.C. § 706(2)(A); *see Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("In the absence of statutory authorization for its act, an agency's 'action is plainly contrary to law and cannot stand.'"); *cf. Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1178 (D.C. Cir. 1979) (Leventhal, J., concurring) (while "the mere conduct of proceedings . . . is not final action," "[i]f a proceeding should eventuate in a [final action] that a party opposes, the party may challenge the final action . . . on the ground that the rule is defective for reasons of disqualification of a member").

motion is not within the Chairman's assigned ministerial functions. 42 U.S.C. § 7171(c) ("The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission."); *see* Pet'rs Br. 25-28.

1. FERC appears to begin with a rather surprising suggestion: that the word "executive" in the provision defining the Chairman's unilateral authority should be interpreted by reference to the full scope of the "Executive power" under Article II of the Constitution. FERC Br. 38-39 (arguing, *inter alia*, that "the 'Executive power' includes litigating civil actions.") (quoting *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 (5th Cir. 2001) (en banc)). Indeed, as FERC would have it, hidden in the Chairman's exclusive statutory responsibility over the Commission's "executive and administrative operation" (42 U.S.C. § 7171(c)) is the "'special province of the Executive Branch' to decide whether 'to institute proceedings,' including 'through civil . . . process[es].'" FERC Br. 38 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985)).

To begin, this reasoning is self-defeating given the constitutional context: As we have explained, if the statute really *does* vest the Chairman, acting alone, with "the 'Executive power'" (FERC Br. 39), then the statute is unconstitutional under *Humphrey's Executor* and *Seila Law* because the

Chairman is removable only for cause. *See* Pet'rs Br. 35-41, *infra* pages 17-23.

In any event, the provision defining the Chairman's authority to direct "the executive and administrative operation of the Commission" (42 U.S.C. § 7171(c)) is best read to take up the more modest definition of "executive": that is, "of administrative or managerial personnel or functions." Executive, *Webster's New World Dictionary* 490 (2d college ed. 1982); *accord, e.g.*, Executive, *Merriam Webster Dictionary* (2023) ("having administrative or managerial responsibility"). This is apparent both from the statute's pairing of "executive" with "administrative" in describing the scope of the Chairman's power, and from the provision's five examples of the Chairman's duties and responsibilities, each of which describes an essentially ministerial role relating to personnel. 42 U.S.C. § 7171(c); *see Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'"); *accord, e.g.*, *In re Definition of Waters of U.S.*, 817 F.3d 261, 276 (6th Cir. 2016) (Griffin, J., concurring in the judgment) ("The statutory interpretation canon, *noscitur a sociis*" provides that "'a word is known by the company it keeps' to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended

breadth to the Acts of Congress.'"), *rev'd on other grounds sub nom. Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

FERC has no answer as to why a provision whose five examples all concern ministerial personnel decisions would empower the Chairman to change the Commission's substantive policy positions in litigation—something a FERC Chairman most certainly cannot do unilaterally outside of litigation. Indeed, nothing in the statute or FERC regulations hints at such broad power, and "Congress does not hide elephants in mouseholes." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (quotation marks omitted). To the contrary, the regulations abound with circumstances in which a majority vote of the Commissioners is explicitly required (including for actions that are *not* "agency action" under the APA, *see* pages 8-9, *supra*). *See, e.g.*, 18 C.F.R. § 375.204(a)(2) (requiring a recorded vote "by a majority of [FERC's] members" concerning whether a Commission meeting can be called with less than one week's notice); § 375.206(a) ("A meeting or a portion of a meeting may be closed [to the public] only when the Commission votes by a majority of the membership to close the meeting.").

That authority is likewise nowhere to be found in the Chairman's authority to "designate[]" "attorneys . . . [to] appear for, and represent the Commission in, any civil action." 42 U.S.C. § 7171(i); *cf.* FERC Br. 39. As we

explained, this provision explicitly requires any designated attorneys to "represent *the Commission*"—a statutory authorization that does not encompass acting on behalf of the Chairman's unilateral whims. Pet'rs Br. 25. Indeed, FERC appears to concede as much, admitting, as it must, that "the Chairman reasonably may not direct FERC attorneys to advance a litigation position contrary to an '[a]ction of the Commission.'" FERC Br. 40. That admission gives away the game: Seeking a voluntary remand to "revisit [the Commission's] past decision" (*id.*) *is precisely* contrary to that past decision—a decision wherein the Commission as a whole had voted on and directed a particular outcome, and which had already become final and thus had passed beyond the ability of even the *whole Commission* to reopen and reconsider *sua sponte*. Pet'rs Br. 30-31; *see* 16 U.S.C. § 825*l*(a), (b); *Hirschey v. FERC*, 701 F.2d 215, 217-218 (D.C. Cir. 1983).

2. With respect to this last point, FERC fundamentally misunderstands (or deliberately mischaracterizes) our argument. *Cf.* FERC Br. 40-44. We explained in the opening brief that, once a Commission decision becomes final, the Commission loses "the power to correct [its] order" *without* the intervention of a court. *Hirschey*, 701 F.2d at 218; *see*

Pet'rs Br. 30-35.[5] Instead (again, absent judicial intervention), FERC must institute a new Section 206 proceeding, with the accompanying burden of demonstrating not only that the new policy is just and reasonable, but also that the old policy is *un*just and *un*reasonable. *Id.* at 31.

Our point in raising this settled law was not (as FERC suggests) to say that the remand motion would have been unlawful even if the Commission had voted on it; of course that would have been permissible. Rather, our point was that whatever unilateral power the Chairman may have over ministerial litigation decisions, it would be anomalous to smuggle into that statutory authorization the power to unilaterally do something through litigation that even the *whole* Commission is statutorily forbidden from doing *outside* of litigation: reopen a final order after the record has been filed in a court of appeals.[6]

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[5] To the extent Intervenors suggest that this law does not apply because "[a]t the time of the remand, the 2020 Orders were still subject to appeal" (Intervenors Br. 10-11), they are wrong as a matter of black-letter law. FERC loses the ability to *sua sponte* reopen and correct its orders either when the record is filed in the court of appeals (which had already happened in the D.C. Circuit proceedings by the time of the remand), or, if there is no appeal, when the time for appeal expires. *See* Pet'rs. Br. 30-35 (collecting authorities).

[6] FERC's suggestion that the argument "that FERC was required to take the Section 206 route" "is jurisdictionally forfeited for failure to raise it [below]" (FERC Br. 41) is thus beside the point. Petitioners are not arguing that voluntary remand is always improper; our argument is that because

In sum, the DOE Organization Act does not give the Chairman unilateral authority to direct a voluntary remand to reopen and reconsider a final FERC order—particularly when that order is one from which the Chairman dissented. That procedurally and substantively consequential decision is far removed from the type of executive and administrative personnel decisions entrusted to the Chairman, and like other "[a]ctions of the Commission," it required a majority vote.

D. We also explained that the Commission's interpretation of the Chairman's authority must be rejected to avoid serious constitutional problems. Pet'rs Br. 35-41; *see, e.g.*, *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 549 (6th Cir. 2012) (discussing constitutional avoidance canon). In short, while FERC as a body appears to be constitutional so long as *Humphrey's Executor* remains good law, if the agency's power were to be exercised by a single Commissioner rather than the multi-member Commission itself, the lack of at-will removal would render that arrangement a violation of Article II. *See Seila Law*, 140 S. Ct. at 2197-2204; *see id.* at 2203 ("The CFPB's single-Director structure

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voluntary remand is so consequential—indeed, it permits FERC to do something that the agency otherwise lacks statutory power to do—it requires a majority vote, rather than unilateral Chairman-directed action. Petitioners indisputably argued below that voluntary remand is beyond the Chairman's unilateral power. *See* Rehearing Request at 32-33, JA __-__.

contravenes this carefully calibrated [constitutional] system by vesting significant governmental power in the hands of a single individual accountable to no one.").

1. FERC first claims that our invocation of the constitutional avoidance canon is "jurisdictionally forfeited." FERC Br. 45. But like any canon of construction, the canon of constitutional avoidance is a tool in service of resolving a specific interpretive question. Courts "give no mind to a litigant's failure to invoke interpretive canons such as *expressio unius* or constitutional avoidance even if she *intentionally* left them out of her brief." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019) (emphasis added).

Here, Petitioners raised the objection on rehearing (after being denied the opportunity for briefing in the first instance following remand) that the Commission misinterpreted the statutory conferral of "executive and administrative" responsibilities on the Chairman. Rehearing Request 32, JA __. They reiterated Commissioner Danly's concerns and stated that the scope of the Chairman's statutory responsibilities "do[es] not extend to '[s]ubstantive policy and regulatory determinations,'" such as the remand direction. Rehearing Request 32, JA __.

Given the consistent argument that the statute does not authorize the Chairman's action, invoking the canon of constitutional avoidance on appeal

does not present a new "constitutional objection" (FERC Br. 45); it presses the same *statutory* objection that was at issue below. As this Court has explained, the constitutional-avoidance canon is a "cardinal principle of statutory interpretation" that depends not on the constitutionality of a law but on the "serious doubt" about its constitutionality under a particular construction. *Discount Tobacco*, 674 F.3d at 549.

Indeed, this Court has held explicitly that an "argument[] based on the canon of constitutional avoidance" could be raised on appeal notwithstanding an agency exhaustion provision materially identical to the one in the FPA: "Although it is true that the [petitioner] did not raise th[is] argument[] verbatim at the exceptions stage, [the] *argument* nonetheless supports the consistently argued *claims* that the [petitioner] brought below." *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Relations Auth.*, 21 F.4th 401, 406 (6th Cir. 2021) (emphases added); *compare id.* at 406 (quoting language of FLRA exhaustion statute), *with* 16 U.S.C. § 825*l*(b) (FERC exhaustion statute); *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that '[o]nce a federal *claim* is properly presented, a party can make any *argument* in support of that claim.'") (emphasis added) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Jones Brothers, Inc. v. Secretary of Labor is distinguishable. 898 F.3d 669, 677 (6th Cir. 2018). There, the core dispute was whether the agency had statutory authority to issue citations. *Id.* at 672. The plaintiffs failed to preserve any objection concerning the wholly separate issue "whether administrative law judges, who are not appointed by the President, may constitutionally decide cases brought before them." *Id.* at 673. Construing the Mine Act, the Court held that while facial constitutional challenges are exempt from the exhaustion requirement, as-applied constitutional challenges and constitutional-avoidance challenges are not exempt. *See id.* at 674-677.

The crucial difference between *Jones Brothers* and this case is that there, the constitutional-avoidance argument had nothing to do with any of the arguments raised below, and in no sense could the objection be considered preserved. The question was whether the Mine Act *excepted* such entirely new objections from the exhaustion requirement, as it did for facial constitutional challenges, and the answer was no. Here, by contrast, Petitioners invoke the constitutional-avoidance canon solely to support an objection that *was* preserved: namely that, as a statutory matter, the Chairman's "executive and administrative" responsibilities do not include the power to unilaterally reverse course in litigation based on a disagreement with a final order and a change in FERC leadership.

2. On the merits, FERC denies that there are constitutional concerns stemming from its interpretation because, while the President may not remove the Chairman from the Commission except for cause, he or she "may strip the Chairman of his title" at will, leaving him a mere Commissioner. FERC Br. 45-48. The Commission supposes that this sufficiently eases the burden on the President's removal powers. *See Seila Law*, 140 S. Ct. at 2198.

That argument disregards the limitations placed on the President's ability to appoint a replacement Chairman. While "[t]he entire 'executive Power' belongs to the President alone," because "it would be 'impossib[le] for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.'" *Seila Law*, 140 S. Ct. at 2197 (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). When the President must select a replacement from among other Commissioners with for-cause removal protection, there is an intolerable risk that he or she will be "reduce[d] … to a cajoler-in-chief." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 502 (2010).

In other words, the Supreme Court has repeatedly explained that "the President's . . . removal power" must be "unrestricted" in order to comport with the constitutional design. *Seila Law*, 140 S. Ct. at 2198; *see also id.* at 2213 (Thomas, J., concurring in part) (explaining that the Court in the

seminal case of *Meyers v. United States*, 272 U.S. 52 (1926), "repeatedly described this removal power as 'unrestricted'"). And the power to *remove* a FERC Chairman can hardly be described as "unrestricted" when, as FERC acknowledges, the Chairman's *replacement* must be drawn from the (at most) four other seated Commissioners—of which at most three can be members of the President's political party (42 U.S.C. § 7171(b)(1))—and *none* of whom can themselves be replaced at will by other Commissioners more to the President's liking.

Such a constraint on the President's removal power at the least "raises a serious doubt" about the statute's constitutionality—which is all that is required for the avoidance canon. *Discount Tobacco*, 674 F.3d at 549; *see United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021) ("Courts should indeed construe statutes to avoid not only the conclusion that they are unconstitutional, but also grave doubts upon that score.") (quotation marks omitted; alteration incorporated).

Moreover, even if the Chairman *were* removable from the Commission at will, the government's reading would not alleviate the constitutional doubts present here. If the Chairman (as Chairman) possesses the Executive Power to unilaterally adopt policies and control legal positions, that would make him or her (as Chairman) a "principal officer" (*see Edmond v. United States*, 520 U.S. 651, 662-663 (1997); *cf. Rop v. Fed. Hous. Fin.*

Agency, 50 F.4th 562, 570 (6th Cir. 2022)), who in turn must be confirmed by the Senate. U.S. Const. art. II, § 2, cl. 2; *see United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). But the statute here does not provide for Senate confirmation of the Chairman, over and above his or her confirmation to serve as a FERC Commissioner generally; rather, the President unilaterally "designate[s]" one of the existing Commissioners as Chairman. 42 U.S.C. § 7171(b)(1).

Thus, if the office of Chairman carried with it additional, unilateral "Executive Power"—as FERC contends (at 38-39)—the President's "designat[ion]" of a Commissioner to that role, without additional Senate confirmation, would violate the Appointments Clause. *See Arthrex*, 141 S. Ct. at 1979. The designation of the Chairman by the President thus does nothing to avoid the serious constitutional doubts raised by FERC's interpretation.

II. FERC's orders on remand are arbitrary and capricious.

In addition to the *ultra vires* nature of the remand request leading to the orders under review here, we further explained that the Commission's substantive decision is arbitrary and capricious in several respects: FERC "failed to consider an important aspect of the problem" (*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)) by reversing course without considering regulatory stability, a factor FERC itself has

previously held to be critical (*see* Pet'rs Br. 42-47); and both the reversion to a vertical demand curve and the quantitative reduction of the price cap failed to demonstrate the "reasoned decisionmaking" required under the APA. *Louisville Gas & Elec. Co. v. FERC*, 988 F.3d 841, 846 (6th Cir. 2021); *see* Pet'rs Br. 48-54, 55-61.

Here, too, the government's and Intervenors' responses fail to persuade. "And from there, the proper disposition is clear: [The Court] 'shall' hold the action 'unlawful' and 'set [it] aside.'" *Louisville Gas*, 988 F.3d at 846 (quoting 5 U.S.C. § 706(2)(A)).

A. The Commission failed to consider regulatory stability.

As to our first argument, FERC downplays the importance of regulatory stability and all but admits it did not respond to Petitioners' argument. According to the Commission, it "*did* respond" to the regulatory-stability concern by stating that it is "aware of" "no limit" on the Commission's "authority to further consider this matter on remand." FERC Br. 75; Rehearing Order ¶ 104, JA __-__.

That is not at all responsive. First of all, that passage from the Rehearing Order is best understood in context to be a response to Petitioners' objections regarding the statutory authority for the remand order, not a response to the separate contention that the *substance* of FERC's order fails to account for regulatory stability. *See* Rehearing Order

¶¶ 104-108, JA __-__ (reaching the conclusion that "the decision as to a motion for voluntary remand appropriately falls within the Chairman's responsibilities"); *see also* Rehearing Request 2, 4, JA __, __ (setting out the arguments that "[t]he December 2021 Order was arbitrary and capricious . . . because the Commission failed to account for the importance of regulatory stability," and that "[t]he Chairman's unilateral directive to the Solicitor's Office to move for voluntary remand was *ultra vires*" as separate, numbered objections).

And in any event, the Commission's ignorance of any limits on swift reversals of position based solely on a change in leadership and unsupported by any new information or briefing does not excuse it from observing those limits. Specifically, the APA requires FERC to consider important aspects of the problem, and to engage in reasoned decisionmaking under a heightened standard when changing policy. The Rehearing Request highlighted an important aspect of the problem, which was that "to continually fiddle" with regulatory approaches "undermin[es] the certainty and predictability that help transmission owners make long-term investments." Rehearing Request 10, JA __.

This is especially harmful when there is no rhyme or reason to the decision to reverse course, other than a change in administration or Commission leadership and membership. A change in outcome absent

changed circumstances or an updated record erodes the confidence, on the part of regulated entities and the broader public, in the consistency and stability of FERC decisions. The Rehearing Order disregarded these concerns and rested on its ignorance, as well as its claim that FERC followed "standard Commission voting procedures." Rehearing Order ¶ 104, JA __. This oversight is arbitrary and capricious, both in its own right and for failure to adequately respond to the objections raised by Petitioners. *See* Pet'rs Br. 42-47.

B. FERC's reinstatement of the former price cap was arbitrary and capricious.

We also explained that the reinstatement of the $850/MWh Reserve Penalty Factor was arbitrary and capricious, in large part because it fails to account for generators' opportunity costs in the energy market, which has a much higher cap of $2,000/MWh. Pet'rs Br. 55-61.

In its brief, FERC concedes that "some resources' opportunity costs of providing reserve power exceeded $850/MWh" and even "exceeded $1,000/MWh" on occasions from 2014 to 2019. FERC Br. 52-53. That is no surprise given that in 2016, the energy market offer cap *doubled*, going from $1,000/MWh to $2,000/MWh. But the Commission dismisses that statistic, asserting that it does not speak to "whether PJM needed to *accept* those offers to satisfy its reserve requirements," and that the Reserve Penalty Factor is not unjust or unreasonable if PJM can procure sufficient reserves

from other resources "with opportunity costs of $850/MWh or less." FERC Br. 53.

That response is inadequate because it fails to "examine the relevant data and articulate . . . a rational connection between the facts found and the choice made." *Louisville Gas*, 988 F.3d at 846 (quoting *State Farm*, 463 U.S. at 43). PJM showed that its operators *do* procure reserves at prices above $850/MWh and compensate suppliers through uplift. Transmittal Letter at 33, JA __; May 2020 Order ¶ 34, JA __ ("PJM explains that its operators will dispatch resources with opportunity costs greater than $850/MWh to provide reserves, but those resources' costs will not be reflected in market prices and will instead be covered through uplift."). And all agree that "[t]he costs of a resource providing reserves are *mainly based on that resource's lost opportunity costs*." Remand Order ¶ 29, JA __ (emphasis added). It follows that when PJM did have to procure reserves above the price cap, the price at which it procured reserves was "mainly based on" lost opportunity costs. FERC has thus not "articulate[d] … a rational connection" between the facts and its action (*Louisville Gas*, 988 F.3d at 846)—much less given the "more detailed justification" required to

explain its change of position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).[7]

Moreover, the fact that the Reserve Penalty Factors do not set the price for reserves "most of the time" (FERC Br. 53, 57) is irrelevant. Reserves are like insurance in that they do not end up being needed "most of the time"—but that does not make them any less important. As FERC recognizes, reserves are a "bank of resources [committed] to stand ready" in the event of a sudden loss of a generator or unforeseen extreme weather conditions. FERC Br. 9-11. It is during those atypical conditions when the energy generation capability held in reserve is most likely to be significantly called upon—the moments of severe grid stress when reserves fulfill their purpose—that prices inevitably shoot up. *See* Transmittal Letter 20, JA __ ("[I]t is most problematic that the system fails to value reserves when the system is most stressed."). And because energy prices are also in high demand during those times, the opportunity costs associated with selling reserves correspondingly skyrocket. The Commission's emphasis on the

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[7] The "basis for the claimed heightened standard" (Intervenors' Br. 12) is the *Fox* doctrine: Although an agency "need not always provide a more detailed justification," "[s]ometimes, it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy." 556 U.S. at 515; *see Texas v. Biden,* 20 F.4th 928, 991 (5th Cir. 2021) ("[I]t's legally required for a decision predicated on contradicting prior agency findings" to "explain[] why [the prior findings] were mistaken, misguided, or the like"), *rev'd on other grounds*, 142 S. Ct. 2528 (2022).

price figures at which "the reserve markets *usually* clear" (FERC Br. 53 (emphasis added)) fundamentally disregards the reason minimum reserves requirements exist in the first place, and it reveals that the design of the current Reserve Penalty Factors is misaligned with the design of the minimum reserves requirements themselves.

In sum, FERC's "frequency" test irrationally prevents the accurate pricing of reserves because it only results in correct pricing when reserves are least needed. *See* Pet'rs Br. 55-57. What is more, as we have explained, it departs without justification from FERC's own precedents, and is arbitrary and capricious on that basis as well. *Id.* at 57-59. The Commission's argument should be rejected, and its previous policy, which recognized that "[t]he market price needs to capture these opportunity costs, even if relatively rare" (November 2020 Rehearing Order ¶ 81, JA __), should be restored.

C. FERC's reinstatement of the vertical demand curve was arbitrary and capricious.

Finally, we demonstrated that FERC's reversion to a vertical demand curve is arbitrary and capricious, largely because a vertical curve represents that additional reserves have zero additional value, which is definitively not the case, and that operators thus must bias load forecasts to obtain the appropriate amount of reserves. *See* Pet'rs Br. 48-54.

FERC argues that the data showing routine load biasing of thousands of megawatts does not matter because there is not a "one-to-one relationship" between operator biasing of energy demand and actual demand for reserves. FERC Br. 62-63. But regardless of the exact ratio, PJM submitted data showing that operators did bias demand for reserves; during a January 2019 cold snap that is "representative of particularly challenging operational conditions," data showed that "operators biased demand for reserves by between 1,328 MW and 2,048 MW on average across 576 five-minute intervals spanning those two days." May 2020 Order ¶ 78, JA __ (citing PJM Answer, Pilong Reply Aff. ¶¶ 7-9, JA __). Compare those figures to the minimum reserve requirements of roughly 1,600 MW for synchronized reserves and 2,300 MW for primary reserves. May 2020 Order ¶ 79, JA __ (citing Transmittal Letter 26-27), and it becomes apparent that the demand for reserves, once adjusted to account for uncertainties, blows past the vertical drop-off in the demand curve. The systematic and routine reliance on positive biasing exposes a flaw in a market design under which reserves prices quickly fall to $0/MWh. In light of the Commission's past statement that "the costs of resources procured to alleviate shortages should be reflected in transparent market prices whenever possible," *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,057, 61,347 at P 63 (2012), FERC

has not given a reasoned explanation why the current market design is not unjust or unreasonable.

Contrary to FERC's assertion (at 64), Petitioners plainly did not forfeit the argument that the Reserve Penalty Factors of $0/MWh do not reflect the value of reserves. In their Rehearing Request, Petitioners asserted that the "vertical" shape of the demand curves "prohibit PJM from explicitly scheduling the flexibility that is needed to accommodate legitimate forecasting uncertainties beyond the requirement expressed in Step 2A of the demand curve." Rehearing Request 21, JA __. And Petitioners further showed that because PJM operators frequently need to intervene in market outcomes, prices of $0/MWh "do not reflect the true marginal cost of providing necessary reserves." *Id.* at 26, JA __.

FERC next argues that even though nearly half the revenue for PJM's procurement of reserve power comes from out-of-market uplift payments instead of clearing prices, this is not evidence of a flawed market design. FERC Br. 65-66. In reaching this striking conclusion, the Commission did not engage with the Hogan/Pope Report or the Keech Affidavit, both of which were put before the agency and both of which demonstrated how the frequent operator biasing produces uplift. Hogan/Pope Report 4, JA __; Keech Aff. ¶¶ 50-53, JA __. Nor did FERC address evidence that out-of-market actions also produced uplift. *See* Transmittal Letter at 21, JA __.

These consequences flow from the shape of the demand curve because, as explained, it does not recognize the actual value of reserves.[8]

In defending the vertical demand curve, FERC focuses on denying the pertinence of assessing the sloped demand curve. FERC Br. 68-69. It acknowledges that it has previously found vertical demand curves to be unjust and unreasonable in the capacity markets. FERC Br. 69; *see ISO New England Inc.*, 153 FERC ¶ 61,338 (2015). Yet the Rehearing Order's bare explanation that the reserves market is "distinct" from the capacity market and that its decision in the capacity-market context was based "on factors not present here," Rehearing Order ¶ 88, JA __, fails to satisfy the APA's standard of "articulat[ing] a satisfactory explanation" for its action (*Louisville Gas*, 988 F.3d at 846), much less the "more detailed justification"

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[8] In crediting the Independent Market Monitor's assertion to the contrary (*see* FERC Br. 67), FERC overlooked substantial record evidence that, like biasing, out-of-market actions are produced by the demand curve's abrupt capping of prices below costs. *See* Hogan/Pope Report at 12, JA __ ("[O]perator actions (with costs greater than the maximum reserve penalty price) are taken to maintain reserves both before the economic dispatch model is run, through biasing, and after, through out of market actions."); Pilong Aff. ¶¶ 18-20, JA __-__ (explaining out-of-market actions); PJM Transmittal Letter at 21-22, JA __ (graph depicting that "[o]ut of market actions by PJM dispatchers to ensure adequate reserves during these stressed conditions led to a spike in uplift"). Moreover, regardless of the cause of the uplift, the "extent of operator biasing" alone sufficiently demonstrates that "the market itself is not providing sufficient reserves for PJM." November 2020 Rehearing Order ¶ 61, JA __.

demanded by the agency's about-face here (*Fox Television*, 556 U.S. at 515). The Court should set aside FERC's orders for this reason, as well.

CONCLUSION

The petition for review should be granted, and FERC's Remand Order and Rehearing Order should be vacated.

Dated: June 5, 2023

Respectfully submitted,

/s/ *Paul W. Hughes*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Petitioners certifies that this brief:

(i) complies with Rule 32(a)(7)(B) and the briefing schedule approved by this Court (*see* Dkt. 22) because it contains 7,480 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365 and is set in New Century Schoolbook in a size equal to 14-point font.

Dated: June 5, 2023 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on June 5, 2023, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: June 5, 2023 /s/ *Paul W. Hughes*