No. 18-868

In the Supreme Court of the United States

ELECTRIC POWER SUPPLY ASS'N, NRG ENERGY, INC., and CALPINE CORP.,

Petitioners,

v.

ANTHONY STAR, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ILLINOIS POWER AGENCY, BRIEN J. SHEAHAN, JOHN R. ROSALES, SADZI MARTHA OLIVA, AND D. ETHAN KIMBREL, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE ILLINOIS COMMERCE COMMISSION, and EXELON GENERATION COMPANY, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF STATE RESPONDENTS

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QUESTIONS PRESENTED

The Federal Power Act (the "FPA") gives the Federal Energy Regulatory Commission ("FERC") exclusive authority to regulate rates for wholesale sales of electricity in interstate commerce, but reserves to States authority over retail power sales and electricity generation. The FPA also expressly authorizes FERC, but not private parties, to bring an action to enjoin a violation of the FPA.

The questions presented in this case are:

1. Whether the FPA supports a private cause of action to enjoin a violation of its provision authorizing FERC to regulate rates for sales of wholesale electricity in interstate commerce.

2. Whether a state program that subsidizes the environmental benefits of generating emission-free electricity constitutes wholesale power ratesetting, preempted by the FPA, where the subsidy payments to the generator are not a part of, or made in connection with, a sale of wholesale power in interstate commerce.

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INTRODUCTION

After this Court held in 1927 that States may not regulate wholesale sales of electricity in interstate commerce, Congress enacted the FPA, which gives FERC exclusive rate-setting authority over such sales, while also expressly reserving to States the authority to regulate the generation and retail sale of electricity. Under this "dual-sovereignty" system of electric power regulation, state laws that *regulate* wholesale electricity prices are preempted, but States are not precluded from taking all actions within their authority to regulate power generation that *incidentally affect* wholesale prices. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297–99 (2016). FERC can take such incidental effects into account as part of its authority to ensure that wholesale rates are just and reasonable, 16 U.S.C. §§ 824d, 824e, and its decisions in that regard are subject to judicial review, 16 U.S.C. § 825*l*.

In this case, the Seventh Circuit agreed with FERC that an Illinois program to promote the environmental benefits of emission-free nuclear power does not invade FERC's exclusive authority to set wholesale electricity rates, but instead falls within the State's reserved authority over power generation. The Second Circuit reached the same conclusion in a similar case: *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) ("*Zibelman*").

The petition for review of the Seventh Circuit's decision should be denied for several reasons.

First, the Court could reach the merits of petitioners' FPA preemption question and reverse the lower courts' judgment against them only if it first determines that the FPA supports a private cause of action to enjoin a violation of its terms. Although the district court held that no such cause of action exists, this Court would have to decide that initial question — which raises difficult issues about equitable rights of action and remedies under federal statutes that do not expressly provide them — without the benefit of any consideration of it by the Seventh Circuit or any other court of appeals.

Second, petitioners admit there is no circuit split on the question they ask the Court to decide. The Seventh and Second Circuits agree on the answer to that question. And FERC and the United States, as amicus curiae, took the same position in this case.

Third, the question presented is neither urgent nor important enough to justify this Court's review. That is especially true because FERC has begun a proceeding to modify its wholesale auction rules to account for the effects on wholesale prices of programs like Illinois', and its decision in that matter can be judicially reviewed.

Finally, petitioners' argument that the Seventh Circuit's decision conflicts with *Hughes* misstates the Court's holding in that case. The Maryland program at issue in *Hughes* invaded FERC's exclusive authority to set rates for sales of wholesale electricity by first requiring a local generator to "clear" the FERC-approved wholesale capacity auction, and then replacing the auction's capacity price with the price set by the program's "contracts for differences." 136 S. Ct. at 1294–95, 1297. Illinois' program, by contrast, does not provide any compensation, much less additional compensation, for a *wholesale sale* of power. Instead, it pays for the environmental benefits of emission-free power *generation* — something FERC has repeatedly held is within the States' jurisdiction under the FPA, not its own. And under Illinois' program the generator receives payments regardless of how, and at what price, its power is sold. The program therefore is not wholesale ratesetting, in form or substance.

Ultimately, petitioners' argument is not so much that *Hughes* requires finding Illinois' program to be a form of *de facto* wholesale ratesetting preempted by the FPA, but that the Court should expand FPA preemption to cover every state program that provides additional revenues to power generators because such revenues indirectly *affect* wholesale prices. But *Hughes* explicitly rejected that very notion. 136 S. Ct. at 1298. And FERC, subject to judicial review, is fully capable of regulating wholesale markets by tailored means that account for the complexities of interstate electricity markets.

STATEMENT

A. Federal Statutory Background

1. Following the Court's holding that States may not regulate wholesale sales of electricity in interstate commerce, see *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), Congress enacted the FPA, which created FERC's predecessor and gave it jurisdiction over the transmission and wholesale sale of electricity in interstate commerce, 16 U.S.C. §§ 824, 824d, 824e. At the same time, the FPA expressly reserved to the States authority over the generation and

retail sale of electricity. 16 U.S.C. §§ 824(a), (b); see *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) ("*EPSA*").

The FPA requires FERC to ensure that all rates for wholesale sales of electricity in interstate commerce are "just and reasonable." 16 U.S.C. § 824d(a) (Section 205). If it finds that a rate or charge for any transmission or wholesale sale of electricity under its jurisdiction is "unjust, unreasonable, [or] unduly discriminatory," it shall "determine the just and reasonable rate [or] charge" and "fix the same by order." 16 U.S.C. § 824e(a) (Section 206(a)). Parties aggrieved by a FERC order may obtain judicial review directly in a federal court of appeals. 16 U.S.C. § 825*l* (Section 313). And FERC may bring an action in federal district court to enjoin any violation of the FPA or any FERC regulation or order. 16 U.S.C. § 824m (Section 314).

2. In recent decades, the electricity industry has shifted away from a model in which vertically integrated utilities produce, distribute, and sell power, to a system in which many producers supply electricity to a multi-state "grid," and different parts of the business — generation, wholesale sales and transmission, local distribution, and retail sales — are often performed by separate entities. See *Hughes*, 136 S. Ct. at 1290, 1292; *New York v. FERC*, 535 U.S. 1, 7–8 (2002). As these trends progressed, FERC adopted a more market-based approach to regulating rates for wholesale sales of electricity in interstate commerce. See, e.g., FERC Order No. 888 (61 Fed. Reg. 21,540) (requiring functional unbundling, open access, and nondiscriminatory pricing for interstate transmission services); see also *New York*

v. FERC, 535 U.S. at 10–14. FERC also authorized the creation of voluntary associations of transmission line owners, known as Independent System Operators and Regional Transmission Organizations (collectively, "RTOs"), to manage parts of the grid. *Hughes*, 136 S. Ct. at 1292.[1]

In addition, FERC shifted away from the traditional cost-plus-profit model of approving specific wholesale rates, or tariffs, and authorized RTOs to conduct auctions in their respective areas for interstate sales of wholesale "energy" (on a day-ahead and real-time basis) and future wholesale "capacity," which ensure sufficient supply to meet anticipated demand. See *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 535–37 (2008). In both types of auctions, RTOs accept bids starting with the lowest bid until the anticipated need is met. The price for the last-accepted bid, referred to as the "clearing price," then applies to all accepted bids. *Hughes*, 136 S. Ct. at 1290, 1293.

Power generators and local utilities (sometimes known as "load serving entities," or "LSEs") also may enter into long-term "bilateral contracts," outside the capacity auctions. Under such contracts, the utility becomes the owner of the capacity, including for pur-

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1 Illinois is served by two RTOs: PJM Interconnection, LLC ("PJM"), which covers much of northern Illinois and large parts of the eastern United States, and the Midcontinent Independent System Operator ("MISO"), which covers most of Illinois and much of the Midwest. Pet. App. 1a–2a; see *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 770 & Fig. 1 (7th Cir. 2013).

poses of the auctions. *Hughes*, 136 S. Ct. at 1292–93; see also *Morgan Stanley Capital Grp.*, 554 U.S. at 545–46 (holding that FERC may reject bilateral contract price only if it seriously harms consuming public).

B. State Statutory Background

1. In 2007, Illinois began a statewide program to promote renewable energy (Ill. Pub. Act 95–481; Ill. Comp. Stat., ch. 20, § 3855/1–75(c)). This program, like similar ones in many other States, created state-law property interests, known as "renewable energy credits," or "RECs," in the environmental benefits of renewable energy — e.g., the reduced consumption of fossil fuels and related airborne emissions, including greenhouse gases — that are distinct from the underlying energy.[2] RECs are issued for each megawatt hour of eligible energy produced, but they are separated, or "unbundled," from that energy and traded in transactions independent from the sale of that energy. Ill. Comp. Stat., ch. 20, § 3855/1–10; cf. *Edison Elec. Inst.*, 69 FERC ¶ 61,344 (1994) (addressing regulatory status of sulfur dioxide emission allowances issued under 1990 Clean Air Act Amendments and sold independently from sales of wholesale electric power). Illinois utilities must acquire RECs matching a statutory percentage of their retail distribution, which increases progressively to 25% in 2025. Ill. Comp. Stat., ch. 20, § 3855/1–75(c).

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[2] Renewable-energy programs in other States are described in V. Arroyo, *et al.*, *State Innovation on Climate Change: Reducing Emissions from Key Sectors While Preparing for A "New Normal"*, 10 Harv. L. & Poly Rev. 385, 388 & n.14 (2016); see also Pet. App. 19a, n.10.

The utilities, as buyers of RECs, pass the corresponding cost along to their Illinois retail customers. Ill. Comp. Stat., ch. 220, §§ 5/16–108(k), 16–111.5(*l*).

2. Amid growing public concerns about the adverse environmental effects of fossil fuel-based electricity, and prompted by the announcement that several Illinois nuclear power plants might close, Illinois, building on the model of its earlier REC program, enacted the ZEC Program following a multi-agency review of potential impacts. Ill. Pub. Act 99–906, §§ 1.5, 5. The enabling legislation found that:

- emissions of sulfur oxides, nitrogen oxides, particulate matter, and greenhouse gases have "significant adverse health effects on persons exposed to them, and . . . result in climate change trends that could significantly adversely impact Illinois";
- reducing such emissions "is critical to improving air quality in Illinois for Illinois residents"; and
- "[p]reserving existing zero emission energy generation . . . is vital to . . . achieving [Illinois'] environmental goals and ensuring that air quality in Illinois continues to improve."

Id., § 1.5.

The ZEC Program, which lasts 10 years, requires Illinois electric utilities to purchase zero-emission credits, or "ZECs," which represent the environmental benefits associated with emission-free nuclear power, measured by a fixed percentage of the retail power they sell. Ill. Comp. Stat., ch. 20, §§ 3855/1–10, 1–75(d–5). The utilities pass that cost along to their ratepayers.

Id., § 3855/1–75(d–5)(2).

The Illinois Power Agency, with approval by the Illinois Commerce Commission, selects the eligible nuclear power plants and administers the process for them to enter into ZEC contracts with Illinois utilities. Ill. Comp. Stat., ch. 20, § 3855/1–75(d–5)(1). Whether a nuclear power plant is chosen for the program depends on several criteria, including whether ZEC payments to it are likely to result in its continued operation, thereby minimizing emissions of carbon dioxide "from electricity consumed in Illinois" and emissions of "sulfur dioxide, nitrogen oxide, and particulate matter that . . . adversely affect the citizens of [Illinois]." *Id.*, § 3855/1–75(d–5)(1)(C).

The price of ZECs is set by a statutory formula that includes a base price of $16.50 per megawatt hour (identified as the "Social Cost of Carbon," as determined by the U.S. Interagency Working Group on the Social Cost of Carbon), increased yearly by one dollar per megawatt hour starting in 2023. That figure is reduced for a full delivery year if, and to the extent that, a combination of previously determined capacity prices and market-based projections of energy prices for that year increases above a baseline amount. Ill. Comp. Stat., ch. 20, § 3855/1–75(d–5)(1)(B).[3] The purpose of

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[3] This figure is set in advance for each delivery each year based on a composite of PJM and MISO capacity prices for that year and an average of the preceding year's projected energy prices for each month in the delivery year, as determined by futures-market transactions published by the Intercontinental Exchange. The ZEC price adjustment applies if this figure exceeds a $31.40

this price adjustment is "to ensure that the procurement remains affordable to retail customers in [Illinois] if electricity prices increase." *Id.*

C. Proceedings Below

1. Petitioners, who are fossil fuel-based power producers, filed this action in federal district court alleging that the ZEC Program is preempted by the FPA and should be enjoined under the principles announced in *Ex parte Young*, 209 U.S. 123 (1908). Petitioners alleged that the ZEC Program is preempted by the FPA because it gives eligible nuclear plants "substantial out-of-market payments for each [megawatt hour] of electricity they produce," thereby "altering the revenue" they receive for generating power. Pet. App. 59a–60a.

The complaint named as defendants the Illinois officials in charge of implementing the ZEC Program (the "state respondents"). *Id.* at 65a. Exelon Generation Co., LLC ("Exelon"), which owns and operates several nuclear plants in Illinois, intervened as a defendant. *Id.* at 14a.

The state respondents and Exelon moved to dismiss the action, arguing that (1) petitioners did not have a cause of action to seek an injunction against the ZEC Program on the ground that it is preempted by the FPA, and (2) their preemption claim lacked merit. The district court granted these motions, agreeing with both arguments as alternative grounds for its judgment. *Id.*

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baseline, which was set using a similar formula. Ill. Comp. Stat., ch. 20, § 3855/1–75(d–5)(1)(B).

at 14a, 30a–47a. Petitioners appealed.

2. At the Seventh Circuit's invitation, the United States and FERC filed an amicus brief, limited to the merits of the preemption issue. 7th Cir. Doc. 135 at 1–2. This brief stated that the district court correctly held that the ZEC Program is not preempted by the FPA because it does not regulate wholesale rates for electricity. *Id.* at 7–27. The district court's decision was correct, they said, because the ZEC Program does not condition ZEC payments on the generator's clearing a wholesale auction, and so does not suffer from the "fatal defect" that *Hughes* identified in Maryland's program. *Id.* at 7, 9–14. Instead, they explained:

> ZECs are separate commodities that represent the environmental attributes of a particular form of power generation; they are not payments for, or otherwise bundled with, sales of energy or capacity at wholesale, and thereby fall outside of FERC's exclusive jurisdiction over wholesale transactions.

Id. at 10; see also *id.* at 22–27.

The United States and FERC also disagreed with petitioners' contention that the ZEC Program is preempted because it has the "practical effect" of conditioning payment on the sale of wholesale power in a FERC auction. That is not the case, they said, because the program does not require nuclear power eligible for ZEC payments to be sold in such an auction, and instead such power can be sold "via wholesale auction, bilateral contracts, or directly to retail customers." *Id.* at 12–16. The ZEC Program's price adjustment provision also did not support petitioners' position, they stated, because "[u]nlike the payment under the Maryland program, the Illinois statute does not link ZECs to a particular generator's actual wholesale revenues." *Id.* at 14.

Finally, the United States and FERC stated that if state subsidy programs have a detrimental effect on wholesale markets, FERC "can exercise its responsibility under the Federal Power Act to ensure just and reasonable prices" in those markets without "resort . . . to the extraordinary and blunt remedy of preemption." *Id.* at 20. Thus, they asserted, "the solution lies with the Commission, not with courts." *Ibid.*

3. Acting in its regulatory capacity, FERC later issued an order (the "June 29 Order") starting a process to amend the rules for PJM capacity auctions to ensure that capacity prices are just and reasonable, taking into account the effect of state subsidies for power generation. *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (June 29, 2018); see also Pet. App. 7a. The June 29 Order stated that such amended rules "in no way divest[] the states in the PJM region of their jurisdiction over generation facilities," and that "States may continue to support their preferred types of resources in pursuit of state policy goals." June 29 Order, par. 158; see also Pet. App. 7a.

4. Without addressing whether petitioners had a cause of action to enjoin the ZEC Program, the Seventh Circuit affirmed the district court's judgment, holding that the ZEC Program does not set rates for wholesale power. Pet. App. 3a–7a. The Seventh Circuit relied in particular on *Hughes*' statements that its holding reached "only state rules that depend on participating

in the interstate auction," and that States "'may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain.'" *Id.* at 5a (quoting *Hughes*, 136 S. Ct. at 1298). Although a nuclear plant "must *generate* power" to receive ZEC payments, the Seventh Circuit explained, the ZEC Program does not require it to sell that power in an interstate auction, like the Maryland program. *Id.* at 6a (emphasis in original). In addition, the Seventh Circuit stated, under the ZEC Program "the value of a credit does not depend on [the generator's] bid." *Ibid.*

The Seventh Circuit further rejected petitioners' contention that the ZEC Program was preempted due to its "indirect" effect on auction prices, "by keeping active a generation facility that otherwise might close." *Ibid.* "[B]ecause states retain authority over power generation," the court held, "a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law." *Ibid.* FERC agreed with that view, the court added, by reaffirming that "'States may continue to support their preferred types of resources in pursuit of state policy goals.'" *Id.* at 7a (quoting June 29 Order, par. 158.)

Finally, the Seventh Circuit noted that FERC may modify its own rules regulating wholesale rates if it believes changes are necessary to ensure those rates are just and reasonable, and that aggrieved parties may then seek judicial review of such changes. *Ibid.* Any need for such rule changes, the court held, does not establish preemption, and is "instead an inevitable consequence of a system in which power is shared between state and national governments." *Ibid.*

D. New York Proceeding in *Zibelman*

1. In a separate action brought by some of the same plaintiffs challenging a similar program adopted by the New York Public Service Commission, the district court dismissed the action, and the Second Circuit affirmed. *Zibelman*, 906 F.3d at 45–57. In alternative holdings, the district court ruled that (1) the plaintiffs did not have a cause of action to enjoin the New York program on the basis that it is preempted by the FPA, and (2) the FPA does not preempt the New York program. *Id.* at 48. The Second Circuit, like the Seventh Circuit, did not decide whether the plaintiffs had a cause of action, *id.* at 49, but it agreed with the district court on the merits of the preemption issue, *id.* at 49–57. *Zibelman* is also the subject of a pending petition for certiorari (Docket No. 18-879).

ARGUMENT

The petition should be denied for several reasons. *First*, to reach the question petitioners present, the Court would have to resolve a threshold issue — not yet addressed by any court of appeals — and rule that the FPA supports a private cause of action to enjoin a violations of its terms, even though the FPA expressly gives FERC alone the right to seek an injunction against a violation. *Second*, there is no circuit split on the question petitioners present. To the contrary, the Seventh and Second Circuits, joined by FERC, have all rejected petitioners' position. *Third*, petitioners' question presented is neither urgent nor important. *Fourth*, the Seventh Circuit correctly held that Illinois' ZEC Program, unlike the program preempted in *Hughes*, does not invade FERC's exclusive authority over wholesale ratemaking, but instead falls within the authority to regulate power generation that the FPA expressly reserves to the States.

I. Resolving Petitioners' Question Presented Requires a Threshold Decision on Whether They Have a Cause of Action to Enjoin a Violation of the FPA.

Because the Seventh Circuit rejected petitioners' preemption claim on the merits, it did not have to, and did not, decide whether the FPA authorizes a private cause of action to enjoin a violation of its terms. Pet. App. 3a. But petitioners would not give this Court that luxury. Whether they may maintain a private right of action does not merely provide an independent ground to affirm the judgment below; it is a question that logically precedes, and must be resolved before, any ruling in this case that the FPA preempts state law. Yet the Court would have to resolve that threshold issue — which raises difficult questions about the existence of a private cause of action to enjoin a violation of the FPA — without the benefit of a decision by the Seventh Circuit, or any other circuit court, addressing it. Moreover, all relevant considerations point to the conclusion that the FPA does not support such a cause of action, meaning that the Court ultimately would not reach the issue on which petitioners seek review.

A. Petitioners' Preemption Claim Depends on Whether the FPA Supports a Private Cause of Action to Enjoin a Violation.

At every stage of this case, respondents disputed that petitioners have a cause of action to enjoin the ZEC Program on the ground that it is preempted by the FPA. Pet. App. 3a, 30a–34a. Thus, respondents have fully preserved this as a basis to sustain the district court's judgment dismissing this action and the Seventh Circuit's opinion affirming that judgment. See, e.g., *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 80 (2009).[4] In addition, that threshold issue was fully briefed both in the district court and in the Seventh Circuit, and the district court relied on it as one of two alternative grounds for its judgment. Pet. App. 3a, 30a–34a.

Ultimately, petitioners can prevail on their claim only if they both *have* a preemption cause of action under the FPA and they prevail on the *merits* of that cause of action. But this Court should not reach the second question unless it first rules in petitioners' favor on the first. It makes no sense for this Court to address the merits of a cause of action that does not exist. This circumstance alone warrants denying the petition.

B. No Circuit Court Has Decided the FPA Cause-of-Action Question, Which Raises Difficult Issues.

Compounding the barrier this threshold issue poses to this Court's review is fact that neither the Seventh Circuit in this case, nor any other circuit court, includ-

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4 In *Hughes*, the respondents did not challenge the petitioners' right to seek a judgment declaring the Maryland program preempted by the FPA, and the Court accordingly did not address the issue. 136 S. Ct. at 1296, n.6.

ing the Second Circuit in *Zibelman*, has addressed it. Thus, to reach petitioners' preemption question the Court would have to address the private-cause-of-action question in the first instance — something it generally avoids. See, e.g., *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1190 (2017) (declining to decide in first instance issue court of appeals did not address). That is especially problematic here because this threshold question raises complex issues concerning equitable rights of action and remedies under federal statutes that do not expressly provide them.

Notably, petitioners do not contend that the FPA *expressly* gives them a cause of action to enjoin a violation of its provisions. Sections 206(a) and 313 of the FPA allow private parties only to petition FERC to adjust wholesale rates that are not just and reasonable, or are discriminatory, and to seek judicial review of FERC's ruling on such a petition. 16 U.S.C. §§ 824e(a), 825*l*; see also *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251–52 (1951) (holding that private parties may not directly seek federal court ruling that wholesale rates are not just and reasonable, which FERC must determine).

Petitioners likewise have never contended that the FPA creates an *implied* right of action for private parties to enjoin a violation of its terms. That is understandable because Section 314 of the FPA expressly gives FERC, but not private parties, the right to seek an injunction against a violation of the FPA or any FERC rule or order. 16 U.S.C. § 824m; see also *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 74 (1996).

Petitioners also have never claimed that the FPA provision on which they rely gives them rights enforceable under 42 U.S.C. § 1983. Pet. App. 66a; see also *id.*, 88a, 90a. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("reject[ing] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983"); see also *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) ("to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs").

Instead, petitioners purport to assert a private cause of action to enjoin official conduct alleged to violate federal law under the principles applied in *Ex parte Young*, 209 U.S. 123 (1908), and examined in *Armstrong v. Exceptional Child, Inc.*, 135 S. Ct. 1378 (2015). Pet. App. 66a; Dist. Ct. Doc. 83 at 30–33. But whether the FPA supports such a private cause of action to enjoin a violation of its terms implicates difficult issues about the circumstances in which a private party may seek an *Ex parte Young* injunction — a "judge-made remedy" based on English common law — against the alleged violation of a federal statute. *Armstrong*, 135 S. Ct. at 1384–85.

Armstrong first held that the Supremacy Clause (U.S. Const. Art. VI, cl. 2) does not create a cause of action. 135 S. Ct. at 1383–84. It then held that the private plaintiffs did not have a cause of action to enjoin state Medicaid reimbursement rates allegedly preempted by Section 30(A) of the Medicaid Act where this provision contains an express enforcement procedure that does not include a private remedy, and it establishes a "judgment-laden standard" — requiring rates "consistent with efficiency, economy, and quality of care" — that is "judicially unadministrable." *Id.* at 1385.

No court of appeals has yet considered whether, under *Armstrong*'s analysis, a private cause of action exists to enjoin implementation of a state law allegedly preempted by the FPA. The factors relevant to whether the FPA supports such a cause of action include:

> (1) whether the plaintiffs are seeking an "anti-suit injunction" as the targets of an enforcement action that allegedly violates the FPA; see *Armstrong*, 135 S. Ct. at 1384 (stating that preemption-based injunction may issue when "federal law immunizes [the plaintiff] from state regulation"); see also *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting); cf. 42 U.S.C. § 1983 (creating cause of action for deprivation of "rights, privileges, or *immunities*" under federal law) (emphasis added);
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> (2) whether the FPA provision relied on gives private parties specific "rights"; see *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 898–905 (10th Cir. 2017) (holding that plaintiffs lacked cause of action for *Ex parte Young* injunction against state law allegedly preempted by Controlled Substances Act where that Act did not give

them any "rights"); and

(3) whether the FPA contains an express remedial scheme that applies to that provision; see *Armstrong*, 135 S. Ct. at 1385; *Sandoval*, 532 U.S. at 290 (2001); *Seminole Tribe*, 517 U.S. at 74.

Because no court of appeals has yet decided whether, in light of these considerations, the FPA supports the existence of the preemption cause of action asserted by petitioners, the Court should let that issue percolate further in the lower courts before considering it. This case, at this time, is a particularly unsuitable vehicle for the Court to decide that threshold issue.

C. The FPA Does Not Support a Private Cause of Action to Enjoin a Violation of its Provisions.

There are, in any event, compelling reasons to conclude, as the district court held, that the FPA does not support a private cause of action to enjoin an alleged violation of its exclusive grant of authority to FERC to set wholesale electricity rates. That means the Court would never reach petitioners' question presented.

First, petitioners have never contended that they are the target of any current or threatened enforcement action under the ZEC Program, in violation of the FPA. See *Armstrong*, 135 S. Ct. at 1384; *Douglas*, 565 U.S. at 620 (Roberts, C.J., dissenting).

Second, under the FPA the right to regulate wholesale electricity rates belongs to FERC, not private parties. And because the FPA does not give petitioners any "right" to have FERC set wholesale electricity rates, they should not be recognized as having a cause of action under the FPA to enforce that aspect of the statutory scheme. Compare *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (holding that where "the general acts of Congress relating to the mails" gave the complainants "the *legal right* . . . to have their letters delivered at the postoffice as directed," they could obtain injunctive relief against Postmaster's refusal to comply with that right) (emphasis added), with *Safe Streets Alliance*, 859 F.3d at 898–905 (holding that because Controlled Substances Act did not give plaintiffs any "rights," they had no cause of action for preemption-based injunction, under *Ex parte Young* and *Armstrong*, against state law that allegedly violated Act).

Third, the FPA expressly authorizes FERC, but not private parties, to seek an injunction against any violation of the FPA or any FERC rule or order. 16 U.S.C. § 824m. That specific remedial provision negates petitioners' suggestion that the FPA also supports a private cause of action to enjoin such violations. See *Armstrong*, 135 S. Ct. at 1385 (holding that Medicaid Act § 30(A), which contained express enforcement procedure that did not include private remedy, excluded private preemption-based cause of action for *Ex parte Young* injunction); see also *Sandoval*, 532 U.S. at 290; *Seminole Tribe*, 517 U.S. at 74.[5]

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[5] In the district court, petitioners argued that their claim to have a preemption-based cause of action under the FPA was supported by Section 317 (16 U.S.C. § 825p), which gives federal courts "exclusive jurisdiction" of "all suits in equity and actions

This does not mean, however, that petitioners are without any remedy if the ZEC Program does violate the FPA. To the extent they complain that the ZEC Program affects wholesale electricity prices in a way that renders those prices unjust and unreasonable, the FPA enables them to pursue that complaint before FERC, subject to judicial review. 16 U.S.C. §§ 824e(a), 825*l*. And the June 29 Order shows that several petitioners are currently pursuing that very process, in which FERC could issue a decision at any time.[6]

II. There Is No Circuit Split, and FERC Agrees that the FPA Does Not Preempt State Laws to Promote State Environmental Policies.

Even apart from the obstacle presented by the threshold private-cause-of-action issue, petitioners cannot point to any circuit split or other conflict of authority on the merits of the FPA preemption question

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at law brought to . . . enjoin any violation of" the FPA. That provision applies to FERC actions to enjoin FPA violations. But the district court rightly rejected this argument, stating that "such vesting jurisdiction in the district courts does not create a *private* cause of action." Pet. App. 30a–31a (emphasis in original, citing *Montana-Dakota Utils. Co.*, 341 U.S. at 249). See also *Texas Indus., Inc. v. Radcliff Mat'ls Inc.*, 451 U.S. 630, 640–41 (1981).

6 It is also possible that FERC, while not expressly authorized to do so, can issue a ruling, subject to judicial review, that a particular state program is preempted by the FPA's grant to FERC of exclusive jurisdiction to regulate wholesale electricity rates. See *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (2010) (resolving petition for declaration that FPA preempts utility commission's requirement that utilities purchase power at specified price).

they urge the Court to decide. To the contrary, the only two circuit courts that examined this question squarely held that Illinois' and New York's ZEC programs do not impermissibly usurp FERC's authority to regulate wholesale electricity rates, but instead only "'incidentally affect areas within FERC's domain.'" Pet. App. 5a (quoting *Hughes*, 136 S. Ct. at 1298); see *Zibelman*, 906 F.3d at 54, 56–57. This unity of lower court views justifies denying the petition.

Significantly, FERC agrees with these courts. Pet. App. 4a; 7th Cir. Doc. 135 at 7–19. Just as they did, FERC distinguished between state laws, as in *Hughes*, that invade FERC's statutory authority to set wholesale prices, and state laws, like Illinois', that only incidentally affect such prices. 7th Cir. Doc. 135 at 7–8, 15–19 ("a subsidy like the ZEC that *affects* (in some way) wholesale rates should not be conflated with a state law that *targets* the wholesale market") (emphasis in original). Petitioners' quarrel with that view is unconvincing, as described below in Section IV. More important, because FERC itself agrees with all lower courts that petitioners' position about the FPA's preemptive scope is wrong, there is no reason for the Court to intervene.

III. The Preemption Question Presented Is Not Urgent or Important Enough to Justify This Court's Review.

Given the lack of any circuit split, the question presented would have to be exceptionally important and urgent to justify review at this time. It is neither.

Contrary to petitioners' characterization, there is no stampede of state laws to subsidize nuclear power generation due to its environmental benefits. In the wake of the Illinois and New York programs, exactly one State, New Jersey, has passed a law granting financial support to avoid losing the environmental benefits of emission-free nuclear power. See Pet. 31 n.10 (citing N.J. Stat. Ann. § 48:3–87.5, enacted in 2018). Petitioners allude to similar legislative proposals, *id.* at 27 n.7, but it remains to be seen whether any becomes law. And if the New Jersey law, or any of these proposals, ultimately does lead to an actual circuit split or produces the type of national problem that could justify this Court's consideration, it may then decide whether to address it. Until then, FERC should be trusted to exercise its statutory authority (subject to judicial review) to ensure just and reasonable rates for wholesale electricity by protecting the effective functioning of wholesale electricity markets and, at the same time, accommodating the States' express authority over power generation. Indeed, the pending FERC proceeding pursuant to its June 29 Order refutes petitioners' suggestion that this Court must act now, in this case, to avoid an unworkable "patchwork of political rent-seeking." Pet. 27.

IV. The Seventh Circuit's Opinion Is Consistent with *Hughes* and the Court's Preemption Precedent Under the FPA.

The most petitioners can muster is the contention that all eight judges to rule on the issue, and FERC, are wrong on the merits. They are not. The ZEC Program is not "indistinguishable" from the program held invalid in *Hughes*, as petitioners claim. Pet. 4–5. Petitioners' argument disregards key differences between the two programs that firmly support the Seventh Circuit's conclusion that the ZEC Program falls comfortably within the States' authority over power generation and does not invade FERC's authority to regulate rates for wholesale sales of electricity. Put simply, ZEC payments for *generating* emission-free electricity do not set the price for any *wholesale sale* of that electricity. Nothing in *Hughes* warrants a contrary conclusion. Even if lower court error justified certiorari review — and it does not — there was no error here.

A. The ZEC Program is Not Ratemaking for Sales of Wholesale Electricity.

The state respondents agree that wholesale ratemaking is exclusively FERC's responsibility. But the scope of that authority is not as broad as petitioners claim, and it does not encompass the ZEC Program. Ratemaking under the FPA has a straightforward meaning: "to establish the amount of money a [person] will hand over in exchange for power." *EPSA*, 136 S. Ct. at 777. Under this definition, the ZEC Program is not wholesale ratemaking, in form or function.

Critically, payments under the ZEC Program are not consideration for the sale of electricity at all, much less for the sale of wholesale electricity. Instead, they are consideration for the positive environmental attributes of zero-emission power generation, which are distinct from the electricity itself. The ZEC Program, by providing financial support for that generation to preserve those environmental benefits, thus fits within the States' authority over power-generating facilities, and it does not cross the boundary around FERC's exclusive right to determine just and reasonable prices for sales of wholesale electricity.

Hughes does not support a contrary conclusion. The Maryland program invalidated in *Hughes* set the price for individual sales of electric capacity through a two-step process: by requiring the generator to "clear" the capacity auction, and then replacing the auction price for that capacity with the price determined by the program's "contracts for differences." 136 S. Ct. at 1295–99; see also *id.* at 1295 ("Maryland's program guarantees [the generator] the contract price *rather than* the auction clearing price.") (emphasis added). Based on these key features, the Court "agree[d] with the Fourth Circuit's judgment that Maryland's program *sets an interstate wholesale rate*, contravening the FPA's division of authority between state and federal regulators." *Id.* at 1297 (emphasis added).

The ZEC Program is different in every material respect. Like Illinois' REC program, which petitioners admit is valid, Pet. App. 37a; 7th Cir. Doc. 40 at 51–54, the ZEC Program provides compensation for the environmental benefits of emission-free nuclear power, not for the electricity itself. It does so with payments that are not conditioned on any wholesale sale of electricity. Those payments are made regardless of how, and at what price, that nuclear power is sold. And they do not vary based on the price of any sale — in a FERC-approved auction or otherwise — of the electricity whose generation produces the environmental benefits that give rise to those payments.

Petitioners say these differences are immaterial because, as a practical matter, the nuclear plants that receive ZEC payments will sell their power output in wholesale transactions — either through auctions or bilateral contracts — subject to FERC's regulatory authority. Pet. 3–5, 13, 18–23. The Seventh and Second Circuits, and FERC itself, correctly rejected this reasoning, which would nullify the FPA's carefully crafted distinction between regulating power *generation*, which is reserved to the States, and regulating *rates for wholesale sales* of power, which is solely FERC's responsibility. See *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 513 (1989) ("we must take seriously the lines Congress drew in establishing a dual regulatory system").[7]

Because development of the interstate grid means that most power produced is transmitted and sold in interstate wholesale markets, see *New York v. FERC*, 535 U.S. at 7–8, 16, petitioners' theory would effectively prohibit all financial support for power generation — including wind, solar, and other renewable energy — regardless of whether it controls the price of individual wholesale sales, as in *Hughes*. But *Hughes* specifically disclaimed any such reading of the Court's holding, stating that it did "not address the permissibility of various other measures States might employ to encour-

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[7] *Northwest Central Pipeline* involved the Natural Gas Act, not the FPA, but "the relevant provisions of the two statutes are analogous," and the Court therefore "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10.

age development of new or clean generation, including tax incentives, land grants, [or] direct subsidies." 136 S. Ct. at 1299. That disclaimer conforms to the FPA's express design because such subsidies, like the ZEC Program, increase a generator's revenues without setting the price paid for any wholesale sale of electricity.[8]

It is true, as petitioners note, Pet. 16, 25, that "[t]he FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result." *EPSA*, 136 S. Ct. at 780 (citation and internal quotation marks omitted); see also *Hughes*, 136 S. Ct. at 1297. But although, as discussed below, the ZEC Program may indirectly *affect* wholesale electricity prices, it does not — directly or indirectly — *regulate* those prices.

The distinction is illustrated in *Northwest Central Pipeline Corp.* There, the Court upheld a Kansas law that prevented waste and protected the shared production rights of multiple producers from common natural gas pools (referred to as "correlative rights") by cancelling the rights of producers who engaged in prolonged underproduction. Distinguishing its prior decisions finding to be preempted state laws "imposing *purchasing* requirements on interstate pipelines," the Court explained that the Kansas law "regulated *production* rates in order to protect producers' correlative rights —

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[8] That is true for emission-free power sold at wholesale in FERC-approved auctions and through bilateral contracts, which, contrary to petitioners' formulation of their question presented, they admit is an alternative way for nuclear generators to sell their output. Pet. 71a; see also 7th Cir. Doc. 135 at 11 n.3.

a matter firmly on the States' side of th[e] dividing line." 489 U.S. at 514 (emphasis added). The Court added that, even though the state law might have an "effect on the costs of purchasers," "Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate rates of production, conserve resources, and protect correlative rights." *Id.* See also *Hughes*, 136 S. Ct. at 1298 (holding that States "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain").

The same principle applies here. The Seventh Circuit correctly held, therefore, that Illinois' ZEC Program, by regulating power generation, operates on the States' side of the line drawn by the FPA's system of dual-sovereign regulation and does not, directly or indirectly, regulate prices for wholesale sales of electricity. Pet. App. 4a–7a.

Nor is there any merit to petitioners' contention that, even if the rest of the ZEC Program is valid, its price adjustment feature — under which ZEC payments for a megawatt hour of emission-free power may go down by a fixed amount for a given year — makes the program equivalent to one that conditions payments on a generator's "participation" in a FERC auction, as in *Hughes*. See Pet. 11, 19. As the Seventh Circuit observed: "If a producer does offer power to an interstate auction, the value of a [zero-emission] credit does not depend on its bid." Pet. App. 6a.[9]

B. ZEC Payments Are Not Charges Received "In Connection With" Sales of Wholesale Electricity.

Petitioners argue that even if ZEC payments do not themselves constitute wholesale ratemaking, they are still preempted because they invade FERC's authority to ensure that charges "in connection with" wholesale sales of electricity are just and reasonable. Pet. 16, 19–23. This argument misconceives both the scope of FERC's authority over such charges and the relation between ZEC payments and sales of wholesale power.

As noted, the FPA authorizes FERC to regulate rates for charges received "in connection with" sales of wholesale electricity. 16 U.S.C. § 824d(a) (Section 205(a)). Such charges are commonplace for "ancillary services," such as voltage control, system dispatch, and energy imbalance service. See *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1125 (D.C. Cir. 2011); FERC Order 888, 61 Fed. Reg. at 21,579–83. But FERC has ruled that sales of products or services that are not "bundled" with a sale of wholesale electricity or the transmission of electricity in interstate commerce, in the sense that they not part of the *same transaction* as

[9] Even if the ZEC Program's price adjustment feature permitted a contrary conclusion, that feature of the law is severable, both under the terms of the enabling statute, Ill. Pub. Act 99–906, § 97, and under general principles governing constitutional challenges to state laws, see *Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992). At worst, therefore, that feature would fall — and ZEC payments would not.

that sale, are outside its jurisdiction. *WSPP Inc.*, 139 FERC ¶ 61,061, pars. 5, 22–24 (2012); see also *Edison Elec. Inst.*, 69 FERC ¶ 61,344, *62288–89 (1994) (holding that sales of sulfur dioxide emission allowances issued under 1990 Clean Air Act Amendments are outside FERC's jurisdiction when they are "independent of a sale of electric energy for resale in interstate commerce"). This interpretation by FERC of the scope of its own statutory authority is entitled to significant deference. See *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013). And, as the United States and FERC noted in their amicus brief below (7th Cir. Doc. 135 at 10, 22–25), FERC specifically applied this limiting principle in *WSPP Inc.* to sales of RECs created by state law that are not bundled with wholesale electricity sales. 139 FERC ¶ 61,061, pars. 23–24.

Hughes is consistent with this view of the FPA. There, the Court held that payments under Maryland's program were not independent of a wholesale sale "because the payments are *conditioned* on [the generator's] capacity clearing the auction — and, accordingly, on [its] *selling* that capacity to PJM," so that "the payments are certainly 'received . . . in connection with' interstate wholesale sales to PJM." 136 S. Ct. at 1297 n.9 (quoting FPA Section 205(a)) (emphasis added); see also *id.* at 1291 ("Maryland's program operates *within the auction*") (emphasis added).

By contrast, payments under the ZEC Program are not part of, or made in connection with, any transaction for the sale of wholesale power. Unlike the contracts-for-differences payments in *Hughes*, they are "unbundled" — at the point of generation — from the emission-free electricity that justifies them. Thus, these payments — for unbundled zero-emission credits — fall outside FERC's jurisdiction to ensure that rates for wholesale electricity, or charges in connection with such sales, are just and reasonable.

C. The ZEC Program Is Not Preempted Due to Its Incidental Effect on Wholesale Prices.

Finally, there is no merit to petitioners argument that the ZEC Program is preempted because it "will massively distort wholesale markets" and consequently "threaten . . . the FERC-authorized mechanisms for setting wholesale rates at economically efficient levels." Pet. 15, 26. Even if that were true (which the state respondents dispute), it does not establish that the ZEC Program constitutes wholesale ratesetting or prevents FERC from ensuring just and reasonable rates for wholesale electricity sales.

The premise of this argument, made even more forcefully by several amici supporting petitioners (see Energy Economists' Br. at 13, 15–19; Industrial Customers' Br. at 3, 5–12), is that even if the ZEC Program does not *regulate* wholesale prices, it will *affect* them to such an extent that it will frustrate FERC's regulation of wholesale power markets. But the Court has repeatedly held that incidental effects on wholesale rates do not establish preemption; otherwise the FPA's express reservation to States of regulatory authority over power generation would be nullified. *Hughes*, 136 S. Ct. at 1298; *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1600 (2015); *Nw. Cent. Pipeline Corp.*, 489 U.S. at 515 (stating that this theory, if adopted, would "thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . . and would render Congress' specific grant of power to the States to regulate production virtually meaningless"); see also *EPSA*, 136 S. Ct. at 774 (approving "common-sense construction of the FPA's language" limiting FERC's authority to regulation of "rules or practices that '*directly* affect the [wholesale] rate.'") (citation and internal quotation marks omitted, emphasis and brackets in original).

FERC embraces the same view: transactions that are "independent of a wholesale electric energy transaction" do not directly affect wholesale rates, and so are outside its jurisdiction. *WSPP Inc.*, 139 FERC ¶ 61,061, pars. 18, 23–24. Again, FERC's interpretation of its statutory jurisdiction is entitled to great deference. See *City of Arlington*, 569 U.S. at 301. And, as noted, FERC specifically held in *WSPP, Inc.* that state renewable-energy programs that divorce generation-related environmental benefits from electricity itself and regulate transactions in those benefits, without also regulating wholesale electricity sales, are beyond its regulatory authority. 139 FERC ¶ 61,061, pars. 18, 23–24.[10]

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[10] FERC has repeatedly affirmed this view regarding the scope of its authority under the FPA and the States' ability to advance specific policies under their authority over power generation. See *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004 (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) (per curiam).

The same principle applies with equal force to the ZEC Program. Thus, the Seventh Circuit correctly held that the ZEC Program is not preempted merely because it incidentally affects wholesale electricity prices. Pet. 2a–3a, 6a. These incidental effects bear no resemblance to the *de facto* wholesale ratesetting condemned in *Hughes*. Instead, they are a permissible byproduct of the States' express authority under the FPA to regulate power generation. *Id*. at 7a.

In effect, petitioners' contrary theory seeks a vast expansion of *Hughes* and FPA preemption that would prohibit all state subsidies for certain types of power generation and write into the FPA a policy of pollution-friendly economic "efficiency" that guarantees fossil fuel-burning power generators the financial advantages of cost-free environmental externalities. But nothing in the FPA mandates such a perverse policy.

While *Hughes* held that Maryland's program was preempted because it set a wholesale rate, the Court made clear that its holding should not be read to extend to "other measures . . . to encourage development of new or clean generation, including tax incentives, land grants, [or] direct subsidies," or to "foreclose . . . States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation." 136 S. Ct. at 1299 (citation and internal quotation marks omitted). That is precisely what the ZEC Program does. And petitioners' ardent desire to engraft a broader free-market-efficiency principle onto the FPA does not make the Seventh Circuit's decision inconsistent with this Court's precedent or warrant review in this case.

At the same time, the conclusion that the ZEC Program's subsidies only incidentally affect wholesale rates does not prevent FERC from responding to them. Rather, as FERC explained (7th Cir. Doc. 135 at 7–8, 19–22), it may, to the extent necessary to maintain just and reasonable wholesale rates, adopt "in-market" rules — as part of its authority to regulate wholesale sales — that take into account the effects of such out-of-market subsidies. 16 U.S.C. § 824e(a). In fact, FERC is currently preparing such rules to address the impact on wholesale rates of state programs that promote existing and future sources of emission-free power.

Petitioners insist that FERC's exercise of this authority shows that the ZEC Program is preempted. Pet. 29 (citing *Hughes*, 136 S. Ct. at 1298, n.11). That again conflates the distinction between *de facto* wholesale ratesetting, as in *Hughes*, and state policies that have only an incidental effect on wholesale rates. That FERC adopted rules to respond to the Maryland program in *Hughes* did not *exclude* a finding that the program was preempted ratesetting. But it does not follow that FERC's June 29 Order initiating a process to set new PJM capacity-market auction rules establishes that state programs supporting emission-free power *must be* preempted ratesetting.

Finally, where state policies have incidental effects on wholesale rates, FERC's ability to address those effects in a tailored way, as opposed to the all-or-nothing options available under petitioners' claim for judicial relief, shows why such policies — including the ZEC Program and similar renewable-energy programs — do not automatically trigger FPA preemption. Thus, the

Seventh Circuit rightly agreed with the United States and FERC that the FPA's design prescribes this tailored approach, not "the extraordinary and blunt remedy of preemption," and that if the ZEC Program's indirect effects on wholesale rates warrant a response, "the solution lies with the Commission, not with courts." 7th Cir. Doc. 135 at 20.[11]

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[11] Petitioners' invitation to have this case "held," rather than consolidated, if the Court grants certiorari in *Zibelman*, Pet. App. 30–31, should be declined. If certiorari is justified on the question petitioners present, the Seventh Circuit's decision and *Zibelman* are plainly equal vehicles to resolve it, and therefore should be consolidated, as is common in similar situations. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (same).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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