Nos. 17-2433, 17-2445

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

VILLAGE OF OLD MILL CREEK, *et al.*, Plaintiffs-Appellants, v. ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, Defendant-Appellee, and EXELON GENERATION COMPANY, LLC, Intervening Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 17-cv-1163 The Honorable MANISH S. SHAH, Judge Presiding.
ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*, v. ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, *et al.*, and EXELON GENERATION COMPANY, LLC, Intervening Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 17-cv-1164 The Honorable MANISH S. SHAH, Judge Presiding.

STATE DEFENDANTS' SUPPLEMENTAL MEMORANDUM PURSUANT TO COURT'S JANUARY 3, 2018 ORDER

LISA MADIGAN
Attorney General of Illinois
Richard S. Huszagh
Assistant Attorney General
100 W. Randolph, 12th Floor
Chicago, Illinois 60601
rhuszagh@atg.state.il.us
(312) 814-2587

I. The Court Should Defer to FERC's Primary Jurisdiction in Connection with Administrative Proceedings Before It.

In light of FERC's statutory authority to determine whether a State is setting prices for wholesale sales of electricity or whether a practice affecting a wholesale rate, or a charge in connection with a wholesale sale of electricity, is just and reasonable, the Court should defer to FERC's primary jurisdiction in resolving proceedings before it. Several such proceedings are ongoing, and another is imminent. First, some of the EPSA Plaintiffs filed a petition with FERC requesting a determination that, under PJM's current wholesale auction rules, out-of-market subsidies for certain nuclear power plants result in rates that are not "just and reasonable," and seeking changes to those rules to "fix" this claimed problem. See *https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14528293* ("FERC Complaint"). Second, FERC itself has initiated a technical conference to address the possible need for changes to its rules governing competitive wholesale markets in light of state policies "that prioritize certain generation resources or resource attributes." See *https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14544920*. Third, PJM recently finalized a petition that it will soon submit to FERC seeking approval of auction rules that establish separate treatment for certain generation subsidies, including subsidies like those provided under the ZEC Program. See *www.pjm.com/-/media/library/reports-notices/special-reports/2018/20180116-capacity-market-repricing-proposal-updated.ashx?la=en*. Each of these proceedings concerns matters within FERC's special regulatory expertise, and as to which its decisions are entitled to judicial deference. Giving effect to FERC's primary jurisdiction in connection with its resolution of these proceedings is therefore appropriate.

The doctrine of primary jurisdiction applies when a claim before a court "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956); see also *Pennington v. Zionsolutions LLC*, 742 F.3d 715, 720 (7th Cir. 2014). It enables courts to benefit from an agency's expertise in specialized matters, and it respects Congress's desire for uniform results in those matters. *W. Pac. R. Co.*, 352 U.S. at 64-65; see also *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J., concurring); *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 751 (10th Cir. 2005); 33 C. Wright & C. Koch, Jr., *Fed. Prac. & Proc.: Judicial Review* § 8399 (2006) ("Primary jurisdiction . . . allows complex questions to be answered in a uniform manner by one decisionmaker, the agency, rather than many different courts."). In light of these purposes, the doctrine may be invoked by a court *sua sponte*, including by a reviewing court. *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 n.2 (9th Cir. 2002); *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996).[1]

Primary jurisdiction is often applied to cases relating to agency rates and tariffs, including claims contesting the validity of a tariff. See, e.g., *Texas & P. Ry. Co. v.*

---

[1] In response to the district court's suggestion, the parties indicated that they did not object to soliciting FERC's views, but FERC declined to provide them, explaining that its positions are normally based on "the statements of the Commission as expressed in its orders," but that at the time the Commission lacked a quorum. Doc. 91 at 1-2. FERC further noted that a complaint filed by Plaintiffs relating to the ZEC Program was then pending before it but that, without a quorum, it had not yet acted on that complaint. *Id.* In these circumstances, and because primary jurisdiction would not provide a basis to dismiss this action (as opposed to staying it) before FERC acts in proceedings before it, there is no basis to suggest that the State Defendants waived primary jurisdiction by not including it in their Rule 12(b) motion below. In any event, any waiver would not bind this Court.

Abilene Cotton Oil Co., 204 U.S. 426, 440-41 (1907) (holding that reasonableness of interstate shipping rates requires uniform determination by Interstate Commerce Commission, not "divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question"); *Arsberry v. Illinois*, 244 F.3d 558, 562, 565 (7th Cir. 2001); *Hansen v. Norfolk & W. Ry. Co.*, 689 F.2d 707, 710-11 (7th Cir. 1982); *Indiana Harbor Belt R. Co. v. United States*, 510 F.2d 644, 649 (7th Cir. 1975); *Spence v. Baltimore & O. R. Co.*, 360 F.2d 887, 890 (7th Cir. 1966); see also *Lo Shippers Action Comm. v. I.C.C.*, 808 F.2d 64, 66 (D.C. Cir. 1986). And it finds "relatively frequent application . . . in pre-emption cases." *Pharm. Research & Mfrs. of Am.*, 538 U.S. at 673 (2003) (Breyer, J., concurring) (citing 2 R. Pierce, Administrative Law § 14.4, p. 944 (2002)). Both considerations justify applying primary jurisdiction and staying these appeals pending FERC decisions on proceedings before it concerning the types of generation subsidies provided by the ZEC Program.

If Plaintiffs have a cause of action for injunctive relief (see below, Section II), their preemption claims clearly implicate matters within the special expertise that Congress entrusted to FERC under the FPA. These claims assert that Illinois' ZEC Program invades FERC's exclusive jurisdiction under the FPA, or in the alternative conflicts with FERC's exercise of its concurrent jurisdiction under the FPA, because the program gives nuclear power plants selected to sell zero-emission credits ("ZECs") "substantial out-of-market payments for each MWh of electricity they produce." Doc. 1 at 2-3 (par. 4). As discussed above, resolution of the first of these claims (*if* it represents an available cause of action for injunctive relief) depends on a determination of the scope of FERC's juris-

diction over interstate sales of wholesale electricity, and in particular whether the program's "out-of-market payments" for the environmental attributes of zero-emission nuclear power may properly be viewed as actually setting prices for sales of wholesale electricity. That is an issue on which FERC's views concerning the scope of its own jurisdiction (see below at 16 n.8) are centrally important and entitled to significant deference.[2]

Plaintiffs' alternative conflict-preemption claim requires an examination of whether the ZEC Program prevents FERC from fulfilling its duty under the FPA to establish just and reasonable prices for wholesale electricity sales, or whether, instead, FERC may adopt policies that accommodate the ZEC Program's environmental goals while also accomplishing FERC's mission under the FPA.[3] For both preemption theories, therefore, a FERC ruling in a proceeding before it would assist the Court.

For similar reasons, the interest in uniform interpretation and application of the FPA also counsels in favor of deferring to FERC's primary jurisdiction to revolve matters in proceedings before it that involve issues raised here. The FPA's purposes are best

---

[2] Presumably aware of FERC's repeated holdings that it does not have jurisdiction over unbundled sales of state-created property interests in the environmental attributes of emission-free power generation (see below at 16 n.8), Plaintiffs' complaint to FERC suggested that it should not address whether the ZEC Program is preempted by the FPA. See FERC Complaint at 11, n.46. But that attempt to avoid a FERC ruling on this issue does not preclude such a ruling, and it should not operate to prevent application of primary jurisdiction.

[3] As noted in the State Defendants' brief (at 49-50 & n.18), FERC has rejected the notion that the FPA prohibits any state policy to promote environmental goals that affects wholesale prices, or that the FPA enshrines some right to enjoy the competitive advantage of creating pollution without internalizing its costs. On the contrary, FERC has repeatedly held that it may accommodate such state policies while, at the same time, ensuring the reliable and affordable transmission and wholesale sale of electricity in interstate commerce.

served by decisions from a single agency — FERC — regarding the scope of its jurisdiction over wholesale electricity sales, and addressing whether practices affecting wholesale prices, or charges in connection with such sales, are just and reasonable. A multitude of potentially conflicting decisions on these issues by diverse courts would defeat the FPA's design to entrust such decisions to FERC, subject to limited judicial review.

II. Injunctive Relief Under *Ex parte Young* Is Not Available to Plaintiffs.

A plaintiff with Article III standing has a cause of action for injunctive relief against official conduct in violation of federal law in *some* circumstances. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) ("federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law"). But it is not true, as Plaintiff contend, that "any plaintiff with Article III standing may seek an injunction against enforcement of a preempted state law." (EPSA Reply Br. at 7.) Instead, as described below, when a plaintiff is not the object of a current or anticipated enforcement action and does not claim that official conduct violates its rights under the United States Constitution, a cause of action for injunctive relief is available only if (1) the federal statute relied on contains rights-conferring language for a class of persons that includes the plaintiffs; (2) the statute does not contain a detailed remedial scheme that impliedly excludes additional judge-created remedies; and (3) the statutory duties the plaintiffs seek to enforce are not based on judgment-laden criteria to be applied by a federal agency, rather than a federal court. *Armstrong*, 135 S. Ct. at 1384-86; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74-75 (1996); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 898-904 (10th Cir. 2017);

Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health, 699 F.3d 962, 982-84 (7th Cir. 2012).[4]

As a historical matter, injunctive relief against unauthorized official conduct under the principles announced in *Ex parte Young*, 209 U.S. 123 (1908), is well established for situations in which the plaintiff is the object of a pending or anticipated enforcement action. *Ex parte Young* was, itself, such a case. *Id.* at 130-31, 144-48, 155-56, 165-66 (suit to enjoin enforcement of state law imposing prohibitive fines for violations of allegedly confiscatory rail tariffs claimed to deprive plaintiffs of due process and equal protection of the laws). The Court stated the relevant principle to be

> that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, *to enforce against parties affected an unconstitutional act*, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Id. at 155-56 (emphasis added). See also *Armstrong*, 135 S. Ct. at 1384 ("if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted") (citing *Ex parte Young*, 209 U.S. at 155-56); *Poindexter v. Greenhow*, 114 U. S. 270, 295-96 (1885) (approving suit against tax collector who, under color of void law, was about to seize taxpayer's property for nonpayment of taxes, and stating, "the action itself is purely defensive"); *Douglas v.*

---

[4] This issue is distinct from whether a federal court has subject matter jurisdiction, see *Planned Parenthood of Ind.*, 699 F.3d at 984, and whether the relief sought is barred by sovereign immunity, *Indiana Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 392 (7th Cir. 2010) (Easterbrook, J., dissenting) ("to say that a claim against a state officer sidesteps sovereign immunity is not enough; plaintiffs still need a right of action.").

Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 619-20 (2012) (Roberts, J., dissenting); John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 998 (2008) ("Crucial to understanding *Young* is that injunctions to restrain proceedings at law were sometimes granted to enforce defenses that could be raised at law but the assertion of which would nevertheless not afford the equity plaintiff full protection.").

Affirmative injunctive relief also is available to remedy or prevent violations of constitutional rights. See *Osborn v. Bank of United States*, 9 Wheat. (22 U.S.) 738, 838-41 (1824); see also *Ex parte Young*, 209 U.S. at 130-31, 144-48, 155-56, 165-66 (due process and equal protection); see generally *Davis v. Passman*, 442 U.S. 228, 241-42 (1979) ("the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution") (emphasis in original).[5]

By contrast, affirmative injunctive relief against state action claimed to be preempted by a federal statute is not available generally to persons who are not the object of a pending or anticipated enforcement action. See *Safe Streets Alliance*, 859 F.3d at 898-904, 906 n.19; *Planned Parenthood of Ind.*, 699 F.3d at 982-83; see also *Douglas*, 565

---

[5] Professor Monaghan emphasizes the distinction between injunctive relief against violations of the Constitution and violations of federal statutes:

> The remedial consequences of violations of federal statutes can be seen to present issues different from violations of the Constitution, and Congress, it could be argued, should have a major role in shaping affirmative remedies for federal statutory violations. . . . [T]o extend *Young* beyond constitutional violations is a stretch for me, and it calls into question the Court's entire implied-right-of-action jurisprudence in the non-constitutional context.

Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 Notre Dame L. Rev. 1807, 1827-28 (2016) (footnotes omitted).

U.S. at 619-20 (Roberts, J., dissenting) (disputing that common-law equity jurisdiction provides basis for non-defensive injunctive relief against alleged violation of federal statute); *Indiana Prot. & Advocacy Servs.*, 603 F.3d at 392 (Easterbrook, J., dissenting) ("to say that a claim against a state officer sidesteps sovereign immunity is not enough; plaintiffs still need a right of action. Most suits to which [*Ex parte*] *Young* applies rest on § 1983"). Especially given the Supreme Court's jurisprudence relating to implied private rights of action under federal statutes (see *Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001); *Cort v. Ash*, 422 U.S. 66, 78 (1975)), and relating to the avail-ability of Section 1983 to enforce such statutes (see *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005)), the judge-made remedy of injunctive relief to invalidate state laws alleged to violate a federal statute cannot be deemed presumptively available to every plaintiff who satisfies Article III standing requirements. See *Safe Streets Alliance*, 859 F.3d at 894, 898-904; *Planned Parenthood of Ind.*, 699 F.3d at 982-84. To the contrary, in line with that jurisprudence, such relief is available only when a plaintiff who is not the object of an enforcement proceeding satisfies three criteria:

(1) the statute confers specific rights on persons like the plaintiff;

(2) the statute does not contain a detailed remedial scheme; and

(3) the obligations the plaintiff seeks to enforce are not based on judgment-laden criteria that the statute entrusts to application by a federal agency, rather than federal courts.

See *Armstrong*, 135 S. Ct. at 1385 (holding that a party "cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement") (citing *Douglas*,

565 U.S. at 618-20 (Roberts, J., dissenting)); *Seminole Tribe of Florida*, 517 U.S. at 74-75; *Safe Streets Alliance*, 859 F.3d at 898-904; *Planned Parenthood of Ind.*, 699 F.3d at 982-83; see also *Sandoval*, 121 U.S. at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (citation and internal quotation marks omitted); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) ("Congress rather than the courts controls the availability of remedies for violations of statutes"). Here, all three criteria exclude the availability of injunctive relief under *Ex parte Young* for Plaintiffs' preemption claim based on the Federal Power Act (the "FPA").[6]

A. The Federal Power Act Does Not Confer on Plaintiffs Statutory Rights Against Conflicting State Laws.

Plaintiffs' reliance on the availability of an equitable cause of action to enjoin the ZEC Program founders at the threshold requirement that the FPA confer on them a statutory right not to be affected by state laws that address matters subject to FERC regulation. As the Tenth Circuit explained in *Safe Streets Alliance*, the availability of an equitable *remedy* to enforce a federal statute presupposes the existence of a statutory *right*, not just a statutory *duty*. 859 F.3d at 898-903 (citing, inter alia, *Armstrong*, 135

---

[6] Plaintiffs rely on cases that assumed the availability of injunctive relief against official conduct preempted by a federal statute. EPSA Reply Br. at 9-11. But those cases did not specifically address and decide that issue, and thus are not precedent for Plaintiffs' position. See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004); *Texas v. Cobb*, 532 U.S. 162, 169 (2001). Moreover, these cases were decided before *Armstrong*, and many of them rested on a basis *Armstrong* rejected: that the Supremacy Clause provides a cause of action for preemption-based relief. 135 S. Ct. at 1382-84. Others are in any event consistent with the analysis in this Supplemental Memorandum — involving either anticipatory defenses to enforcement proceedings, constitutional rights, or rights conferred by a federal statute for which injunctive relief was consistent with the statutory scheme and criteria.

S. Ct. at 1382-87; *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 261 n.8 (2011), and *Ex parte Young*, 209 U.S. at 160-62); see also *Safe Streets Alliance*, 859 F.3d at 903 ("Congress, not the courts, creates federal statutory substantive rights, which are prerequisites to private suits to enforce federal statutes"); *Planned Parenthood of Ind.*, 699 F.3d at 982-83. Thus, Article III standing, by itself, is insufficient to support a cause of action for an injunction to enforce a federal statute against state or local officials. *Safe Streets Alliance*, 859 F.3d at 898-99 & n.8. The relevant statute must unambiguously give the plaintiffs specific rights that may be enforced by the equitable remedy of an injunction. *Id.* at 902; *Planned Parenthood of Ind.*, 699 F.3d at 982-83.

This analysis is consistent with Supreme Court jurisprudence addressing whether a federal statute creates an implied private right of action, or is enforceable under Section 1983. See *Gonzaga Univ.*, 536 U.S. at 283 (rejecting notion that "anything short of an unambiguously conferred right [may] support a cause of action brought under § 1983," and holding that "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983"); *City of Rancho Palos Verdes*, 544 U.S. at 119-20; *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 857 (7th Cir. 2017); *Planned Parenthood of Ind.*, 699 F.3d at 982-83. For both inquiries, a statute must do more than declare duties; it must grant rights to an identifiable class of persons. *Gonzaga Univ.*, 536 U.S. at 283-84; *Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.") (citation and internal quotation marks omitted); *Chessie Logistics Co.*, 867 F.3d at 857; *Planned*

Parenthood of Ind., 699 F.3d at 972-73, 982 ("The statute confers no individual rights and therefore the remedy of § 1983 is unavailable."); but see *Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting) ("the principles that we have developed to determine whether a statute creates an implied right of action, or is enforceable through § 1983, are not transferable to the *Ex parte Young* context").[7]

The FPA may give the EPSA Plaintiffs a right to just and reasonable wholesale prices for electricity, but it does not give Plaintiffs any unambiguous statutory right to be free from state regulation that affects prices for wholesale sales of electricity. As described in the State Defendants' brief (at 28-29), the FPA establishes a system of dual sovereignty over electricity regulation under which FERC has jurisdiction over the transmission and wholesale sale of electricity in interstate commerce, while States retain jurisdiction over the generation of electricity, retail sales, and other police power functions, including environmental protection. At most, therefore, the FPA arguably imposes on States a duty not to set rates for wholesale sales of electricity in interstate commerce, but it does not contain any language conferring on any class of individual plaintiffs specific *rights* against such state regulation. And absent such language, Plaintiffs, who are not subject to any enforcement proceedings under the ZEC Program, do not have any rights under the FPA that may be enforced the ZEC Program by an *Ex parte Young* injunction.

---

[7] Although both inquiries require a finding that Congress intended to create statutory *rights*, for Section 1983 a plaintiff need not also show an implied legislative intent to create a private *remedy*. See *Gonzaga Univ.*, 536 U.S. at 283-84.

Plaintiffs' reliance on *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), is misplaced. There, injunctive relief against the Postmaster's refusal to deliver mail to the complainants was justified by specific rights given to them by statute.

> In our view of these statutes the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered at the postoffice as directed. . . . [T]he courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.

Id. at 110. See also *Restoration Risk Retention Grp., Inc. v. Gutierrez*, ___ F.3d ___, 2018 WL 388070, *4 (7th Cir., Jan. 12, 2018) (affirming availability of injunctive relief against state law allegedly conflicting with Liability Risk Retention Act, 15 U.S.C. §§ 3901-06, which gives "risk retention groups" right to operate free from insurance regulation by any State other than chartering State). No similar statutory rights are conferred on particular individuals by the FPA, which imposes restrictions on certain actions by the States, but does not contain any language granting a specific class of plaintiffs any right to be free from any consequences of state regulation affecting wholesale electricity sales. See *Gonzaga Univ.*, 536 U.S. at 283; *Sandoval*, 532 U.S. at 289; *Safe Streets Alliance*, 859 F.3d at 904; *Planned Parenthood of Ind.*, 699 F.3d at 972-73, 982.

B. The Federal Power Act's Detailed Remedial Scheme Excludes Supplementary Judge-Made Remedies.

Plaintiffs' assertion of an *Ex parte Young* cause of action for injunctive relief against the ZEC Program fails for the additional reason that the FPA's detailed remedial

scheme forecloses additional judge-made remedies. In an analogous context, the Supreme Court has held that although Section 1983 generally provides a cause of action for violations of federal statutes, no such cause of action exists for the violation of a statute that contains its own detailed remedial scheme. *City of Rancho Palos Verdes*, 544 U.S. at 120-24 ("in *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue . . . *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated") (emphasis in original); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981); *Hickey v. Duffy*, 827 F.2d 234, 242 (7th Cir. 1987) ("When Congress creates the remedy as well as the right, § 1983 is inapplicable."); cf. *Gonzaga Univ.*, 536 U.S. at 289-90 (emphasizing administrative enforcement procedures of Family Educational Rights and Privacy Act as circumstance that "counsel[s] against our finding a congressional intent to create individually enforceable private rights").

In *Seminole Tribe*, the Court applied the same reasoning to a claim for injunctive relief under *Ex parte Young* and held that such a cause of action was not available to enforce the Indian Gaming Regulatory Act's duty to negotiate a gaming compact where that statute contained "a detailed remedial scheme for the enforcement against a State of [the] statutorily created right." 517 U.S. at 74. Similarly, in *Armstrong* the Supreme Court, noting that "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,'" held that where, among other things, the reimbursement-rate provisions in Section 30(A) of the Medicaid Act were

subject to an express statutory remedy (i.e., the withholding of federal funds by the Secretary of Health and Human Services), an *Ex parte Young* cause of action against an alleged violation of Section 30(A) was unavailable. 135 S. Ct. at 1385 (quoting *Sandoval*, 532 U.S. at 290). See also *Armstrong*, 135 S. Ct. at 1385 (holding that a party "cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement") (citing *Douglas*, 565 U.S. at 618-20 (Roberts, J., dissenting)); *McDonnell v. Cisneros*, 84 F.3d 256, 261 (7th Cir. 1996) ("When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies . . . .").

That principle, that a detailed remedial scheme in a federal statute excludes other remedies, governs here. As noted in the State Defendants' brief (at 22-23 & n.8), the FPA contains an extensive array of enforcement mechanisms, including direct enforcement actions by FERC (16 U.S.C. §§ 825m(a), (b)), administrative proceedings before FERC subject to judicial review (16 U.S.C. §§ 824e(a), 825*l*(b)), and private actions to enforce the provisions of the Public Utility Regulatory Policies Act (16 U.S.C. §§ 824a–3(g)(2), (h)). At the same time, the FPA excludes any private right to seek relief directly in federal court to enforce the statutory requirement that charges for wholesale electricity rates be "just and reasonable." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("[T]he prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce."). Thus, in light of the FPA's detailed statutory remedies, a cause of action for injunctive relief under *Ex parte Young*, which would essentially circumvent the limits and conditions embedded in Congress's carefully crafted enforcement scheme,

is unavailable. *Seminole Tribe*, 517 U.S. at 74; see also *City of Rancho Palos Verdes*, 544 U.S. at 121-22 (surveying cases in which statutory administrative procedure excluded availability of § 1983 claim).

C. The Federal Power Act Vests Administration of Its "Just and Reasonable" Standard in FERC, Not in Federal Courts.

Finally, Plaintiffs' reliance on *Ex parte Young* is unavailing for the additional reason that the FPA adopts criteria — that wholesale rates be "just and reasonable" — whose enforcement is entrusted to FERC, and that are not judicially administrable. That is most obviously true for Plaintiffs' conflict preemption claim, which alleges that the ZEC Program's "out-of-market payments" for the environmental attributes of zero-emission nuclear power will adversely affect wholesale prices established in FERC-approved auctions. Doc. 1 at 2-3 (par. 4), 34-45 (pars. 78-80). The FPA gives FERC, not the courts, the authority to determine whether a wholesale rate or practice that directly affects wholesale electricity rates is "just and reasonable" and, if it finds that such a rate or practice is not just and reasonable, to "fix" it. 16 U.S.C. § 824e(a); see also *Montana-Dakota Utils. Co.*, 341 U.S. at 251-52. Absent such action by FERC, a court cannot realistically decide whether, or to what extent, a challenged rate or practice is not "just and reasonable" and thus conflicts with the FPA's terms or with "the accomplishment and execution of [Congress's] full purposes and objectives" in passing it. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). (As described above (at 1), several proceedings that involve these very issues are currently pending before FERC involving these very issues.) Indeed, Plaintiffs concede that if FERC determines that wholesale market prices affected by ZEC payments are just and reasonable, including after any FERC

modification of wholesale market rules, there would be no violation of the FPA. (Jan. 3, 2018 argument, audio at 13:44 - 13:59.)[8]

The same conclusion applies to Plaintiffs' field preemption claim, which maintains that the ZEC Program is field preempted because it impermissibly "affects" wholesale prices or establishes rates "in connection with" wholesale sales. (EPSA Br. at 37-40; EPSA Reply Br. at 23-25.) Again, the FPA expressly authorizes FERC to bring suit in federal court to enjoin acts or practices that violate the FPA, 16 U.S.C. § 825m(a), and it also gives private parties the right to seek a ruling by FERC, subject to judicial review, that a given act or practice violates the FPA, 16 U.S.C. §§ 824e(a), 825*l*(b). This includes requests for FERC to issue a declaratory ruling that a challenged practice is preempted, see, e.g., *California Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, pars. 1-2, 64-67, also subject to judicial review. Such a ruling by FERC would necessarily involve a determination regarding the scope of its jurisdiction over practices "affecting" wholesale prices and charges "in connection with" wholesale sales. And, as the State Defendants explained (State Def. Br. at 41), FERC's interpretation of those terms (see above at 16 n.8), which are essentially "indeterminat[e]," *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774

---

[8] As previously noted (State Def. Br. at 37, 41-43), FERC has ruled that it does not have jurisdiction over sales of state property interests in the environmental attributes of specific types of power generation that are "unbundled" from wholesale sales of electricity — i.e., not sold as part of a transaction that includes the wholesale sale of electricity. See *WSPP Inc.*, 139 FERC ¶ 61,061 (2012), pars. 18, 24; *Am. Ref-Fuel Co.*, 105 FERC ¶ 61004 (2003); *Cal. Pub. Utilities Comm'n*, 133 FERC ¶ 61,059, par. 31 & n.62 (2010); *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, *4-5 (1995); see also *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 190 (2d Cir. 2008). But that jurisdictional limitation of course does not limit FERC's ability to establish and modify the *market rules* for wholesale auctions of electricity, including rules specifically relating to bids by generators that receive out-of-market payments for such environmental attributes.

(2016), is entitled to significant deference. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871, 1874-75 (2013). For this reason as well, the judge-made remedy of an injunction under *Ex parte Young*, which would circumvent FERC's exercise of its statutory authority under the FPA, is unavailable. See *Armstrong*, 135 S. Ct. at 1384.

III. The Principle of *Illinois Brick* Prevents Suit by the Retail Plaintiffs, Who Are Not Participants in Wholesale Electricity Markets.

The preemption claims by the retail plaintiffs, in Case No. 17-cv-1163, are also foreclosed because they are only indirectly affected by the ZEC Program. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735-36 (1977), the Supreme Court held that damages claims under Section 4 of the Clayton Act may be brought only by parties who were directly overcharged for goods or services as a result of uncompetitive conduct, not downstream customers of those parties, even if they are also harmed. See also *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 206-08 (1990). The underlying principle extends beyond antitrust claims. As this Court explained in *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), longstanding precedent holds that not every person injured by a legal wrong has a right to seek redress, and that such a right is generally limited to persons injured directly, not persons with indirect or derivative injuries. *Id.* at 1174-75 (7th Cir. 1985) ("The other part of Justice Holmes's 'tendency' — that the indirectly injured party may not sue — is equally well established") (citing *Southern Pac. Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.)); see also *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1194 (7th Cir. 1985) (noting that shareholder may not sue for injury to it resulting indirectly from injury to corporation).

That principle applies here to exclude the retail plaintiffs' derivative claim alleging that the ZEC Program is preempted by the FPA. The FPA gives FERC jurisdiction to ensure that the rates for wholesale sales of electricity are just and reasonable, while leaving to States the regulation of retail sales. Thus, while participants in wholesale markets may claim to be directly injured by practices that adversely affect wholesale prices, retail customers, whose rates are regulated by the States and are only derivatively affected by the wholesale prices paid by wholesale purchasers, may not sue to complain of those practices.

Respectfully submitted,

/s/ *Richard S. Huszagh*

LISA MADIGAN
Attorney General of Illinois
Richard S. Huszagh
Assistant Attorney General
100 W. Randolph, 12th Floor
Chicago, Illinois 60601
rhuszagh@atg.state.il.us
(312) 814-2587

Certificate of Filing and Service

I hereby certify that on January 26, 2018, I electronically filed the foregoing State Defendants' Supplemental Memorandum Pursuant to Court's January 3, 2018 Order with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will effect service on other participants in the case, all of whom are registered CM/ECF users.

/s/ *Richard S. Huszagh*