NO. 18-879

In the
Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION and NRG ENERGY, INC., *Petitioners*,

v.

JOHN B. RHODES, *et al.*, *Respondents*.

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

NEW YORK STATE RESPONDENTS BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq.*, establishes coordinate state and federal jurisdiction over the production and sale of electric energy. It provides for federal jurisdiction over wholesale sales of electricity in interstate commerce, but expressly disclaims federal jurisdiction over "any other sale of electric energy" and, except as specifically provided, over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1).

To reduce greenhouse gas and pollutant emissions, New York's Public Service Commission created two subsidies: one to encourage increasing electricity generation by new renewable resources; and another to retain, for a transition period, continued electricity production by existing zero-emission nuclear power plants. Plaintiffs challenged New York's nuclear subsidy and a similar one in Illinois. Two district courts and two unanimous courts of appeals agreed with the submission of the United States and the Federal Energy Regulatory Commission (FERC) that the FPA does not preempt the nuclear subsidies. The courts of appeals did not reach the district courts' alternative grounds for dismissing the preemption claims based on *Armstrong v. Exceptional Child Center*, *Inc.*, 135 S. Ct. 1378 (2015).

The questions presented are:

1. Whether plaintiffs, who are not regulated by New York's order and have no FPA cause of action, may bypass FERC and instead invoke federal court equity jurisdiction to challenge the subsidy; and

2. Whether the FPA preempts a state generation subsidy that does not depend on how the subsidized generator sells electricity.

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STATUTORY PROVISIONS

FPA § 201(a), 16 U.S.C. § 824(a), provides that:

> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

FPA § 201(b)(1), 16 U.S.C. § 824(b)(1), provides that:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

INTRODUCTION

In 2016, New York State announced plans to meet half its electricity needs with renewable resources by 2030 and to reduce its greenhouse gas emissions by 40 percent over the same period. In the State's view, nuclear power is a crucial, emission-free bridge to that future. Nuclear power plants produce about a third of the State's total electricity, and avoid the annual release of tens of millions of tons of pollutants and greenhouse gases. Recently, however, several of those nuclear power plants have struggled economically and threatened to retire. If they close before enough new renewable resources are built, the gap will be filled with fossil-fueled generation and emissions will spike. To avoid that outcome, the State adopted two subsidies—one to increase electricity production by new renewable resources and another to sustain, while that build-out occurs, continued production by existing nuclear plants. Generators receive the subsidies when they produce power with eligible facilities, regardless of how they choose to sell the electricity.

Petitioners—rival generators who expect more profit if the nuclear plants close—challenged New York's nuclear subsidy and a similar one enacted in Illinois. They claimed the Federal Power Act (FPA) preempts the state subsidies, but failed to convince any court or even a single judge. The FPA empowers the Federal Energy Regulatory Commission (FERC) to regulate wholesale electricity sales, but simultaneously preserves state authority to regulate electricity generation. Under this framework, States can subsidize selected generators, and FERC regulates how the generators participate in wholesale electricity markets.

Ten months ago, at the Seventh Circuit's invitation, the United States and FERC filed a brief rejecting the

proffered preemption claims. The Second and Seventh Circuits agreed, and unanimously affirmed the district courts' dismissals of those claims. Petitioners contend that review by this Court is warranted on grounds that New York's nuclear subsidy conflicts with this Court's decision in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). But two district courts, two courts of appeals, the United States, and FERC all considered how the state subsidies fare under *Hughes* and reached the same conclusion: the FPA does not preempt the subsidies. Petitioners posit unpersuasively that they all got it wrong.

Hughes held preempted a Maryland program that set rates for a new generator's sales of electricity in FERC-regulated wholesale auctions; the generator received state contract payments only if it completed sales in those auctions. Here, New York (and Illinois) imposed no such requirement. Eligible nuclear generators receive the subsidy for producing electricity regardless of how they sell it or how much they receive for their sales. Petitioners would apply *Hughes* anyway, because they say (inaccurately) that commercial realities require nuclear plants to sell exclusively in wholesale auctions even if States do not mandate it. But a generator's decision to sell in a wholesale auction is not the same as a state requirement to do so. And treating a generator's decision to engage in auction sales as providing the "tether" necessary for *Hughes* preemption would dramatically expand that avowedly "limited" decision (*id.* at 1299). Worse, it would eviscerate the authority to regulate generation that Congress expressly reserved to the States. 16 U.S.C. § 824(b)(1); *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 512-13 (1989).

As the decisions of the courts of appeals are in agreement with each other, with the views of the expert federal agency, and with this Court's precedent, further review is unwarranted.

STATEMENT

A. Statutory and Regulatory Framework

1. When New York consumers turn on their lights, they use electricity produced, transmitted, and sold under the supervision of multiple sovereigns regulating in turn. States regulate generation facilities and electricity production, *Hughes*, 136 S. Ct. at 1292, including "questions of need . . . and other related state concerns," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 194, 205 (1983). FERC then regulates transmission of that electric energy and sales for resale in interstate commerce. 16 U.S.C. § 824(b)(1). But the FPA extends federal jurisdiction "only to those matters which are not subject to regulation by the States," 16 U.S.C. § 824(a), and withholds federal jurisdiction over "facilities used for the generation of electric energy" unless "specifically provided." 16 U.S.C. § 824(b)(1). The FPA also reserves to the States the authority to regulate "other sale[s] of electric energy," *id.*, including retail sales to end users. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766 (2016) (*EPSA*).

In short, electricity supply begins with generation and ends with retail sales, both under state control. *Id.* FERC regulates the middle segment, transmission and wholesale sales. *Id.* "[L]ike all collaborative federalism statutes," the FPA thus envisions "a federal-state relationship marked by interdependence." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring).

2. State authority to regulate generation—including production of electricity sold in interstate commerce—predates the FPA. In 1927, this Court held States powerless to set rates for wholesale electricity sales in interstate commerce. *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927). Yet just five years later, the Court *upheld* Idaho's power to tax the generation of electricity in that State even though the electricity would be sold in Utah. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 177-78, 181-82 (1932). The Court explained that the "process of generation" is "essentially local," even if the electricity is immediately sold in interstate commerce. *Id.* at 181.

The FPA carried forward the jurisdictional divide between electricity production and interstate electricity sales. Congress considered removing state authority over facilities that "produce energy [for] interstate" wholesale sales, S. Rep. No. 74-621, at 48 (1935), but chose not to "usurp[]" that authority, H.R. Rep. No. 74-1318, at 8 (1935).[1] Instead it preserved state authority over generation while empowering FERC to regulate wholesale sales.

Congress knew the interlocking state and federal fields were not "hermetically sealed" (*EPSA*, 136 S. Ct. at 776), and actions in each would affect conditions in the other. Even so, Congress drew the statute "with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (quotation omitted).

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[1] *See id.* at 27 (omitting Senate bill provisions that would have removed state authority over "the production of electric energy for interstate transmission").

3. When the FPA was enacted, most utilities "controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies." *EPSA*, 136 S. Ct. at 768. They sold generation, transmission, and distribution services as "a single bundled package" to captive retail customers in franchised service territories. *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 396 (D.C. Cir. 2004).

Beginning in the 1970s, Congress and the Commission started promoting development of independent power producers and reliance, where possible, on competitive forces to ensure just and reasonable wholesale prices. *See New York v. United States*, 535 U.S. 1, 7-10 (2002). To prevent vertically integrated utilities from stifling competition by throttling access to the grid, FERC in 1999 encouraged utilities to turn over transmission operations to independent operators. *Id.* at 11. Seven operators now serve areas covering roughly two thirds of the country's electricity usage, with each administering a regional grid. *EPSA*, 136 S. Ct. at 768. Each also operates competitive auctions to set wholesale electricity prices (*id.*), though the regional markets differ and FERC often eschews one-size-fits-all requirements. *E.g.*, Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 FERC ¶ 61,071, P 512 (2008). New York's grid and wholesale auctions are operated by the New York Independent System Operator (NYISO). Pet. App. 6a-7a.

4. Some States, including New York, likewise revised their retail regulation to rely more on competition among independent generators. New York required most of its vertically integrated utilities to divest their generation facilities. As a result, most generation facilities in the State now are owned by independent power producers.

New York generators can sell power either at wholesale or at retail. At wholesale, they can sell in the NYISO auctions or by entering into contracts that transfer rights to electricity outside the auctions. For example, generators can sell by contract to local utilities, which re-sell the purchased electricity to retail consumers. *Hughes*, 136 S. Ct. at 1292, 1293-94 & n.3; FERC, Div. of Energy Mkt. Oversight, *Energy Primer* at 90 (2015) (*Primer*), https://perma.cc/XPC8-8TQQ; *see also* Pet. App. 10a. Utilities selling electricity to retail customers are called "load serving entities" or "LSEs." Alternatively, generators can sell to marketers who act as middlemen between generators and LSEs. *Automated Power Exch. Inc. v. FERC*, 204 F.3d 1144, 1148 (D.C. Cir. 2000).

At retail, generation-owning companies can sell electricity directly to end users in one of two ways. First, because New York has opened most of the State to competition for retail sales, generators can become competitive suppliers and sell directly to retail customers. Joint Appendix, Vol. 2, at A-182, 191, *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654) (C.A. Joint App'x).[2] Second, some New York LSEs remain vertically integrated, and continue to sell to retail customers in franchised service areas. The Long Island Power Authority (LIPA), for example, owns part of the Nine Mile 2 nuclear plant, receives the challenged Zero-Emission Credit (ZEC) subsidy for its share of plant output, and sells electricity directly to retail customers. *See* C.A. Joint App'x at A-97, 144, 232.

[2] An affiliate of the ZEC plant owners owns a competitive supply company and sells power to retail customers. *See* Choosing Your New York Electric and Gas Companies, Constellation, https://perma.cc/7R3R-VYBH (last visited Nov. 14, 2017).

B. State Environmental and Public-Health Regulation of the Generation Mix

1. When regulating wholesale sales under FPA subchapters II and III, FERC does not consider "health, safety, [or] environmental" concerns. *Grand Council of Crees* (*of Quebec*) *v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000) (quotation omitted). The FERC-regulated wholesale auctions are explicitly neutral as to "environmental or technological goals." *ISO New England Inc.*, 138 FERC ¶ 61,027, P 91 (2012). But FERC has never suggested that States must be similarly indifferent to those values when exercising their FPA authority.

FERC acknowledges that "resource decisions are the prerogative of state commissions," which "may wish to diversify their generation mix to meet environmental goals in a variety of ways." *S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,676, *reh'g denied*, 71 FERC ¶ 61,269 (1995). For example, "a state may choose to require a utility to . . . purchase power from the supplier of a particular [] resource." *Id.* at 61,676; *see also Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 926 (2018). Alternatively, States may "impos[e] a tax on fossil generators," or give "direct subsidies" or "tax incentives" to "alternative generation." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, at 62,080 (1995); *see also New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014) (States may "subsidize the construction of [preferred] generators" to achieve environmental goals, while FERC regulates how those generators participate in wholesale markets).

2. Where utilities remain vertically integrated, States can direct them to build generation facilities of desired types. Elsewhere, States accomplish generation goals by enacting portfolio standards, which require

LSEs to serve customers with electricity produced using eligible technologies.

Some portfolio standards require LSEs to buy the actual electricity produced by the favored generation. More commonly, state law separates the attributes of environmentally friendly electricity production from the electricity itself. *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008). These attributes are recorded using certificates or credits that document that one megawatt-hour of electricity was produced by qualifying means.[3] LSEs comply with applicable State requirements by buying the certificate or credit, with or without the associated electricity. As explained below, New York used this approach in the challenged order to support both new renewable and existing nuclear generation.

Twenty-nine States and the District of Columbia have enacted portfolio standard requirements. *Primer* at 52. And their efforts are responsible for roughly half the growth in the Nation's renewable energy since 2000. National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals* (Feb. 1, 2019) (*NCSL RPS Report*), https://perma.cc/WTJ6-N3VV (last visited Feb. 23, 2019). Each State defines for itself what technologies qualify and how many credits its LSEs must buy. *See Allco*, 861 F.3d at 93. At least 21 States and the District of Columbia have adopted granular requirements to support investment in specific technologies, such as offshore wind or rooftop solar generation. *NCSL RPS Report*. At least one

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[3] A generator's instantaneous output is measured in megawatts, and its output over time is measured in megawatt-hours. Union of Concerned Scientists, *How is Electricity Measured?*, https://perma.cc/VNA8-7DX6 (last visited Mar. 4, 2019).

State (Indiana) allows utilities to meet part of the requirement with nuclear energy. *Id.*

Under this well-established model, when an eligible generator sells electricity and an attribute credit together in a wholesale sale, the transaction is "bundled" and subject to FERC's jurisdiction. *WSPP, Inc.*, 139 FERC ¶ 61,061, P 24 (2012). When the generator sells the electricity and the credit separately, the sales of the different products yield separate revenue streams. The wholesale electricity sale remains subject to FERC's jurisdiction, but the "unbundled" credit sale is not. *Id.* FERC has consistently concluded that state law—not federal law—governs how generation attribute credits are created, valued, and sold. *Id.*; *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 23 (2003), *appeal dismissed sub nom. Xcel Energy Servs. Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005).

C. New York's Clean Energy Standard

In 2016, the New York Public Service Commission issued a Clean Energy Standard aimed at fulfilling two state energy goals: (1) to generate half of New York's electricity from renewable resources by 2030; and (2) to reduce statewide greenhouse gas emissions by 40 percent over the same period. Pet. App. 39a. To achieve these ends, the order created two programs.

One program—which petitioners have not challenged—supports development of new renewable generation by requiring a state agency to buy increasing amounts of unbundled "renewable energy credits" (RECs) from qualifying generators, thereby providing them a subsidy. Pet. App. 8a, 39a. Eligible generators receive one REC for each megawatt-hour of renewable electricity they produce. *Id.*

The nuclear subsidy, challenged here, is not directed at new generation but instead aims to preserve—temporarily, while the renewable build-out occurs—the continued operation of certain nuclear power plants. Like a REC, a ZEC is "a credit for the zero-emissions attributes of one megawatt-hour" of qualifying "electricity production." Pet. App. 8a, 40a. It is a subsidy "for each unit of electricity generated," Pet. 4, without regard to "whether or where the generators sell their power." Pet. App. 58a.

As of 2014, nuclear power plants generated 31 percent of New York's electricity. *See* Pet. App. 40a. But several of those nuclear plants were on the verge of closing prematurely, in part because no means was in place to compensate them for avoiding the public health costs of fossil-fueled generation emissions. C.A. Joint App'x at A-271. The Commission found that if those nuclear plants were to retire, the resulting gap in New York's electricity supply would be filled in the short run with additional fossil-fueled electricity, causing the annual emission of an extra fifteen million tons of carbon dioxide plus other pollutants. Pet. App. 40a-41a; C.A. Joint App'x at A-103. New York evaluated whether it could avert that outcome by building even more renewable generation instead of retaining the nuclear plants, but concluded that it would be "virtually impossible" to build sufficient new resources at the scale and pace needed. C.A. Joint App'x at A-211.

To avoid paying unnecessarily, New York limited ZEC eligibility to nuclear plants that could meet five criteria.[4] Applying these criteria, it deemed three nuclear plants ZEC-eligible. *Id.*

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[4] ZEC eligibility is based on: (1) a nuclear plant's past contribution to New York's clean-energy mix; (2) whether the plant would be at risk of retiring without ZECs; (3) ZEC costs and benefits compared

Because there were too few eligible plants to allow for effective competition and market pricing, New York set ZEC prices administratively. Pet. App. 43a n.7. Prices are based on a federal inter-agency approximation of the "damage from carbon emissions." Pet. App. 9a. New York then subtracts "the portion of that cost already captured" through the State's participation in a regional emissions cap-and-trade program, and multiplies the result by the tons of carbon avoided by each megawatt-hour of zero-emission energy. *Id.* ZEC prices are set in six two-year tranches. For the first two years, the ZEC subsidy is fixed at $17.48 per megawatt-hour. Pet. 9-10.

ZEC prices for the remaining two-year periods are governed by the formula above, but may be reduced below those levels based on two considerations. Pet. App. 9a. First, to reduce the risk of paying subsidies no longer needed to keep the plants operating, ZEC prices in later tranches are reduced if forecast wholesale electricity prices rise above a benchmark. As the court of appeals observed, this adjustment looks to future price forecasts and never "true[s] up" or adjusts ZEC prices in response to actual prices in any wholesale auction. *Id.* at 9a-10a, 16a-17a. Second, ZEC prices in the last three tranches may be reduced if New York experiences stronger-than-predicted renewable development. If the non-nuclear power mix becomes greener than expected, retaining the nuclear plants' zero-emission energy will displace less carbon.

The ZEC program is time-limited and will expire in 2029, or perhaps sooner. C.A. Joint App'x at A-104. The State can modify or end the ZEC program if a national,

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to other clean-energy alternatives; (4) impacts on ratepayers; and (5) the public interest. Pet. App. 8a.

regional, or other program similarly "pays for or internalizes the value of the zero-emission attributes." *Id.* at A-254. NYISO, the wholesale market operator, said it supports using ZECs to retain nuclear generation "until longer-term market solutions can be developed."[5]

D. Proceedings Below

Competing generators, who perceive that they will benefit from higher electricity prices if the nuclear plants retire, sued in federal court. They claimed that ZECs were preempted by the FPA and contrary to the Commerce Clause. Pet. App. 5a.

The district court granted motions to dismiss the preemption claims on two alternative grounds. First, relying on this Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the court held that plaintiffs had neither a Supremacy Clause nor FPA cause of action and that the FPA's comprehensive administrative scheme foreclosed private parties bypassing FERC and litigating preemption claims in district court. Pet. App. 50a. On the merits, the court held that plaintiffs failed to state a plausible preemption or Commerce Clause claim. Pet. App. 52a, 70a, 78a, 91a.[6]

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[5] *See* ECF No. 55-1 (Order Adopting a Clean Energy Standard), App'x B at 73, *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554 (S.D.N.Y. 2017) (No. 1:16-CV-8164); Letter from Bradley C. Jones, President & CEO, NYISO, to Hon. Audrey Zibelman, Chair, N.Y. State Pub. Serv. Comm'n, Case 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard 2 (July 22, 2016), https://perma.cc/G4NR-DG23.

[6] A pending state-court challenge, *Hudson River Sloop Clearwater, Inc. v. N.Y. Pub. Serv. Comm'n*, No. 7242-2016 (N.Y. Sup. Ct. Albany Cty. filed Nov. 30, 2016), asserts that ZECs are ultra vires, arbitrary and capricious, and contrary to state law. On Janu-

The court of appeals affirmed on the merits, without considering the *Armstrong* issue. Pet. App. 12a. The court agreed that New York's ZEC program is not field preempted because it is not impermissibly tethered to wholesale market participation. Pet. App. 6a. ZECs also are not conflict preempted, the court held, because the plaintiffs failed to identify any clear damage to federal goals. *Id.* Its decision comported with the Seventh Circuit's ruling in a recent case raising nearly identical issues, *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018), *pet. for certiorari filed*, No. 18-868 (U.S. Jan. 7, 2019). At the Seventh Circuit's invitation, the United States and FERC filed an amicus brief which explained that Illinois's similar ZEC program was not preempted.

REASONS TO DENY THE PETITION

Two courts of appeals (and two district courts) have concluded unanimously that the FPA does not preempt state ZEC programs, which reward qualifying electricity production without regard to how or where the electricity is sold. FERC and the United States agree. And while the state programs may sustain temporarily the continued operation of the subsidized generators, doing so does not interfere with FERC regulation or "distort" (Pet. 31) wholesale markets. FERC comprehensively regulates wholesale auctions, and ZECs (like other production subsidies) can affect those auctions only as FERC allows. FERC is considering whether to revise the rules governing how subsidized generators partici-

ary 22, 2018, the state court dismissed one claim, but denied motions to dismiss the rest. Slip op. at 9. New York believes the remaining claims are baseless, but, if state-court petitioners prevail, their requested relief—nullifying the ZECs—would moot the petition.

pate in wholesale auctions, and affirmed specifically in its *Star* amicus brief that state ZEC programs pose no obstacle to federal regulation. Further review is therefore unwarranted.

These cases also are poor vehicles for consideration of the issue petitioners raise. The district courts dismissed plaintiffs' preemption claims on the merits *and* because the FPA implicitly forecloses private parties bypassing FERC and pursuing preemption claims in federal court. To address the issues raised by these cases fully, the Court would have to confront that question too. But it is not well developed because the courts of appeals did not reach it. Additionally, petitioners' question presented assumes that the generators will sell "their entire output at [FERC-approved] auctions," Pet. i—an assumption their complaint did not allege and they cannot prove.

I. There Is No Circuit Split or Other Reason to Grant the Petition.

FERC, the United States, and every judge to consider the question—two district courts and two unanimous courts of appeals reviewing de novo—have reached the same conclusion: the FPA does not preempt state zero-emission credit programs that subsidize qualifying electricity production while remaining indifferent to how the electricity is sold.

Petitioners seek to flip the significance of this unanimity on its head, suggesting that this Court must step in to correct the supposed errors before they become "entrenched." Pet. 18. That concern is misplaced. The four court decisions—and the views of the United States and FERC as amici—are correct and consistent with long-standing precedent. But if petitioners' position had merit, nothing would foreclose a different court of appeals from reaching a different result upon

review of another state program. Nor would anything foreclose the D.C. Circuit or another court of appeals from reaching a different result on review of a FERC decision addressing like matters.[7] Until a court of appeals adopts petitioners' position, this Court's review is unwarranted.

Petitioners claim that the decisions of the Second and Seventh Circuits conflict with this Court's 2016 *Hughes* decision. In *Hughes*, the Court found that Maryland set a wholesale rate—and thus was preempted—because the State required the generator to participate in wholesale auctions, conditioned state payments on the completion of auction sales, and, if that condition was met, substituted fixed contract prices for the variable clearing prices the generator received through the auctions. *Hughes*, 136 S. Ct. at 1299. The Court was precise about what doomed Maryland's law: "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.*

Since then, three panels of two courts of appeals have understood *Hughes* to mean what it says, and have rejected (without dissent) attempts to broaden it. Pet. App. 15a-16a; *Star* Pet. App. 6a; *Allco*, 861 F.3d at 98-100. Those decisions also harmonize with the recent, clear, and authoritative views of the United

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[7] The Commission is empowered to adjudicate FPA preemption claims. *E.g.*, *Orangeburg v. FERC*, 862 F.3d 1071, 1081 (D.C. Cir. 2017); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, P 69, *clarified*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044, (2011). Aggrieved parties can seek review either in the court of appeals for the D.C. Circuit or any circuit where the public utility to which the order relates is located or has its principal place of business. 16 U.S.C. § 825*l*(b).

States and FERC. In *Star*, FERC and the United States filed an amicus brief—authorized by the Solicitor General, *see* 28 C.F.R. § 0.20(c)—arguing that the ZEC program is not preempted. Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae in Support of Defendants-Respondents and Affirmance at 7, 22, 27*, Village of Old Mill Creek v. Star*, 904 F.3d 518 (7th Cir. 2018) (No. 17-2433) (U.S. *Star* Br.). As the government explained, ZECs are "commodities that represent the environmental attributes of a particular form of power generation" and "not payments for, or otherwise bundled with, sales of energy or capacity at wholesale." *Id.* at 10. Thus, they "fall outside of FERC's exclusive jurisdiction over wholesale transactions." *Id.* (citation omitted).

Hughes, the government said, found that Maryland adjusted a wholesale rate because the program "conditioned [its] subsidy on generators' participation in the wholesale auction (bidding and clearing requirement)." *Id.* at 9. Illinois (and New York), in contrast, "imposed no such condition on ZECs." *Id.* at 10. Instead, eligible generators receive ZECs "for production of zero-emission power, regardless of whether they opt to sell that power via wholesale auction, bilateral contracts, or directly to retail customers." *Id.* at 16. Thus, the government concluded, ZECs "lack[] the 'fatal defect' that undid the Maryland program," and instead fall within the states' "'reserved authority over generation facilities.'" *Id.* at 7, 10 (citation omitted).

The government also saw no similarity between the States' mechanism to reduce ZEC subsidy payments under some conditions and Maryland's replacement of auction rates with fixed rates set through the contract for differences. *Id.* at 14. Unlike Maryland's contract,

the State programs here "do[] not link ZECs to a particular generator's actual wholesale revenues." *Id.*

II. Like Other Generation Subsidies, ZECs Have No Forbidden Effect On Wholesale Auctions.

Petitioners contend that ZECs are preempted because they threaten to distort the auctions on which FERC relies to set just and reasonable wholesale rates. *See* Pet. 17-18. Petitioners are mistaken both legally and factually.

A. That subsidies increase supply does not trigger preemption.

The law is clear and well-settled: state regulation of production—a field the FPA expressly reserves for the States—is not preempted merely because it affects conditions in the federal field. A contrary rule would "largely . . . nullify that part of [the statute] that leaves to the States control over production, for there can be little if any regulation of production that might not" have such effects. *Northwest Central*, 489 U.S. at 514; *see* 16 U.S.C. § 824(b)(1); Pet. App. 20a-22a.

The United States and FERC have been exceptionally clear and consistent on this point. As their *Star* brief explained (at 7), when States regulate in their field, the "spillover" effect on wholesale markets "does not warrant preemption." States "'select the type of generation to be built'" and their choices "'accumulate into the available supply transacted through the interstate market.'" *Id.* at 16-17 (quoting *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014), *cert. denied*, 136 S. Ct. 1728 (2016)).

The United States has adhered to this view for decades. In *Northwest Central*, the United States explained that the Natural Gas Act did not preempt

Kansas's imposition of a use-it-or-lose-it policy on gas producers, even though the policy was "intended to influence" interstate pipelines' purchasing decisions. The government said that the rule merely regulated the actions of gas producers subject to state jurisdiction and that federal regulation of interstate pipelines does not "protect [them] from the effects of state regulations that form the environment in which [they] conduct[] business within the state." *See* Pet. App. 21a; Brief for the U.S. and FERC as Amici Curiae at *20, *31-32, *Northwest Central*, 489 U.S. 493, 1988 U.S. S. Ct. Briefs LEXIS 1531 (No. 86-1856) (*Northwest* FERC Br.).

In *Hughes*, the United States explained that because States retain jurisdiction over generation facilities, they can "incentivize the construction of new generation," limit construction to "certain types of generation resources," or "require the retirement of generation facilities," even though doing so may indirectly affect wholesale markets. Brief for the United States as *Amicus Curiae* at 32, *Hughes*, 136 S. Ct. 1288 (No. 14-614) (*Hughes* FERC Br.) (*citing Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010)). States may incentivize generation "directly" or "indirect[ly]" (*id.* at 19), and "[p]ermissible state programs" include requiring local utilities to "purchase a percentage of electricity from a particular generator" or "the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements." *Id.* at 34. States may employ such tools to support preferred generators "even if the price signals in the regional wholesale capacity market indicate" that the resources are not "needed." *Id.* at 33.

Courts "need not, and should not, resort . . . to the extraordinary and blunt remedy of preemption" (U.S. *Star* Br. at 20) out of fear that state generation subsidies will upset wholesale power markets, as FERC has ample ability—and more flexible and precise tools—to ensure that wholesale rates are just and reasonable. The Commission regulates wholesale auctions "extensively." *Hughes*, 136 S. Ct. at 1294. FERC supervises comprehensive rules specifying (among other things) which generators can bid and at what price, which bids clear, and how they affect the resulting auction prices.[8] While state production subsidies may help keep a generator operating when it otherwise might close, that extra supply in the marketplace cannot affect wholesale auctions except as FERC allows.

State ZEC programs "pose[] no obstacle" to FERC regulation of wholesale markets. U.S. *Star* Br. at 19, 22. Indeed, FERC is now considering whether to modify the rules that govern how generators that receive state subsidies of various types may participate in wholesale auctions. *Id.* at 4-5, 20 ("[T]he interplay of state policies and wholesale markets—specifically how, and subject to what restrictions, generators that receive state support may participate in wholesale markets—is very much a live issue at the Commission.") For example, in *Calpine Corp. v. PJM Interconnection*,

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[8] In *New Jersey Board of Public Utilities v. FERC*, 744 F.3d 74, 98 (3d Cir. 2014) and *New England Power Generators Ass'n*, 757 F.3d at 291, two courts of appeals affirmed FERC's authority to control how subsidized generators participate in wholesale auctions. Both courts emphasized that States remain free to subsidize generation, while FERC ensures that wholesale auction prices remain just and reasonable. The Second and Seventh Circuit ZEC decisions reflect the same understanding. Pet. App. 25a-28a; *Star* Pet. App. 6a-7a.

LLC, 163 FERC ¶ 61,236 (2018), presaged by FERC's *Star* brief, the Commission found that PJM's existing tariff was unjust and unreasonable because it did not adequately address the wholesale auction price effects of state subsidies. The Commission is now evaluating a range of tariff solutions. *See id.* P 8.

This exercise of agency expertise, not judicial preemption analysis, is the FPA-sanctioned way to control how state generation subsidies affect wholesale markets. *See infra* Part III.A. Courts considering preemption reach all-or-nothing conclusions permitting or forbidding state programs, with unpredictable and potentially inconsistent effects on a wide range of state generation-support measures. FERC, in contrast, has the tools and the expertise to proceed in a tailored fashion that maximizes the effectiveness of both federal regulation and state authority recognized by the FPA. And in the event that FERC perceives a state rule as entering the federal field or posing a danger to effective federal regulation, the agency may declare the state rule preempted (subject to judicial review) or sue in district court to enjoin it (16 U.S.C. § 825m(a)). Preemption suits by private parties wrongly pretermit this process.

B. Other, concededly legal subsidies produce the same effects.

State power to subsidize generation for policy reasons is "unquestioned." *New England States Comm. on Elec. v. ISO New England, Inc.*, 142 FERC ¶ 61,108, at 61,490 (2013) (LaFleur, Comm'r, concurring). States may "grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds." *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, P 31 n.62

(2010).[9] In the Second Circuit, petitioners themselves acknowledged that "New York retains ample authority to promote power generation and to protect the health and welfare of its citizens through . . . means" other than ZECs. Brief and Special Appendix for Plaintiffs-Appellants at 40, *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654). They admitted the State can provide "tax incentives," construct and operate "state-owned generation," or give "direct subsidy payments." *Id.*

But those concededly legal measures would affect wholesale auctions the same way and to the same degree (if any) as the ZECs. Because ZECs are awarded for production without regard to sales, they will not change how eligible plants sell their output. They will not induce a generator to sell in a wholesale auction instead of by contract or at retail. Nor will they change the bidding behavior of a generator that opts to sell in a wholesale auction. When a nuclear plant sells its output in a wholesale auction, it does so as a price taker because it cannot readily turn off and on in response to short-term price fluctuations. Pet. 8-9. And that is so regardless of whether it receives ZECs for producing the electricity. *Id.* Petitioners' alleged harm comes simply from ZECs keeping the plants in business. *See* Pet. App. 26a, 122a-123a. And any concededly legal subsidy that kept the plants in business would produce the same results. As plaintiffs admitted, "if New York decided to just write a check to a nuclear plant, that would have some of the same effects." Pet. App. 63a.

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[9] Referring to both state and federal subsidies, FERC's former Chairman explained that "all energy resources" receive subsidies, and "an idealized vision of markets free from the influence of public policies . . . does not exist." *N.Y. Pub. Serv. Comm'n*, 158 FERC ¶ 61,137, at 61,865 (2017) (Bay, Comm'r, concurring).

As petitioners believe that States have other options to keep the nuclear plants running, deciding the legality of one means of doing so is not especially important to the functioning of wholesale auctions. Alternatively, if petitioners do not believe what they said below, then the petition conceals an effort—countenanced by no court or federal agency—to ban state subsidies to generators that choose to sell in wholesale auctions.

III. This Case Is A Poor Vehicle for Considering the Question Presented.

Even if the Court believes that petitioners' question presented is important, this case is a poor vehicle to address it. First, answering the question in the manner petitioners suggest would not entitle them to relief, because it would leave untouched the district court's alternative *Armstrong* grounds for dismissing plaintiffs' complaint. Second, petitioners' question presented assumes facts that their own complaint did not allege and that could not be proved on remand.

A. Plaintiffs lacked a cause of action or other basis for invoking the district court's jurisdiction.

In *Hughes*, because the parties did not raise the issue, the Court assumed without deciding that private plaintiffs alleging FPA preemption could seek relief in federal court. 136 S. Ct. at 1296 n.6. Here and in the Illinois proceeding, the district courts considered the question and found that plaintiffs had no Supremacy Clause, FPA, or equitable right to ask courts—instead of the expert federal agency—to decide their preemption claims. Pet. 14 n.7; Pet. App. 45a-51a.; *Star* Pet. 12 n.4.; *Star* Pet. App. 30a-34a. While the courts of appeals did not reach the issue because they held as a matter of law that plaintiffs had no viable preemption

claims, the underlying defects in plaintiffs' actions still exist.

The Supremacy Clause creates no cause of action. *Armstrong,* 135 S. Ct. at 1383. The FPA authorizes FERC, in its discretion, to sue in district court to enjoin statutory violations. 16 U.S.C. § 825m(a). And it authorizes private parties to sue in one limited instance not applicable here. *See* Pet. App. 48a. Otherwise, the statute affords private parties no right of action—as plaintiffs conceded below. Pet. App. 45a.

Plaintiffs sought but failed to show "the availability" to them of "a judge-made action at equity," *Armstrong*, 135 S. Ct. at 1386. There are two reasons why an equity action is unavailable here.[10] First, the plaintiffs are not regulated by New York's order, and thus are not among the class of plaintiffs who can invoke a federal court's equity power. *Armstrong*, 135 S. Ct. at 1384 (equity action lies "if an individual claims federal law immunizes him from [preempted] state regulation."). Second, "equity [jurisdiction] to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id*. at 1385. The district court reviewed the FPA statutory scheme, and found that Congress intended to route FPA enforcement through FERC. Pet. App. 47a-48a.[11] That makes sense, because bypassing FERC would substitute potentially incon-

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[10] The district court based its decision only on the second reason.

[11] Unlike the district court considering the Illinois ZECs, the district court below held that the FPA's "just and reasonable" standard was judicially administrable. *Id.* at 49a-50a. We submit respectfully that the district court considering Illinois's program was correct, as the FPA sets "standard[s] for [FERC] to apply and, independently of Commission action, creates no rights which courts may enforce." *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

sistent views of generalist courts for FERC's expertise in regulating complex wholesale power markets and setting federal energy policy.

Thus, even if the Court were inclined to review the preemption merits despite the absence of a circuit split, it should not do so here. Unlike *Hughes*, the district court here ruled that plaintiffs had neither a cause of action nor a basis for invoking equity, and respondents advanced the argument in the court of appeals as an alternative ground for affirming the judgment. Pet. App. 12a. If a writ were granted, respondents would continue to press the argument as an alternative basis for affirmance. But the issue is not well developed for this Court's review because no court of appeals has reached it.

B. Petitioners' question presented assumes facts the complaint never alleged and which they cannot prove.

Petitioners would have this Court decide whether the FPA preempts programs that "subsidize only generators that sell their entire output via [wholesale] auctions . . . ." Pet. i. The Court should not consider that question because, even allowing for the Rule 12(b)(6) dismissal context, the question assumes too much and would not change the case's eventual outcome no matter how it were answered.

In asking whether the FPA preempts programs that subsidize "only generators that sell their entire output" in wholesale auctions, petitioners assume facts that their complaint never alleged and they cannot prove. The complaint alleged only that nuclear output must be sold "directly or indirectly" in NYISO auctions. Pet. App. 116a. "Indirect" auction sales can mean only one thing: that a generator sells power to a buyer who offers it into an auction on its own account. *Hughes*, 136

S. Ct. at 1293-94 & n.3. FERC's auctions have "long-accommodated" such bilateral contracts, which transfer ownership from one party to another outside the auction and do not raise preemption concerns. *Id.* at 1299.[12]

Petitioners now seemingly question whether bilateral sales "even exist in New York." Pet. 24 n.9. Of course they do. Their own complaint says so. Pet. App. 104a; *see also* Pet. 7. And the ZEC plants have long sold their output that way. They were built by vertically integrated utilities that sold their output to retail customers long before the development of wholesale auctions. *E.g.*, *R.E. Ginna Nuclear Power Plant*, *LLC*, 151 FERC ¶ 61,023, P 2 & n.4, *on reh'g*, 152 FERC ¶ 61,027 (2015). When those companies divested, the new owners sold the electricity back to them by contract. *Id.* P 2. For example, the Ginna plant's new owner sold 90 percent of the plant's output by contract until 2014. *Id*. Other ZEC plants had similar contracts. *Entergy Nuclear FitzPatrick*, *LLC*, 118 FERC ¶ 62,085, at 64,222 (2007); *Niagara Mohawk Power Corp*., 95 FERC ¶ 62,165, at 64,245 (2001); *Power Auth. of the State of N.Y.*, 53 N.R.C. 488, 517 (2001). Fitzpatrick's owner still sells some of that plant's output to an unaffiliated LSE by contract today.[13] And each FERC-

[12] Petitioners argue that, if a State were to subsidize the generation of electricity sold through a wholesale contract, that too would be preempted. Pet. 24 n.9. But New York provides an environmental attribute payment for energy produced, no matter *how* it is sold. That ZECs are awarded regardless of whether the generator sells in an auction, by contract, or at retail shows that the State is permissibly regulating production, not wholesale sales.

[13] Specifically, Exelon sells some Fitzpatrick output to LIPA under a contract now extended through 2020. *See* Memo from Thomas Falcone to the Trustees of the Long Island Power Authority 2 (Sept. 27, 2017) (discussing extension), https://perma.cc/T6RH-

jurisdictional ZEC plant owner has a FERC-filed tariff allowing it to sell wholesale power at negotiated rates.

The complaint also recognizes that New York LSEs can use "generation that they own" to meet their needs. Pet. App. 104a. The Long Island Power Authority owns part of one of the ZEC plants, and sells power directly to retail customers. *See supra* p. 7. The complaint's own allegations thus defeat the assumption embedded in petitioners' question (Pet. i), that the ZEC plants "sell their entire output" in wholesale auctions.

Petitioners assert that nuclear plants must sell at wholesale auctions because they "always run at full output." Pet. 25. But even if that premise is true, the conclusion does not follow. Running at full output dictates only how much electricity the generator must sell—not how or to whom. There is simply no physical characteristic that requires a nuclear plant to sell all its output in a wholesale auction, as petitioners' question presented assumes.

IV. The Court of Appeals Correctly Applied Settled Law.

The petition should be denied because it depends on conflating payments for generating electricity by environmentally friendly means with the rates received for selling it. In petitioners' view, if a generator sells electricity at wholesale, any dollar it receives—for electricity or not—effectively resets the FERC-approved wholesale rate. That is not and never has been the law.

1. States regulate generation, while FERC regulates wholesale sales. 16 U.S.C. § 824(b)(1). States may tax

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Q7NH; *Annual Disclosure Report of the Long Island Power Authority (Fiscal Year 2017)* at 28 (table showing Fitzpatrick contract 2020 expiration), https://perma.cc/MQM8-XGA8.

and subsidize generation even when the electricity will be sold at wholesale in interstate commerce under FERC jurisdiction. *Id.*; *Pfost*, 286 U.S. at 181; *New England Power Generators Ass'n v. FERC*, 757 F.3d at 291. What matters is whether the State is regulating state-jurisdictional production (as in *Northwest Central*, 489 U.S. 493) as opposed to FERC-jurisdictional wholesale sales (as in *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 84 (1963)), or has conditioned a state payment on completion of a sale in a wholesale auction (as in *Hughes*).

Generators frequently sell generation byproducts separately from wholesale electricity, with each sale producing separate revenue. Sometimes they sell physical byproducts, like heat, steam, carbon dioxide, or hot water. *E.g.*, *PSEG Fossil, LLC*, 95 FERC ¶ 61,405, at 62,507 (2001). Other times, they sell state-created instruments documenting that electricity was generated by environmentally-friendly means. *Wheelabrator*, 531 F.3d at 186. FERC is well aware of these byproduct sales, and has never asserted that they amount to illegal augmentation of wholesale electricity rates. In fact, FERC has held the opposite. In *WSPP*, 139 FERC ¶ 61,061, FERC held that when generators sell environmental credits separately from electricity, the credit revenues are "not a charge in connection with a wholesale sale of electricity" and do not impermissibly "affect wholesale electricity rates." *Id.* P 24. As States create the generation credits, States "have the power to determine . . . how they may be sold or traded; it is not an issue controlled by" federal law. *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 23.

2. Petitioners tried to single out ZECs for challenge—and capitalize on the recent *Hughes* decision—by alleging that something about nuclear generators

creates a *de facto* auction-sale requirement functionally indistinguishable from the one Maryland imposed. But even accepting petitioners' incorrect claim that ZEC plants must sell their output in wholesale auctions, what New York and Maryland did remains different. New York neither imposed an auction sale requirement nor conditioned its subsidy on a *de facto* one remaining in place. Pet. App. 18a. The happenstance of wholesale sales, without a state-imposed requirement, should not be enough to preempt state subsidies under a statute that preserves state authority to regulate and subsidize generation. If *de facto* wholesale sales were enough of a tether for *Hughes* preemption, it would transform that decision's "limited" holding (136 S. Ct. at 1299) into a sweeping one preempting state subsidies for a wide swath of clean generation sold at wholesale.

3. Petitioners also "mischaracterize . . . the ZEC program." Pet. App. 16a, 23a. They claim that New York does not change the subsidy in response to "fluctuations of, or factors that might affect, the 'social cost of carbon.'" Pet. 26. But New York has adjusted the social cost of carbon for inflation (C.A. Joint App'x at A-264), and will lower ZEC prices if increased renewable generation means that nuclear output later in the program displaces less carbon then than it did at the outset (*id.* at A-221).

Petitioners further assert that the ZEC subsidy amount "varies inversely with FERC-approved auction rates," as the payments did in *Hughes*. Pet. 21. ZECs must work that way, they say, because otherwise "the subsidy might dip below the level necessary to achieve the ZEC program's purpose of keeping the favored plants afloat." *Id.* at 26. Not so. While petitioners are correct that New York intends for ZECs to help keep

the plants producing emission-free electricity, petitioners misconceive how ZEC prices work. ZECs do not guarantee profitability or "var[y] inversely" (*id.* at 21) with a recipient's other revenues. A ZEC plant's wholesale revenues could plummet, but its ZEC payments never would rise above the inflation-adjusted social cost of carbon. Pet. App. 16a. After the program's first two years, if forecast wholesale index prices rise above a benchmark, ZEC prices decline. *Id.* But there is no true-up to *actual* rates. *Id.* 16a-17a. Thus, if a forecast increase does not materialize, the ZEC plant must make do with both low electricity prices *and* low ZEC payments. Pet. App. 16a. That is simply nothing like *Hughes*, where Maryland required a generator to sell its output in a FERC-regulated auction but ensured that auction prices would have no effect on the amount the generator received for its sales.

4. New York has created a tailored subsidy to support continued nuclear generation needed to avoid the emission of harmful greenhouse gases and other pollutants. The program is limited in scope and duration, and is tied to electricity production without regard to how the electricity is sold. The subsidy may keep the needed nuclear plants operating, but their continued operation can affect the wholesale auctions (should the plants choose to sell there) only as FERC allows. The courts, the United States, and FERC have found that the ZEC programs remain in the state field, and pose no obstacle to federal regulation. They are not preempted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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