17-2654-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COALITION FOR COMPETITIVE ELECTRICITY, DYNEGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, AND SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs-Appellants,

v.

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners of the New York Public Service Commission,

Defendants-Appellees,

EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC,

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICI CURIAE BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, ILLINOIS, MASSACHUSETTS, NEW YORK, OREGON, VERMONT AND WASHINGTON IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

GEORGE JEPSEN
Attorney General of Connecticut
CLARE E. KINDALL
Assistant Attorney General
Department Head – Energy
Ten Franklin Square
New Britain, CT 06051
Tel. (860) 827-2683
Clare.Kindall@ct.gov

Attorneys for the State of Connecticut by and through George Jepsen, Attorney General

XAVIER BECERRA
Attorney General of California
KATHLEEN A. KENEALY
Chief Assistant Attorney General
ROBERT W. BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GAVIN G. MCCABE
Supervising Deputy Attorney General
M. ELAINE MECKENSTOCK
Deputy Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612-1492
Tel. (510) 879-0299
Elaine.Meckenstock@doj.ca.gov

Attorneys for the State of California by and through Xavier Becerra, Attorney General

Counsel for Amici Curiae
(additional counsel on signature page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases

Federal Agency Cases

Statutes

Other Authorities

INTEREST OF THE AMICI CURIAE

Pursuant to Fed. R. App. P. 29(a), the undersigned States (collectively, the "Amici States") submit this brief in support of the Defendant New York Public Service Commissioners.[1] The Amici States have a strong interest in defending state authority to support electricity generators that provide improved air quality or other environmental, health and safety benefits to the States and their citizens.

New York created the Zero Emission Credit ("ZEC") program at issue in this case to allow the continued operation of nuclear facilities that historically have provided New York with electricity without polluting the air. New York's Clean Energy Standard, of which the ZEC Program is an integral component, is designed to reduce greenhouse gas emissions to combat climate change, reduce other emissions caused by fossil fuel combustion (including nitrogen oxides, sulfur dioxide, and particulate matter), and reduce related public health impacts. Memorandum Opinion & Order, dated July 25, 2017 ("Decision"), SPA-3.[2]

Like New York, the Amici States have adopted programs, including some that promote specific forms of electricity generation (such as solar, wind, and hydroelectric), to protect our citizens from hazards associated with poor air quality

[1] The New York Attorney General joins this brief under Executive Law 63(1), which authorizes his participation in actions "affecting the property or interests of the state."

[2] Citations in the form "A-__" are to the Joint Appendix and "SPA-__" to the Special Appendix.

and climate change, as well as to further grow our available electricity generation resources. While each of these programs is unique, reflecting the particular needs and circumstances of diverse States, they all involve policy determinations like New York made here—that certain forms of electricity generation best serve the State's goals. Regardless of their views regarding nuclear power, the Amici States have a significant interest in ensuring the proper application of Federal Power Act preemption and dormant Commerce Clause principles to such programs—to preserve the long-standing authority and discretion States have traditionally exercised to protect the health of their citizens and the environment, and to ensure sufficient electricity generation.

ARGUMENT

New York developed its ZEC program to provide support to qualifying electricity generators in order to ensure that those generators continue to provide important air quality benefits to New York and its residents. The Federal Power Act ("FPA"), 16 U.S.C. §791a *et seq.*, does not preempt the New York ZEC program because the program fits squarely within the authority conferred on the States in the cooperative federalism scheme intrinsic to the Act. Further, New York's ZEC program does not violate the dormant Commerce Clause because it distinguishes between electricity generators based on their ability to provide air quality benefits and their need for financial assistance to do so. This is neither

economic protectionism nor an undue burden on interstate commerce. The district court correctly dismissed the complaints, and that decision should be affirmed.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE NEW YORK ZEC PROGRAM IS NOT PREEMPTED BY THE FEDERAL POWER ACT.

Plaintiffs' preemption arguments ignore the cooperative federalism scheme that underlies the FPA, misapply recent Supreme Court precedent, and misconstrue New York's program.

When Congress enacted the FPA, it divided roles and powers between federal and state governments. Section 201 of the Act vests the Federal Energy Regulatory Commission (FERC) with authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." *Allco Finance Ltd v. Klee*, 861 F.3d 82, 87 (2d Cir. 2017) (petition for certiorari pending). The FPA maintains the traditional zones of state jurisdiction, including the generation, retail sale, and intrastate wholesale sale of electricity. 16 U.S.C. § 824(b)(1); *FERC v. Electric Power Supply Association*, 136 S. Ct. 760, 767-768 (2016) ("*EPSA*").

There is a strong presumption against finding that a federal statutory scheme preempts the States' powers, particularly when the statutory scheme provides for state and federal roles. The presumption against preemption particularly applies when states exercise "their police powers to protect the health and safety of their citizens." *Steel Institute of New York v. City of New York*, 716 F.3d 31, 36 (2d Cir.

2013) (holding city crane regulations are not preempted by federal OSHA regulations). *See also Figueroa v. Foster*, 864 F.3d 222, 231-235 (2d Cir. 2017) (state discrimination laws are not preempted by national labor laws). Where "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayer, J., concurring), *citing New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973). The "Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence. Pre-emption inquiries related to such collaborative programs are particularly delicate." *Id.*

The U.S. Supreme Court has issued three decisions in the past two years clarifying the contours of this federal-state jurisdiction: *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *EPSA*, 136 S. Ct. 760; and *Hughes*, 136 S. Ct. 1288. In these cases, the Court recognized and affirmed the cooperative federalism scheme in which the States and the federal government have different but interlocking roles.[3]

[3] *Oneok* involved the Natural Gas Act, but "the relevant provisions of the [Natural Gas Act and FPA] are analogous. This Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298, n.10.

As the district court below correctly held, the New York ZEC program falls well within the States' jurisdiction under the FPA and is not subject to field preemption. Decision, SPA-14-30. Further, Plaintiffs do not allege they are unable to comply with federal law and the ZEC program, and the New York ZEC program does not conflict with the purposes of the FPA. Accordingly, the district court correctly held that the ZEC program is not barred by conflict preemption. SPA 30-36. *See also Oneok*, 135 S. Ct. at 1595 (describing standard for conflict preemption).

New York's establishment of tradeable credits for the environmental attributes associated with certain electricity generators neither "directly intervene[s]" in the wholesale electricity market, *Hughes*, 136 S. Ct. at 1297, nor "stand[s] as an obstacle" to the purposes of the FPA, *Oneok*, 135 S. Ct. at 1595. New York's ZEC program is not preempted by the FPA.

A. The Federal Power Act Embraces the Concept of Cooperative Federalism, Preserving Substantial Authority for the States.

When Congress established "the system of dual state and federal regulation" under the FPA, it did so "with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 510–11 (1989); *Oneok*, 135 S. Ct. at 1599. Congress observed that the Act "takes nothing from the State [regulatory] commissions: they retain all the State power they have at the present time."

Northwest Central Pipeline, 489 U.S. at 511, *quoting* 81 Cong. Rec. 6721 (1937); *see also Oneok*, 135 S. Ct. at 1599. After enactment, States retained the power "to allocate and conserve scarce natural resources". *Northwest Central Pipeline*, 489 U.S. at 511. States likewise retained "jurisdiction … over facilities used for the generation of electric energy," (16 U.S.C. § 824(b)(1)), including the need for "new power facilities, their economic feasibility, and [retail] rates and services." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

The FPA made "federal and state powers complementary and comprehensive so that there will be no gaps for private interest to subvert the public welfare." *EPSA*, 136 S. Ct. at 780 (internal quotation marks and brackets omitted). Indeed, as the district court noted, the "FPA is the paragon of cooperative federalism." Decision, SPA-30. The Supreme Court's recent decisions in *Oneok*, *EPSA*, and *Hughes* acknowledge this interdependency of state and federal roles in the increasingly complex world of electricity and energy regulation.

In *Oneok*, the Court distinguished between "measures *aimed directly* at interstate purchasers and wholesales for resale and those aimed at subjects left to the States to regulate," holding, consistent with the FPA's system of dual state and federal regulation, that only the former could be preempted. *Oneok*, 135 S. Ct. at

1599-1600 (emphasis in original; internal citations omitted). The *Oneok* Court expressly rejected that a state regulation is preempted merely because it "affected" FERC's wholesale rates, recognizing that such a rule would nullify the express state authority under the Act. *Id.* at 1600-1601.

In *EPSA*, the Court expounded upon the dual jurisdictional nature of the FPA. FERC had incorporated demand response, where retail electricity customers are paid not to use power at certain times, into the wholesale energy markets, arguably impinging upon authority solely reserved to the States. *EPSA*, 136 S. Ct at 767. Emphasizing that the "wholesale and retail markets in electricity are inextricably linked," and adopting a "common-sense construction" of the FPA, the Court limited FERC's statutory jurisdiction over rules or practices that affect wholesale rates to "rules or practices that *directly* affect the wholesale rate." *Id.* at 774 (emphasis in original; internal citations and quotes omitted). With that limitation, because "every aspect" of the challenged federal regulation occurred "exclusively on the wholesale market," the Court upheld the federal regulation as within FERC's authority. *Id.* at 776.

Finally, in *Hughes*, the concurrence emphasized that "the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence." *Hughes*, 136 S. Ct. at 1299-1300 (Sotomayor, J. concurring).

In sum, because the wholesale and retail electricity markets are inextricably linked, indirect effects of FERC rules on state retail markets and of state rules on federal wholesale markets abound. The Supreme Court has recognized the interdependency of the dual jurisdictions and, accordingly, has limited preemption under the FPA to instances of States directly interfering with sales in a FERC-regulated market.

B. New York's ZEC Program is a State-Created Energy Credit Program that is Wholly Consistent with the Cooperative Federalism Principles of the FPA.

The New York program creates a new commodity—a ZEC—that compensates generating facilities for an energy attribute separate and distinct from the energy sold. Decision, SPA-27. New York defines a ZEC as a tradeable "credit for the zero-emissions attributes of one megawatt-hour of electricity production by an eligible nuclear facility." Decision, SPA-5. *See also Village of Old Mill Creek v. Star*, 2017 WL 3008289, *3 (N.D. Ill. 2017). Like renewable energy certificates (RECs), ZECs are "inventions" of state law whereby "energy attributes are 'unbundled' from the energy itself and sold separately." *Allco*, 861 F.3d at 93; *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Public Utility Control*, 531 F.3d 183, 186 (2d Cir. 2008). *See also* Decision, SPA-27 (ZEC compensates an attribute separate from energy production). ZEC programs compensate eligible

generators for the environmental attributes of electricity production regardless of how the resulting energy is sold. Decision, SPA-20, SPA-27.

ZEC payments are not tied to or bundled with the sale of capacity or energy in the federal wholesale markets. Decision, SPA-7, SPA-20. New York ZECs are sold in a separate, state-created market, and the New York ZEC price is established based on the social cost of carbon and a forecast of wholesale electricity prices. *Id*. ZEC prices are established through a state administrative process, rather than by a market, because there were insufficient eligible generators to create a competitive market. SPA-7 n-7. Because New York's program does not require generators to participate in the wholesale markets, the generators awarded ZECs may sell the underlying energy at negotiated rates to bilateral purchasers, in the federal wholesale markets, or directly to industrial or governmental end-users for their own consumption.

Further, when FERC undertakes its rate-setting responsibilities under the FPA—to ensure wholesale rates are "just and reasonable" and not "unduly discriminatory and preferential," it does not generally consider environmental attributes. Indeed, FERC has acknowledged that sales of environmental attributes on an "unbundled" basis, separate from the associated energy sales, do not impinge on FERC's jurisdiction. *WSPP Inc.*, 139 FERC ¶61,061, P18 (2012); *see also Grand Council of the Crees (of Quebec) v. FERC*, 198 F.3d 950, 956-957 (D.C.

Cir. 2000) (noting other instances where FERC has declined to consider environmental attributes). But being able to recognize and reward environmental benefits of different types of generation—including in the form of tradable instruments, like RECs, that embody environmental attributes—is important for States as they seek to meet environmental, health, and safety objectives. The New York ZEC program regulates unbundled attributes that fall squarely within the state's jurisdiction. It does not regulate the sale of energy in the wholesale market and is not preempted.

C. The New York ZEC Program is not the Kind of "Tethered" Regulatory Scheme Found Preempted under *Hughes*.

The Plaintiffs heavily rely upon *Hughes*, contending that the New York ZEC program mirrors the state program preempted by *Hughes*. Plaintiffs-Appellants' brief 30-43. Plaintiffs misapply *Hughes* and ask this Court to improperly expand the narrow confines of the *Hughes* holding.

The *Hughes* Court held that the FPA preempted Maryland's program to encourage new electricity generation plants where the regulatory program required the generators to sell the capacity into the federal wholesale market, and then ensured the generators would be paid the difference between the wholesale market rate and a contract rate. Recognizing the danger of an overly broad reading of the case, the *Hughes* Court explained that States remain able to encourage specific

types of electricity generation facilities. Expressly describing its holding as "limited," the Court wrote:

> We reject Maryland's program **only because it disregards an interstate wholesale rate** required by FERC …. **Nothing** in this opinion should be read to foreclose Maryland and other States **from encouraging production of** new or **clean generation** through measures **untethered** to a generator's wholesale market participation. **So long as a State does not condition payment of funds on capacity clearing the auction**, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Hughes, 136 S. Ct. at 1299 (emphasis added). *See also Allco*, 861 F.3d at 99.

The *Hughes* Court held the Maryland program was preempted by the FPA because it replaced a FERC wholesale rate and expressly "tethered" or tied compensation to the generator's wholesale sales into the federal wholesale electricity market. The Court defined "tethered" as "condition[ing] payment of funds on capacity clearing the auction." *Id.*

In *Allco*, this Court applied *Hughes* and rejected a federal preemption challenge to a state energy program that was not tethered to wholesale energy market sales. The *Allco* plaintiff challenged Connecticut statutes that authorized the State to solicit proposals for renewable energy generation, select winning bids, and then direct Connecticut utilities to enter into wholesale energy contracts with the winning bidders. *Allco*, 861 F.3d at 86. Connecticut transferred "ownership of electricity from one party to another by contract, independent of the [wholesale] auction." *Allco*, 861 F.3d at 99. The *Allco* court determined that *Hughes*

established a "bright line," prohibiting a form of contracting where bids were directly "tethered to a generator's wholesale market participation," as when payment of funds is conditioned upon clearing the capacity market. *Allco*, 861 F.3d at 102.

Applying the same legal analysis here, the New York program does not cross the line drawn in *Hughes*. Based on the program's eligibility requirements, use of a price forecast, and current business practices, Plaintiffs contend that ZECs are "conditioned" on the "inadequacy of wholesale rates," and thus have "express" and "integral" connections to the wholesale auction markets. Plaintiffs-appellants' brief 38. Plaintiffs misconstrue the New York ZEC program.

With respect to eligibility requirements, ZECs are, quite simply, the type of action *Hughes* acknowledged States could engage in—"measures 'untethered to a generator's wholesale market participation'" that "encourage[s] production of new or clean generation." *Hughes*, 136 S. Ct. at 1299. *See also* Decision, SPA-18. Indeed, FERC has long noted that States may encourage renewables and other types of generating resources through direct incentives. *See, e.g., Southern California Edison Co.*, 71 FERC ¶61,269 at 62,080 (1995).

Although the ZEC price is established using a forecasted rate and the social cost of carbon, ZECs are created by the production of energy, not by the sale of energy. Decision, SPA-20-22, 27. The New York ZEC program does not require

an energy sale into either the wholesale market or the retail market to create a ZEC – it only requires production to create a ZEC. *Id*. The ZECs created are then sold in a state ZEC market for the environmental attributes. Where generators subsequently decide to sell the energy generated has no bearing on the ZEC program. The district court below correctly found that the sale of energy was merely a business decision, unconnected to the ZEC program. Decision, SPA-20.

D. A Claim of Incidental Impact on Supply and Demand Does Not Trigger Conflict Preemption.

Citing *Oneok*, Plaintiffs contend that the New York ZEC statute is subject to conflict preemption.[4] Plaintiffs-Appellants' brief 44-49. Plaintiffs argue that the statute is preempted because the nuclear generators will not retire if they receive the subsidy, and thus the amount of supply in the wholesale market is "artificially inflated," resulting in lower wholesale prices. Decision, SPA-8; Plaintiffs'-Appellants' brief 46-47. Plaintiffs' "indirect impact" preemption theory was expressly rejected in *Oneok*.

An incidental impact on prices cannot trigger federal preemption, especially where, as here, the structure of the underlying federal statute provides for dual

[4] The *Oneok* court stated the standard for conflict preemption but did not decide the issue and left it to "the lower courts to resolve in the first instance." 135 S. Ct. at 1602. Notably, the district court on remand ruled no conflict preemption existed. *In re W. States Wholesale Nat. Gas Antitrust Litigation*, 2017 WL 1243135, at *8 (D. Nev. Mar. 30, 2017) (appeal filed).

jurisdiction between the federal and state governments. *See Oneok*, 135 S. Ct. at 1600-1601; *EPSA*, 136 S. Ct. at 774. "The law of supply-and-demand is not the law of preemption." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). The *Allco* court rejected arguments that Connecticut infringed upon FERC's regulatory authority merely because the supply of electricity available to Connecticut utilities was increased, placing a downward pressure on wholesale prices. *Allco*, 861 F.3d at 100. Relying upon *Hughes*, the *Allco* court held that the incidental effect on wholesale prices did not amount to regulation of the interstate wholesale electricity market. *Id.* at 101. Under the same rationale, the district court below correctly rejected Plaintiffs' conflict preemption challenge. Decision, SPA-36. This Court should affirm.

II. THE DISTRICT COURT CORRECTLY HELD THAT NEW YORK'S ZEC PROGRAM DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Plaintiffs' dormant Commerce Clause claims fare no better. "Under the … protocol for dormant Commerce Clause analysis, [courts first] ask whether a challenged law discriminates against interstate commerce." *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). Where no discrimination is found, courts apply the *Pike* balancing test under which state laws are upheld unless the burdens they impose on interstate commerce clearly exceed the laws' putative benefits. *Id.* at 338-39. Plaintiffs claim that New York's ZEC program discriminates against

and unduly burdens interstate commerce. Plaintiffs-appellants' brief, 49-58. Both claims fail.[5]

At bottom, Plaintiffs contend that New York may not support the continued operation of generators that provide significant air quality benefits to the people of New York because the qualifying generators who need this support happen to be located in New York. Courts have consistently rejected similar, overly-expansive views of the dormant Commerce Clause, and for good reason. This Court should do the same.

A. Plaintiffs' Discrimination Claims Fail Because ZEC-Qualifying Facilities are not Substantially Similar to Other Generators, and New York May Constitutionally Distinguish Between These Two Groups.

Discrimination analysis under the dormant Commerce Clause begins with identification of the relevant market and the competitors in that market. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298, 300 (1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities," and "substantially similar" generally refers to the competitors "in a single market.") Plaintiffs' discrimination claims implicate two distinct markets: (1) the ZEC

[5] The market participant exception to the dormant Commerce Clause could provide an independent basis for affirmation. *See* ECF Nos. 118 at 49; 121 at 59-61. Contrary to plaintiffs' arguments, that exception is not limited to the use of "general revenue." *See* Plaintiffs-appellants' brief, 58. Rather, it can apply to the use of any "funds which the [government has] authority to administer." *White v. Mass. Council of Const. Employers, Inc.*, 460 U.S. 204, 206 (1983).

market, in which Plaintiffs alleged that New York's "ZEC Order is directly discriminatory" because "only specified New York nuclear facilities are eligible to receive ZECs" (Complaint, ¶98; see also *id.* ¶¶63, 66); and (2) the wholesale energy market which Plaintiffs claim will be adversely effected by the ZEC program (Plaintiffs-Appellants' brief, 51-52).[6] Where, as here, there are potentially multiple markets at issue, courts must decide which market should be "accord[ed] controlling significance" for purposes of identifying the appropriate entities to compare in the discrimination analysis. *Tracy*, 519 U.S. at 303.[7] The ZEC market should be according controlling significance here. Plaintiffs' discrimination claims fail because generators that meet the ZEC qualifications (including provision of air quality benefits) are not substantially similar to generators that do not.

When determining which market is of controlling significance, courts consider the interests served by the markets, including protection of "citizens' health [and] safety." *See Allco*, 861 F.2d at 106. For example, in *Tracy*, the Supreme Court had to decide whether (1) utilities selling natural gas "bundled with

[6] Plaintiffs' wholesale-market allegations only arguably assert a *Pike* claim, providing another basis for dismissal of a wholesale-market-based discrimination claim. *See* Complaint, ¶99 (alleging "burdens" in the wholesale energy market "far outweigh" benefits).

[7] Plaintiffs' waiver of ZEC-market discrimination claims (Plaintiffs-Appellants' brief, 54) does not render that market irrelevant. *See Tracy*, 519 U.S. at 303 (analyzing a market in which "the dormant Commerce Clause has no job to do").

services and protections" designed to ensure reliability and availability for residential consumers were similar to (2) independent marketers selling natural gas "unbundled" from such services and protections. *Tracy*, 519 U.S. at 297. The two classes of businesses competed in the market for unbundled natural gas, in which gas is sold as a standalone product. *Id.* at 303. The two classes did not compete, however, in the market for natural gas bundled with reliability and availability guarantees. *Id*. The *Tracy* Court recognized that this bundled gas market served important public interests and state objectives—including interests Congress had long recognized as desirable. *Id.* at 304. Noting that giving controlling significance to the unbundled market could jeopardize those very interests and objectives, the Court "proceed[ed] cautiously" and concluded that the bundled market should be determinative. *Id.*

Following *Tracy*, this Court concluded that Connecticut's market for renewable energy credits (RECs), and not a national REC market, was determinative, because the former served Connecticut's "legitimate interests" in promoting forms of generation that protect the health and safety of the State's citizens and because those ends, and the means (RECs), were "well within the scope" of recognized, traditional state authority "in the realm of energy regulation." *Allco*, 861 F.2d at 106.

The ZEC market is likewise determinative in this case.[8] Like Connecticut's REC program in *Allco*, New York's ZEC program promotes qualifying generation New York has identified as protecting the environment and public health. Decision at SPA-1. Specifically, New York found that its upstate nuclear plants avoid substantial quantities of emissions. ZEC Order, A-103. As this Court noted in *Allco*, these considerations are well within the realm of traditional state authority. *See Allco*, 861 F.3d at 106; *see also Tracy*, 519 U.S. at 305; *Pacific Gas & Elec. Co.*, 461 U.S. at 206; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

Indeed, the caution exercised by the Court in *Tracy* is equally appropriate here. *See Tracy*, 519 U.S. at 304. Many States have programs that rely on tradable compliance instruments that, like ZECs or RECs, are issued by the State for the sole purpose of embodying criteria that advance the State's particular objectives. *See Allco*, 861 F.3d at 93. Each State decides for itself what attributes its particular instruments embody because each State has its own needs and policy objectives.

[8] Alternatively, this Court could conclude there is no discrimination here because the ZEC market is not a "natural functioning" "interstate market" of the kind the dormant Commerce Clause protects. *See McBurney v. Young*, 569 U.S. 221, 235 (2013). ZECs are not goods produced by private parties in response to market demand. These instruments exist solely because the State chose to create them. Particularly where the qualifications for the instruments advance legitimate state interests (e.g., air quality benefits), the distribution of state-created instruments is not the proper subject of a dormant Commerce Clause claim. *See McBurney*, 569 U.S. at 236 (rejecting discrimination claim involving state-created "product").

For example, some States recognize landfill gas generation as renewable, and will issue RECs for such generation (assuming other applicable requirements are met), while other States do not and will not. *See* U.S. Energy Information Administration, *Annual Energy Outlook 2016* at LR-12.[9] Like the decision to distinguish between utilities selling natural gas bundled with consumer protections and independent marketers selling unbundled natural gas, decisions concerning qualifications for instruments like RECs reflect each sovereign State's policy judgment made by weighing complex sets of potential risks and benefits. *See Allco*, 861 F.3d at 105. The Supreme Court has "consistently recognized" that the Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens," and it should not be interpreted to do so here. *See Tracy*, 519 U.S. at 306 (internal quotation omitted).

The ZEC qualifications serve precisely the kind of values the Supreme Court has recognized that States may use to distinguish between different classes of businesses—even when those businesses might compete in one or more other markets. The ZEC market is the significant one in this case. In that market, generators that advance New York's objectives are not "substantially similar" to those that do not, and treating these two groups differently is not discrimination.

[9] *Available at* https://www.eia.gov/outlooks/archive/aeo16/pdf/0383(2016).pdf, last visited October 20, 2017.

See Tracy, 519 U.S. at 307 (weighing "health and safety considerations" to decide these "threshold question[s]"); *see also Allco*, 861 F.3d at 103-108; *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009). New York is thus not required to treat ZEC-qualifying generators—those that provide the benefits New York seeks—as though they are the same as non-qualifying generators that do not provide those benefits. Plaintiffs' discrimination claims fail.

B. Plaintiffs' Discrimination Claims Fail, Even Assuming All Electricity Generators Are Substantially Similar.

Plaintiffs' discrimination claims still fail, even assuming, *arguendo*, that all electricity generators are substantially similar because of their competition in the wholesale energy markets.

1. The Premise of Plaintiffs' Discrimination Claims is Fatally Flawed.

Plaintiffs' wholesale-market discrimination claims fail for the simple reason that their foundational premise is faulty. Contrary to Plaintiffs' assumption, regulatory programs adopted to advance legitimate state interests, including protection of consumers, public health, and the environment, do not violate the dormant Commerce Clause just because they might make market participation easier for some and harder for others.

The Supreme Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978), illustrates the point. There, Maryland had decided to protect its consumers from abusive pricing and distribution practices of oil refiners by prohibiting refiners from operating retail gasoline stations. *Id.* at 121. There was no dispute that Maryland's policy preference for independent retailers would affect the retail gasoline market. Exxon itself operated 36 retail stations in Maryland before the prohibition was enacted and could operate none afterwards. *Id.* at 121. It was likewise clear that the burden of Maryland's policy preference would fall exclusively on out-of-state interests because all refiners happened to be located outside of Maryland. *Id.* at 121, 125. Yet, the Court rejected Exxon's "underlying notion" that such preferences are unconstitutionally discriminatory, holding expressly that the Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market." *Id.* at 127.

Other courts have likewise upheld state authority to distinguish between businesses based on the relative risks or benefits presented by different types of operations, rejecting an "expansive interpretation of discrimination" that would include "all instances in which a law, in effect, burdens some out-of-state interest while benefitting some in-state interest." *See Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 500 (5th Cir. 2001); *see also Allstate Ins. Co. v. Abbott*, 495

F.3d 151, 161 (5th Cir. 2007); *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009).

Notably, many, if not all, of the laws upheld in these cases had greater impacts than plaintiffs allege here. Many of these laws expressly prohibited entire classes of businesses from *any* market participation. The ZEC program, in contrast, contains no such prohibition and is limited in its scope, given that nuclear facilities make up only about thirty percent of New York's generation mix. Decision, SPA-18. Given that States may, consistent with the dormant Commerce Clause, adopt broader measures—including prohibitions—that differentiate between businesses based on the risks and benefits of their operations, there is no reason to conclude that the more minimal burdens alleged here run afoul of the Constitution.

Further, the authority to distinguish between businesses in ways that protect consumers and residents does not disappear when some portion of the resulting burdens or benefits happens to align with the in-state or out-of-state location of the businesses. In *Exxon*, "the burden of divestiture requirements" fell "solely" on the refiners who happened to be outside Maryland, but this fact did "not lead, either logically or as a practical matter, to a conclusion that the State [was] discriminating…." *Exxon*, 437 U.S. at 125. This Court has likewise noted that happenstance of location—including the fact that a particular market "has more

out-of-state than in-state participants"—is not a basis for a discrimination claim. *See New York Pet Welfare Assn., Inc. v. City of New York*, 850 F.3d 79, 91 (2d Cir. 2017); *see also Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 472-73 (1981) (rejecting both discrimination and undue burden challenges "[e]ven granting that the out-of-state … industry is burdened relatively more heavily than the [in-state] industry").

Likewise, here, even if only in-state generators meet the qualifications for ZECs, that does not transform New York's neutral qualifications into discrimination.[10] Indeed, "[t]he existence of major in-state interests adversely affected"—the in-state generators who will not receive ZECs—underscores that that the ZEC program is not protectionist. *See Clover Leaf*, 449 U.S. at 473 n.17; *see also Town of Southold v. Town of East Hampton*, 477 F.3d 38, 49 (2d Cir. 2007) (absence of discrimination demonstrated by objections from local businesses); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1099 (9th Cir. 2013).

[10] The fact that *Exxon* and *Clover Leaf* involved claims of geographically unbalanced *burdens*, as opposed to *benefits*, does not matter. "The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications…." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984); *see also Allstate Ins.*, 495 F.3d at 156 (rejecting discrimination claim where benefits were allegedly designed "to maintain the dominance of local Texas body shops").

Where, as here, the State expresses a preference based on public health and environmental impacts, not on location, there is no prohibited protectionism. *See also C&A Carbone. Inc. v. Town of Clarkstown, NY*, 511 U.S. 383, 390 (1994) ("We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce *by reason of its origin* or destination out of State.") (emphasis added); *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (finding protectionism where differential treatment was "based *solely* on [product's] origin") (emphasis added); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 361 (1992) (invalidating distinctions based on "no reason, apart from its origin"). Just as "[t]he dormant Commerce Clause is no obstacle" to regulation that seeks "to prevent firms with superior market position … from entering" a particular market "upon the belief that such entry would be harmful to consumers," the Clause likewise is no obstacle to New York supporting the continued availability of nuclear power upon the belief that such generation prevents harm to New York residents. *See Allstate Ins.*, 495 F.3d at 162. Plaintiffs' discrimination claims fail as a matter of law because they lack the premise necessary for such claims.

2. Plaintiffs Have Not Stated, and Cannot State, a Claim of Facial or Purposeful Discrimination.

Plaintiffs argue, in wholly conclusory fashion, that they have alleged that New York's ZEC program discriminates on its face and in its purpose. Plaintiffs-

Appellants' brief, 52. However, Plaintiffs point to no location-based distinctions on the face of the order establishing the ZEC program. In fact, the ZEC qualifications are expressly location neutral as evident by the use of the phrase "regardless of the location of the facility." ZEC Order, A-208; Decision at SPA-6-7. Plaintiffs identify no case finding facial discrimination on such facts, because such cases involve express distinctions based solely on origin. *See, e.g., Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 210 (2d Cir. 2003); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, ME*, 520 U.S. 564, 575-76 (1997); *Wyoming*, 502 U.S. at 455.

Plaintiffs likewise allege no facts and cite no cases that could establish that New York's ZEC program had a protectionist purpose. Notably, Plaintiffs allege no facts like those in *Bacchus*, where Hawaii's Legislature had expressly indicated that its sole intent was to "encourage and promote the establishment of a new [domestic] industry." *Bacchus*, 468 U.S. at 270; *see also Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995) ("The intended effect of these provisions is to foreclose the use of low-sulfur western coal [from outside the State]."). Nor can Plaintiffs allege such facts, given that New York expressly adopted its ZEC program to prevent an increase in carbon-dioxide emissions of more than 15.5 million tons per year. ZEC Order, A-129; *see also Town of Southold*, 477 F.3d at 48 (rejecting discriminatory purpose claim on similar record)

Plaintiffs' conclusory allegations that the ZEC program was enacted to save jobs and property tax revenues (Complaint, ¶96) are not remotely sufficient to state a claim. *See Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 38 (1st Cir. 2005) (rejecting discriminatory purpose claim despite "occasional references" to positive economic effects in State); *Rocky Mountain Farmers Union*, 730 F.3d at 1100 n.13 (same); *Allstate Ins. Co.*, 495 F.3d at 159 (same).

The district court correctly dismissed plaintiffs' facial and purposeful discrimination claims.

3. Plaintiffs Have Not Stated, and Cannot State, a Claim of Discriminatory Effects.

Perhaps recognizing the constitutionality of the distinctions New York has drawn in its ZEC qualifications, Plaintiffs primarily complain about the effects they claim the ZEC program will have on wholesale energy markets. Plaintiffs-Appellants' brief, 51-52. Any such effects flow from non-discriminatory policy judgments about the importance of preserving certain generation for its air quality and other benefits. Accordingly, these effects are most appropriately analyzed under the *Pike* balancing test applicable to the effects of non-discriminatory laws. *Davis*, 553 U.S. at 338-39; *see also, infra*, Sec. II.C (discussing *Pike* claim).

Even analyzed as a discriminatory effects claim, as Plaintiffs posit it, however, this claim fails. As discussed above in Section II.B.1, the dormant Commerce Clause does not prohibit a State from distinguishing between

businesses, and even preferring certain businesses, based on the relative risks and benefits that flow from the operations of those businesses. Further, courts have rarely found discrimination based solely on a law's effects and have consistently indicated that such claims carry heavy burdens for plaintiffs. *See, e.g.*, *International Franchise Ass'n, Inc. v. Seattle*, 803 F.3d 389, 405 (9th Cir. 2015); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007); *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010); *Gwadosky*, 430 F.3d at 39.

Plaintiffs' attempt to rely on *Carbone* does not meet this burden, as that case bears no resemblance to this one. Plaintiffs-Appellants' brief, 51. The ordinance at issue in *Carbone* created a monopoly for one local business. *Carbone*, 511 U.S. at 391 ("it allows only the favored operator to process waste that is within the limits of the town"). Plaintiffs cannot allege that New York's ZEC program does anything of the kind. Rather, while Plaintiffs allege that *some* generators may be "forced to exit the market" or deterred from entering it, they concede that many non-ZEC-qualifying generators will remain in the market alongside those that do qualify for ZECs. Complaint, ¶¶6, 8. *Carbone* is entirely inapposite here.[11]

[11] This case is also wholly distinguishable from *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Plaintiffs-appellants' brief, 50. In *Hunt*, the challenged law had "the effect of stripping away from [out-of-state industry] the competitive and economic advantages it ha[d] earned for itself through its expensive inspection and grading system." *Id.* at 351. Plaintiffs do not,

In fact, as Plaintiffs themselves allege, if the effects Plaintiffs anticipate actually come to pass, those effects will fall on many in-state generators as they do on out-of-state generators. Specifically, Plaintiffs allege the ZEC program will harm all "other generators, including the Plaintiffs, because of the lower auction prices" that result, they allege, from the presence of the ZEC-qualifying generators in the market. Complaint, ¶6. According to Plaintiffs, these "other generators" include numerous large generators in New York. Complaint, ¶¶9, 11, 13, 14, 15. Put simply, any ill effects of the ZEC program will fall on all "non-subsidized generators," regardless of their location. *See* Complaint, ¶6. These facts do not come close to meeting Plaintiffs' heavy burden to state a claim of discriminatory effects. *See, supra*, Sec. II.B.1. Courts have rejected such claims where the law could be "viewed as harming one type of in-state entity … while benefitting another type of in-state entity…." *Int'l Franchise Ass'n, Inc.*, 803 F.3d at 406. Plaintiffs cite no cases that even arguably support a contrary conclusion here. Their effects claim fails as a matter of law.

Plaintiffs cannot state a discrimination claim here, and the district court's judgment should be affirmed.

---

and cannot, identify any such earned advantages that could be stripped away specifically from out-of-state interests by the ZEC program. Further, *Hunt* is best viewed as a discriminatory purpose case. *See Town of Southold*, 477 F.3d at 48 (citing *Hunt* as a discriminatory purpose case); *Bacchus*, 468 U.S. at 270 (same); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (same).

C. Plaintiffs' *Pike* Claims Also Fails.

As noted above, any effects of the ZEC program result from non-discriminatory distinctions based on risks to consumers, public health and the environment. Such effects are properly analyzed under the *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Davis*, 553 U.S. at 338-339. This *Pike* claim also fails.

For one thing, Plaintiffs misstate the *Pike* test, arguing that the ZEC program cannot survive review because, in their view, its "reduction of carbon emissions can be achieved more effectively by non-discriminatory means." Plaintiffs-Appellants' brief, 53. A "nondiscriminatory alternatives" analysis is part of the strict scrutiny to which *discriminatory* laws are subject. *Davis*, 553 U.S. at 338. Under the *Pike* test, in contrast, laws are "upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 338-339. Nondiscriminatory alternatives are not relevant under *Pike*.

Not surprisingly, state laws usually survive *Pike* because courts recognize that state actions designed to protect their citizens can and do permissibly impact markets and commerce. *See Davis*, 553 U.S. at 339. Plaintiffs, thus, must allege an unusual or substantial burden—not just a modest, speculative loss in opportunities or profits—to state a viable *Pike* claim. *See Clover Leaf*, 449 U.S. at 472 (rejecting *Pike* claim in light of "relatively minor" burden); *Nat'l Ass'n of*

Optometrists & Opticians v. Harris, 682 F.3d 1144, 1150 (9th Cir. 2012) (requiring "significant burden"); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994). Plaintiffs' allegations cannot establish the necessary substantial burdens. *See Clover Leaf*, 449 U.S. at 473 (rejecting a *Pike* challenge despite the fact that challenged law *would* change the market, possibly in ways that might favor the State's pulpwood industry).

This conclusion is further bolstered by the fact that the benefits of New York's ZEC program—protection of its citizens and the environment, as well as progress toward New York's climate goals—are well-recognized as outweighing some burden on interstate commerce. *See, e.g.*, *Clover Leaf*, 449 U.S. at 473 (recognizing "substantial state interest" in natural resource protection); *United Haulers Assn., Inc. v. Oneida–Herkimer Solid Waste Management Authority*, 550 U.S. 330, 347 (2007) (recognizing "health and environmental benefits" as substantial enough to outweigh "arguable burden"). In the absence of adequate allegations, it is appropriate to dismiss *Pike* claims on the pleadings. *See, e.g.*, *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501-502 (7th Cir. 2017); *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015); *Alliance of Auto. Mfrs., Inc. v. Currey*, 610 Fed.Appx. 10, 13 (2d Cir. 2015); *Fednav, Ltd. v. Chester*, 547 F.3d 607, 624 (6th Cir. 2008). The district court properly dismissed this claim.

CONCLUSION

For the foregoing reasons, the Amici States respectfully request that the district court's decision be affirmed.

Respectfully submitted,
AMICI STATES OF
California, Connecticut, Massachusetts,
New York, Oregon, Vermont and Washington

GEORGE JEPSEN
ATTORNEY GENERAL OF CONNECTICUT

CLARE E. KINDALL
Department Head – Energy

/s/ *Clare E. Kindall*
Clare E. Kindall
Seth A. Hollander
Assistant Attorneys General
Ten Franklin Square
New Britain, CT 06051
Tel. (860) 827-2683
Clare.Kindall@ct.gov

Attorneys for the State of Connecticut by and through George Jepsen, Attorney General

LISA MADIGAN
ATTORNEY GENERAL OF ILLINOIS
100 West Randolph Street
12th Floor
Chicago, IL 60601

ERIC SCHNEIDERMAN
ATTORNEY GENERAL OF NEW YORK
120 Broadway, 25th Floor
New York, NY 10271

XAVIER BECERRA
ATTORNEY GENERAL OF CALIFORNIA

KATHLEEN A. KENEALY
Chief Assistant Attorney General
ROBERT W. BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GAVIN G. MCCABE
Supervising Deputy Attorney General

/s/ *M. Elaine Meckenstock*
M. Elaine Meckenstock
Melinda Piling
Myung J. Park
Dennis L. Beck, Jr.
Deputy Attorneys General
Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612-1492
Tel. (510) 879-0299
Elaine.Meckenstock@doj.ca.gov

Attorneys for the State of California by and through Xavier Becerra, Attorney General, and the California Air Resources Board

MAURA HEALEY
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS
One Ashburton Place
Boston, MA 02108

ELLEN F. ROSENBLUM
ATTORNEY GENERAL OF OREGON
1162 Court Street N.E.
Salem, OR 97301

ROBERT W. FERGUSON
ATTORNEY GENERAL OF WASHINGTON
P.O. Box 40100
1125 Washington Street SE
Olympia, WA 98504

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL OF VERMONT
109 State Street
Montpelier, VT 05609-1001

CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Local Circuit Rule 29.1 and the Order of the Second Circuit of November 30, 2016 in that this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by Microsoft Word 2010. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced face in 14-point Times New Roman font.

/s/ *Clare E. Kindall*
Clare E. Kindall
Assistant Attorney General

CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were filed electronically on November 27, 2017. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ *Clare E. Kindall*
Clare E. Kindall
Assistant Attorney General