No. 18-868

IN THE

Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., and CALPINE CORP.,

Petitioners,

v.

ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, and 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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent states as follows:

Exelon Generation Company, LLC, is not a public company. Its indirect parent, Exelon Corporation, is a publicly held company. Exelon Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Petitioners ask this Court to review a concededly splitless preemption case in which the United States, the Federal Energy Regulatory Commission ("FERC"), the States, and all eight judges to have considered the question agree: there is no preemption.

The case concerns the Federal Power Act's ("FPA's") scheme of cooperative federalism. States regulate "facilities used for the generation of electric energy," while FERC regulates wholesale electricity sales. 16 U.S.C. § 824(b)(1). For decades, States have used their authority to support generators with characteristics they deem socially beneficial.

In *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016), this Court took care not to disturb that longstanding state authority while invalidating a Maryland subsidy program that tried to set prices for wholesale sales. *Hughes* held that the FPA preempted Maryland's program because it "condition[ed] payment of funds on capacity clearing the [wholesale] auction" regulated by FERC. *Id.* at 1299; *id.* at 1297 n.9. By conditioning payment on successful sales in the FERC-regulated auction, Maryland illegally replaced FERC's rate with the State's. But *Hughes* cautioned that, absent the "fatal defect" of "condition[ing] payment of funds on capacity clearing the [wholesale] action," "[n]othing in this opinion should be read to foreclose" States from "other measures … to encourage … clean generation." *Id.* at 1299. "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Id.* at 1298.

After *Hughes*, Petitioners sued to invalidate Zero-Emissions Credit ("ZEC") programs in Illinois and New York. They acknowledged that these programs lack *Hughes*' "fatal defect": They do not condition payment on generators' sales in FERC's auctions. Instead, like renewable-energy credit programs that have existed for decades with FERC's approval, ZEC programs pay for production—providing generators credits for each megawatt-hour of clean electricity they produce.

Nonetheless, Petitioners urged the courts to disregard the limits *Hughes* placed on its "limited" holding. 136 S. Ct. at 1299. They argued that *Hughes* also condemns state programs lacking *Hughes*' "fatal defect," if the participating generators happen *in fact* to sell in wholesale auctions (as Petitioners claimed was true in Illinois and New York). Two district courts dismissed those claims, and unanimous circuit panels affirmed.

No further review is warranted. Petitioners concede there is no split. In the three years since *Hughes*, only the Seventh and Second Circuits have applied that decision, and each has interpreted *Hughes* and the FPA in the same way.

Each affected sovereign also agrees. In the Seventh Circuit, FERC and the United States jointly filed an *amicus* brief that rejected Petitioners' theories, urged the same reading of *Hughes* the courts below adopted, and implored against resorting "to the extraordinary and blunt remedy of preemption." Br. for the United States and the Federal Energy Regulatory Commission at 20, 2018 WL 2746229 ("U.S. Br."). Also urging the same result was a coalition of seven States as *amici*.

Petitioners cry that ZEC programs will destroy FERC's markets, but that is belied by FERC's own words. FERC and the United States told the court that FERC "has the means and the authority to confront" any "effects" on its markets from ZEC programs, and that "the Federal Power Act does not preempt" such state programs. *Id.* at 8, 27. Nor are such effects anything new. For decades, state programs have affected FERC's markets; as this Court has recognized, state and federal domains "are not hermetically sealed from each other." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016); *see* U.S. Br. 22-27 (detailing FERC precedent permitting "state programs that support clean power in a variety of ways, such as credits and purchase obligations," notwithstanding their effects on FERC's markets).

Here, moreover, FERC is considering market rule changes to "accommodate" these programs while addressing Petitioners' concerns about their indirect effects on wholesale rates. If Petitioners are dissatisfied with FERC's resolution, they can seek judicial review of FERC's decision. Judicial intervention now would disrupt FERC's effort to use the scalpel of regulation, rather than the chainsaw of preemption.

Several vehicle problems also afflict the Petition. First, this case does not present the Question Presented. Petitioners build their Question on the premise that ZEC plants necessarily and inevitably "sell their entire output via [wholesale] auctions." Pet. i. But as both circuits found, the complaint's well-pleaded allegations do not establish this premise (which is also contradicted by facts subject to judicial notice). So, Petitioners must resort to protesting that the circuits "brushed aside the complaint's allegations." Pet. 21. They are wrong that the circuits made any error. But at minimum, this dispute makes the case a poor vehicle. To reach the legal question Petitioners pose, Petitioners admit that the Court would first need to referee this case-specific pleading quarrel.

Second, the district court below found Petitioners lacked Article III standing to advance a key part of their argument—their challenge the ZEC price adjustment—and both district courts concluded that Petitioners lacked a cause of action under *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015). Without addressing those issues, the Court cannot reach the merits—yet no circuit court has considered them.

The decisions below are also correct. ZEC programs pay for what generators produce, not what they sell in wholesale auctions. They therefore are permissible exercises of States' authority over generation. The decisions below so holding are consistent with *Hughes*, and the FPA's text, legislative history, and purpose. They also accord with long-established FERC precedent concerning the bounds of FERC's jurisdiction, a matter on which FERC receives deference.

The Court should deny the Petition.

STATEMENT OF THE CASE

A. The FPA's Cooperative Federalism.

1. The electricity sector is an area of "congressionally designed interplay between state and federal regulation." *Nw. Cent. Pipeline Corp. v. State Corp.*

Comm'n of Kan., 489 U.S. 493, 518 (1989). FERC regulates wholesale electricity sales, ensuring that "rates and charges made, demanded, or received … for or in connection with" such sales are "just and reasonable." 16 U.S.C. § 824d(a). In Illinois, FERC sets some wholesale prices via auctions administered by private regional organizations. FERC also allows wholesale buyers and sellers to enter (and set prices for) bilateral contracts outside the auctions. Pet. App. 6a, 16a.

2. Meanwhile, States have exclusive jurisdiction over "facilities used for the generation of electric energy," including electricity production, as well as over retail sales. 16 U.S.C. § 824(b)(1).

States have long exercised this authority to pursue state policies that help determine which generators produce electricity. Some States guarantee that generators can recover their costs—keeping generators open that otherwise would shutter. *Utilization of Elec. Storage*, 158 FERC ¶61,051, P.22 (2017). States also "grant loans, subsidies, or tax credits" to encourage cleaner generation, or impose costs on generators that pollute. *Cal. Pub. Utils. Comm'n*, 133 FERC ¶61,059, P.31 n.62 (2010); Pet. App. 3a. FERC accepts these policies even though they "driv[e] significant changes in the mix of resources" in wholesale markets. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 139 FERC ¶61,132, P.5 (2012); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). That reflects the "fact of economic life that the wholesale and retail markets in electricity … are not hermetically sealed from each other." *Elec. Power Supply Ass'n*, 136 S. Ct. at 776. Quite the opposite: "transactions that occur on the wholesale market have natural consequences at the retail level," and vice-versa. *Id.*; *see* Pet. App. 4a ("[E]ach use of authorized power necessarily affects tasks that have been assigned elsewhere.").

Of note here, States for decades have offered payments or imposed costs tied to each unit of electricity (called a "megawatt-hour") that generators produce. Pet. App. 19a n.10, 37a, 77a. In particular, 29 States (including Illinois) provide renewable energy credits ("RECs") to subsidize renewable generators. RECs are "state-created and state-issued" credits "certifying that electric energy was generated" using renewable technology. *WSPP Inc.*, 139 FERC ¶61,061, P.21 (2012). In 2012, FERC confirmed it lacked jurisdiction over RECs sold separately from electricity, because REC sales are not sales of "electric energy at wholesale," but of "state-created" certificates reflecting how electricity was produced. *Id.* FERC so held even though many of these programs apply to generators that sell electricity *exclusively* at wholesale. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 55 (2d Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3295 (U.S. Jan. 7, 2019) (No. 18-879).

B. The ZEC Program.

1. In December 2016, Illinois enacted comprehensive energy legislation. It provided energy-efficiency funding, a community solar fund, job training for low-income communities, and an expanded REC program. SB2814, Public Act 099-0906, 99th Gen. Assemb. (Ill. 2016) ("SB2814"); *see* Pet. App. 13a. It also authorized the ZEC Program.

The ZEC Program applies the REC model to preserve prematurely retiring nuclear generation. Recently, nuclear plants have been squeezed—between fossil-fuel generators that do not bear the cost of their air pollution, and renewable generators that receive subsidies like RECs. When nuclear plants retire, the result is heavier reliance on fossil-fuel plants. Illinois enacted the ZEC Program to avoid the "dire consequences to the environment" "associated" with "premature closure of … nuclear power plants." SB2814 §1.5(8) (SA.5).[1]

To address this crisis, the ZEC Program seeks to "[r]educ[e] emissions of carbon dioxide and other air pollutants," *id.* §1.5(1)-(2) (SA.3), by attaching "value [to] the environmental attributes" of "nuclear power," *id.* §1.5(3) (*id.*)—that is, the value of the positive environmental externalities created by their continued operation. A ZEC, like a REC, is a "credit that represents the environmental attributes of one megawatt hour of energy produced" by a nuclear plant. 20 ILCS 3855/1-10.

A state-administered competitive procurement selects which facilities will receive ZECs. Any nuclear plant interconnected with the two regional grids covering Illinois—PJM Interconnection, L.L.C. ("PJM") or the Midcontinent Independent System Operator, Inc. ("MISO")—can apply. The Illinois Commerce Commission ("ICC") selects plants based on environmental criteria: "minimizing carbon dioxide

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[1] "SA" is the Supplemental Appendix attached to Exelon's Seventh Circuit brief.

emissions that result from electricity consumed in Illinois"; "minimizing sulfur dioxide, nitrogen dioxide, and particulate matter emissions that adversely affect the citizens" of Illinois; and "any existing environmental benefits that are preserved by" selection of the winning facilities. 20 ILCS 3855/1-75(d-5)(1)(C). The ICC then directs the State's utilities to buy ZECs—but not energy or capacity—from the winning plants. *Id.*

2. The ZEC Program does not specify how plants are to sell the electricity they produce, nor does it condition eligibility or payment on selling in any particular way. Pet. App. 6a. In practice, ZEC plants have historically sold their electricity in a variety of ways, including outside FERC's auctions. *See infra* at 25-26.

3. The ZEC price is capped at the social cost of carbon—a federal interagency task force's estimate of damage from carbon emissions. 20 ILCS 3855/1-75(d-5)(1)(B)(i); Pet. App. 2a, 19a n.11. Illinois used that figure to measure the harm that would result from nuclear plants' closure. SB2814 §1.5(8) (SA.5). The ZEC price begins at the social cost of carbon. But to protect consumers, the ZEC price can fall below the social cost of carbon (though never rise above it).

Each year, the ICC calculates a "market price benchmark" based on forecasted energy prices (derived from an energy futures price index at a regional trading hub, which is not subject to FERC jurisdiction), and the average of capacity prices in the two regional transmission organizations covering Illinois (PJM and MISO). Pet. App. 2a, 19a-20a. Those prices are never paid to ZEC plants; rather, the benchmark is used as a referent to potentially reduce the ZEC price.

"[T]herefore, even an adjusted ZEC price is not based on the wholesale price a ZEC recipient receives." *Id.* at 43a. If the benchmark is above $31.40/MWh (a historical approximation of electricity prices), the ZEC price is reduced below the social cost of carbon by the difference between the benchmark and $31.40/MWh. *Id.* at 2a; *id.* at 20a n.13; 20 ILCS 3855/1-75(d-5)(1)(B). There is no true-up or reconciliation if (as is inevitable) actual market prices diverge from forecasts.

C. Proceedings Below.

1. In February 2017, Petitioners sued, claiming that the FPA preempts the ZEC Program. The district court dismissed. *See* Pet. App. 12a-55a. It held that Petitioners lacked Article III standing insofar as their suit was based on "the ZEC program's price adjustment": Petitioners claimed an injury from the ZEC Program's effects on FERC's markets, but the price adjustment only *decreased* the ZEC price (and hence any market effect). *Id.* at 24a-25a. Hence, Petitioners' alleged injury "is not traceable to the price adjustment." *Id.* at 24a. The court also held that Petitioners lacked a cause of action to bring their preemption claim. *Id.* 30a-34a. Finally, the court rejected Petitioners' preemption claim on the merits. *Id.* 34a-47a.[2]

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[2] The Seventh Circuit also affirmed dismissal of a similar suit by certain industrial customers. Pet. App. 9a. Those customers have not sought *certiorari*. Nor, contrary to their purported "Waiver of Response," *see* Feb. 15, 2019 Letter from Patrick N. Giordano, are they Respondents here. The Seventh Circuit consolidated the two cases only "for purposes of briefing and disposition"—not all

2. Petitioners appealed. A broad coalition of stakeholders—seven States, environmental organizations such as Natural Resources Defense Council, Inc. ("NRDC") and Environmental Defense Fund, energy economists, legal scholars, and trade associations—all filed *amicus* briefs that opposed Petitioners' preemption theory, recognizing that it would "cast a pall of uncertainty over a wide range of longstanding and effective efforts states have traditionally employed to promote the use of clean energy and further the welfare and wellbeing of their citizens." NRDC 7th Cir. Br. 21.

After oral argument, the Seventh Circuit invited the United States to provide its views in an *amicus* brief. With the Solicitor General's approval, *see* 28 C.F.R. § 0.20, FERC "and the United States then filed a joint brief concluding that Illinois' program does not interfere with interstate auctions and is not otherwise preempted." Pet. App. 4a; *infra* at 19-21. The brief also noted that FERC was conducting a proceeding to address Petitioners' concerns about the indirect effects of the ZEC Program and other state subsidy programs on wholesale markets. U.S. Br. 8, 21-22.

The Seventh Circuit panel, composed of Judges Easterbrook, Sykes, and Reagan (sitting by designation), unanimously affirmed the district court's dismissal. Pet. App. 1a-9a. The court declined to

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purposes, Order, *Village of Old Mill Creek v. Star*, No. 17-2433 (7th Cir. July 18, 2017), ECF No. 5, and issued separate mandates on different dates. No timely *certiorari* petition was filed from the industrial customers' Seventh Circuit case, No. 17-2433.

address whether Petitioners have a cause of action. Because "none of the procedural disputes concern[]subject-matter jurisdiction," it stated it could "go straight to the merits" and affirm on that basis. *Id.* at 3a. It did not mention the district court's Article III holding.

The court noted Petitioners' concession that "a state may take many steps that affect the price of power." Pet. App. 3a. That includes "a tax on carbon," "subsidi[zing] some or all generators," or "creat[ing] a cap-and-trade system." *Id.* So despite Petitioners' rhetoric about the ZEC Program's effects on federal markets, the court understood Petitioners' challenge to rest on the ZEC Program's "price-adjustment aspect," which Petitioners claimed triggered preemption under *Hughes* because it "us[ed] average auction prices as a component in a formula." *Id.* at 2a-3a.

The court rejected Petitioners' reading of *Hughes*. The court interpreted *Hughes* to "draw[] a line between state laws whose effect depends on a utility's participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed)." *Id.* at 4a-5a. The ZEC Program did not run afoul of this line: "To receive a credit, a firm must *generate* power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences." *Id.* at 6a. The court also rejected Petitioners' argument that the price-adjustment mechanism was identical to the *Hughes* program, explaining that the ZEC Program did not involve "the adjustments that Maryland law required." *Id.*

The Seventh Circuit noted that FERC was considering how to address "the effect of state programs designed to subsidize producers of electricity" and that FERC had "opened a new proceeding so that the Commission may determine for itself what changes, if any, should be made" to PJM's market rules. *Id.* at 6a-7a; *infra* at 13-14. While Petitioners "insist[ed]" that these proceedings "show[ed] that the Illinois statute must be preempted," FERC had said the very opposite: In a June 2018 order, FERC noted that it was considering rule changes but emphasized that these proposals "'in no way divest[] the states in the PJM region of their jurisdiction over generation facilities. States may continue to support their preferred types of resources in pursuit of state policy goals.'" Pet. App. 7a (quoting *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶61,236, P.158 (2018)). As the Seventh Circuit explained, "the need to make adjustments in light of states' exercise of their lawful powers does not diminish the scope of those powers." *Id.* "Once the Commission reaches a final decision in the ongoing proceeding," the court noted, "the adequacy of its adjustments will be subject to judicial review." *Id.*

The Seventh Circuit therefore affirmed the district court's dismissal.

Petitioners filed for rehearing, arguing that the court failed to "accept[] as true the complaint's factual allegations." Pet. for Panel Reh'g at 4. In Petitioners' view, the court failed to credit their allegations that ZEC "plants have no choice but to bid all the electricity they generate into the PJM and MISO auctions," and they argued that the court made a factual error in concluding that the ZEC Program did not involve "'the adjustments that [the] Maryland law [at issue in *Hughes*] required.'" *Id.* at 5, 7 (quoting Pet. App. 6a). These supposed "discrepanc[ies]," Petitioners said, were "material" to their legal arguments. *Id.* at 5.

The Seventh Circuit denied rehearing. Pet. App. 56a-57a.

Shortly after the Seventh Circuit's unanimous decision, the Second Circuit also unanimously rejected Petitioners' challenge to New York's ZEC program. *See Zibelman*, 906 F.3d 41 (Jacobs, J., joined by Livingston, J., and Chen, D.J.).

3. Meanwhile, the FERC proceedings noted in the Seventh Circuit's opinion remain ongoing. Those proceedings began in January 2017, when Petitioner EPSA asked FERC to "modif[y]" its existing rules governing the wholesale markets in both Illinois and New York to apply a "minimum offer price rule" to ZEC plants, which would have the effect of excluding ZEC plants from FERC's capacity markets.[3] That relief, it said, would "address" the "threat" posed by the ZEC

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[3] Motion to Amend, and Amendment To, Complaint, and Request for Expedited Action on Amended Complaint at 2-3, 13, 16, *Calpine Corp. v. PJM Interconnection, L.L.C.*, Docket No. EL16-49-000 (FERC Jan. 9, 2017) ("PJM Complaint"); Request for Expedited Action at 6, 15-16, *IPPNY, Inc. v. NYISO, Inc.*, Docket EL13-62-002 (FERC Jan. 9, 2017) ("New York Complaint").

Program without FERC needing to "address preemption."[4]

FERC is still considering EPSA's petitions. In a June 2018 order, as noted above, FERC proposed changes to PJM's market rules. FERC's intent was "to accommodate state policy decisions" to grant subsidies to certain generators, while addressing those subsidies' indirect effects on wholesale market prices. *See Calpine Corp.*, 163 FERC ¶61,236, P.8. FERC proposed that subsidized plants would not participate in the capacity market, and that States supporting plants outside the market would receive credit for the capacity those plants provide. *Id.* at PP 8, 149, 157-158, 160-161. FERC received comments from dozens of parties, including Petitioners. Those proceedings remain pending.

REASONS FOR DENYING THE PETITION

This case presents no split of authority, no disagreement among sovereigns, and no sound reason to grant *certiorari* in the absence of any such division. Meanwhile, before the Court could reach the merits, it would have to address multiple threshold obstacles no circuit court has ruled upon—and if the Court reached the merits, it would discover that this case does not actually *present* Petitioners' Question Presented. The Court should deny the petition.

4 PJM Complaint at 11 & n.46; New York Complaint at 11 & n.46.

I. There Is No Split Of Authority Or Disagreement Among Sovereigns.

1. Petitioners claim that the Illinois and New York programs are preempted because they are "just like the Maryland subsidy program" in *Hughes*. Pet. 12. According to Petitioners, that is because (1) ZEC plants supposedly, "as a practical matter," sell all the "electricity they generate into the wholesale markets," and (2) the ZEC price supposedly is "tethered to wholesale market prices." Pet. 4, 11, 21. These programs, Petitioners contend, thus "guarantee" ZEC plants a price "for the electricity [they] sell at wholesale," and so are preempted under *Hughes*. Pet. 11-12.

There is no division of authority on these issues. All eight judges to consider Petitioners' claims have analyzed them the same way and rejected them for the same reasons.

First, each court has taken the same approach in rejecting Petitioners' claim that ZEC payments are received "in connection with" wholesale sales simply because ZEC plants, "as a practical matter," sell exclusively at wholesale. Pet. 19, 21. Each court followed *Hughes* in asking whether the payments were contingent upon making a wholesale sale. In *Hughes*, Maryland claimed that its payments were "consideration" for various services "separate from … wholesale sales of capacity." 136 S. Ct. at 1297 n.9. In response, *Hughes* asked whether the "payments are conditioned on … capacity clearing the auction." *Id.* And because Maryland had placed that condition on its payments, those payments were "'received … in connection with' interstate wholesale sales." *Id.*

Here, each court applied the same test and reached the opposite result because—as is undisputed—neither Illinois nor New York imposed any such condition. Pet. App. 4a-5a, 43a-44a; *Zibelman*, 906 F.3d at 951-52. That result is consistent with *Allco Finance Ltd. v. Klee*, which is the only other Circuit decision addressing a claim that a state program was "'economically identical'" to the *Hughes* program. 861 F.3d 82, 98 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 926 (2018) (Calabresi, J., joined by Raggi and Lynch, J.J.). Those three judges likewise concluded that, because a Connecticut program did not "condition" payments on selling electricity in a FERC auction, it fell "outside [*Hughes*'] limited holding." *Id.* at 98-100.

None of these courts believed it had accepted a "form-over-substance" evasion. Pet. 25. When a State does not condition payment on wholesale sales, it is not paying *for* wholesale sales. That is substance, not form. Rather, these programs pay for what they *say* they pay for: "the environmental attributes" of "nuclear power" from the participating generators. *Supra* at 7; *see* Pet. App. 6a, 44a; *Zibelman*, 906 F.3d at 45.

The courts also all rejected the argument that preemption should turn on whether generators "as a practical matter" sell at wholesale. Pet. 4, 21. Where to sell is a "business decision that does not give rise to preemption." *Zibelman*, 906 F.3d at 52. "To receive a credit, a firm must generate power, but how it sells that power is up to it." Pet. App. 6a. So far as Illinois and

New York are concerned, a plant "need not" sell "in an interstate auction" and may "choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences"—regardless, the generator receives ZECs. *Id.*; *see id.* at 42a & n.30. This indifference shows that the States are not paying for wholesale sales.

Each court, too, has taken seriously *Hughes*' avowedly "limited" holding, 136 S. Ct. at 1299, in view of the lack of any limiting principle to Petitioners' theory—that *Hughes* preempts any state subsidy received by generators that "as a practical matter" sell exclusively at wholesale. On that rule, many state programs will fall: For example, many "REC recipients … are required" by market rules "to sell their output exclusively at wholesale" or "to bid into wholesale auctions." *Zibelman*, 906 F.3d at 55; *see* Pet. App. 42a, 44a. As each court has recognized, that sweeping result is impossible to square with *Hughes* itself, which adopted its test precisely to avoid undermining "the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies." 136 S. Ct. at 1299; *see* Pet. App. 3a, 5a-6a, 37a; *Zibelman*, 906 F.3d at 51, 56; *see also Coal. For Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 572 (S.D.N.Y. 2017) ("fatal to Plaintiffs' argument is their failure to offer any cogent explanation why ZECs are preempted but other state incentives to generate clean energy … are not").

Second, each court has also rejected Petitioners' argument that ZEC programs are "just like" *Hughes* because the ZEC price supposedly "varies inversely with FERC-approved auction rates," like the "contract for differences" in *Hughes*. Pet. 12, 17, 19.

To begin, each court has recognized that *Hughes* focused on whether the state subsidy was "tethered to wholesale market participation"—not to wholesale prices. *Hughes*, 136 S. Ct. at 1299; Pet. App. 5a-6a, 43a-44a; *Zibelman*, 906 F.3d at 51; *Zibelman*, 272 F. Supp. 3d at 569. When States set payments for products in States' domain, like retail rates or production attributes, they can set any price they see fit. Pet. App. 5a-6a; *Zibelman*, 906 F.3d at 51-52. *Hughes* thus preempted Maryland's program not because it used a contract for differences, but because the "payments [we]re conditioned on … capacity clearing the auction." 136 S. Ct. at 1297 n.9. And here, as just discussed, it is undisputed that there is no such condition. Pet. App. 6a.

Regardless, the ZEC pricing mechanism is quite different and does not involve "the adjustments that Maryland law required." Pet. App. 6a; *see Zibelman*, 906 F.3d at 51 (noting that Petitioners' price-tethering argument depends upon "mischaracteriz[ing] *Hughes* and the ZEC program"). The *Hughes* subsidy was a "contract for differences" that moved up and down to offset changes in the wholesale prices the recipient generator actually received for its sales of capacity in the FERC-regulated auction market, eliminating all market risk and providing the generator a fixed capacity price for (and only for) its auction sales. 136 S. Ct. at 1295.

The ZEC Program is not like that:

- "[T]he initial price of ZECs (the Social Cost of Carbon) has nothing to do with wholesale prices." Pet. App. 43a; *see id.* at 2a.
- "The price adjustment allows the price of ZECs to fall below that initial price," but (unlike in *Hughes*) never to rise above it—and thus generators remain exposed to market risk. *Id.* at 43a; *see id.* at 2a.
- "[E]ven an adjusted ZEC price is not based on the wholesale price a ZEC recipient receives"; instead, it "is calculated using a *composite* of *projected* prices from the energy and capacity markets." *Id.* at 43a (emphasis added); *see id.* at 20a & nn.12-13.
- This figure, moreover, combines "PJM and MISO forecast … prices." Pet. App. 81a-82a; *see id.* at 2a. Because a generator can participate in PJM or MISO, but not both, no generator can ever receive this price. Moreover, "[t]hese projected and composite prices are not within FERC's jurisdiction." *Id.* at 43a.

Thus, "the 'tether' in this case is not to wholesale participation or transactional pricing; the tether is to broader, indirect wholesale market forces." *Id.* The lower courts thus have unanimously rejected Petitioners' claims that the ZEC pricing mechanism is "just like" that in *Hughes*. Pet. 11-12.

2. Conceding "the absence of any circuit conflict," Petitioners claim the Court should grant *certiorari* anyway because it did so in *Hughes*. Pet. 30. But the

Court granted review in *Hughes* at Maryland's request after the Third and Fourth Circuits, at the federal government's urging, invalidated state laws in Maryland and New Jersey. Here, such inter-sovereign conflict is absent. No state law has been invalidated. And FERC and the United States have filed an *amicus* brief urging the same result and same rationale the circuit courts adopted.

The federal government's view is that Illinois' ZEC Program is "not preempted" and instead falls within the authority the FPA reserves to the States. U.S. Br. 7; *id.* at 27. ZEC programs, the United States and FERC explained, lack the key fact that drove preemption in *Hughes*: Maryland "conditioned [its] subsidy on generators' participation in the wholesale auction … while promising a rate distinct from the wholesale market price." *Id.* at 9. But ZEC programs, in the federal government's view, are different: "Generators may receive ZECs even if they do not clear the capacity auctions," because "ZECs are separate commodities that represent the environmental attributes of a particular form of power generation." *Id.* at 10. "[T]hey 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.* In addition, "[u]nlike [in *Hughes*]," ZEC programs "do[] not link ZECs to a particular generator's actual wholesale revenues." *Id.* at 14.[5]

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[5] Nor is the United States' present position a *new* position, as Petitioners imply. Pet. 28. Although the United States urged preemption in *Hughes*, it advocated there the same line that every

The federal government adopted this view in part because, like the courts below, it was keenly aware of the consequences that Petitioners' theory would inflict. Making preemption turn on the business choices of private parties rather than the State's own action, the United States and FERC explained, "would take preemption doctrine down a path not contemplated" by this Court in *Hughes*. *Id.* at 13. "Business realities and market forces cannot be so easily equated with requirements imposed by force of law—a generator's 'business decision' to sell at the auction 'is irrelevant from a preemption perspective' and is not equivalent to a 'state directive.'" *Id.* at 12 (quoting *Zibelman*, 272 F. Supp. 3d at 570).

II. No Crisis Justifies A Grant.

Petitioners claim this is the rare case meriting *certiorari* absent any disagreement because FERC's markets are on the verge of "break[ing]." Pet. 30.

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judge below applied: If a program does not condition payment on wholesale sales—as with ZEC programs—it is not preempted. *See* Tr. of Oral Arg. at 57:2-4, *Hughes*, 136 S. Ct. 1288 (No. 14-614) (stating that a State-imposed subsidy "is not preempted here. It's just when there's a bidding-and-clearing requirement."); *id.* at 52:3-14 (CHIEF JUSTICE ROBERTS: How far . . . do you think your authority reaches with respect to indirect effects on the auction? … Is it [preempted] only because of the legal mandate [requiring wholesale sales] in this case? [UNITED STATES]: Yes. It's … because [the] program in this case, *by requiring the capacity to be bid into the auction and clear*, it directly targets the auction." (emphasis added)); *id.* at 48:4-12 (no preemption "if the State just paid to build a power plant," but "if there was some kind of a bid-and-clear requirement in the auction attached to it," that would be preempted).

The answer to this argument is the one FERC and the United States gave below: FERC "is familiar with the challenge of regulating the wholesale markets while respecting [the] statutory division of federal/state authority and addressing, as necessary, effects of state initiatives on those markets." U.S. Br. 8. FERC assured the Seventh Circuit that the "Commission can exercise its responsibility under the [FPA] to ensure just and reasonable prices in the wholesale markets," and that ZEC programs "pose[] no obstacle to the Commission exercising its regulatory authority." *Id.* at 20, 22.

Indeed, when it filed its brief, FERC was in the midst of considering proposed rules changes aimed "to accommodate state policy decisions and allow resources that receive out-of-market support to remain online." *Calpine Corp.*, 163 FERC ¶61,236, P.8. That FERC proceeding is ongoing. FERC made clear that its proposal, unlike Petitioners' suit, "in no way divests the states … of their jurisdiction over generation facilities. States may continue to support their preferred types of resources in pursuit of state policy goals." *Id.* at P.158. In view of that ongoing proceeding, the United States and FERC urged the Seventh Circuit not to "resort here to the extraordinary and blunt remedy of preemption." U.S. Br. 20. Instead, FERC has the regulatory tools to address Petitioners' concerns in a tailored way that respects the FPA's cooperative federalism. Thus, to the extent there is an important issue to be addressed, it is being addressed where it *should* be—at FERC. *Id.* ("[T]he solution lies with the Commission, not with courts."). And "[o]nce the Commission reaches a final decision in the ongoing proceeding, the adequacy of its adjustments will be subject to judicial review." Pet. App. 7a; *infra* at 30.

FERC could not have been clearer in rejecting Petitioners' claim that FERC's markets are at a "critical inflection point," Pet. 30, necessitating an immediate ruling on preemption. Petitioners contend that FERC's engagement should be taken as a reason for preemption, rather than judicial restraint. Pet. 29. But when "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973). As both circuits understood, this "Court remarked in *Hughes* [that] the exercise of powers reserved to the states under §824(b)(1) affects interstate sales. Those effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments." Pet. App. 7a; *see Zibelman*, 906 F.3d at 50 ("Courts must avoid mistaking the 'congressionally designed interplay between state and federal regulation for impermissible tension that requires pre-emption under the Supremacy Clause.'" (quoting *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring)). Indeed, States *for decades* have "provid[ed] loans, subsidies, or tax credits to particular facilities on environmental or policy grounds." U.S. Br. 26. And for decades, "FERC itself has sanctioned" these programs even though they "may 'affect[] the market clearing price.'" *Zibelman*, 906 F.3d at 56 (quoting *Conn. DPUC*, 569 F.3d at 481).

Petitioners' claims about "serious distortions" to

FERC's markets, Pet. 15, also have little to do with the legal theories they press. In proposing changes to its market rules to address the effects of state subsidies, FERC pointed broadly to *all* programs covering clean generators, including REC programs for "solar … and wind resources." *Calpine Corp.*, 163 FERC ¶61,236, P.151; *see id.* at P.152 (pointing to requirements under "existing state [renewable portfolio standard] programs"). Yet Petitioners disclaim any challenge to these other programs. Pet. 10 n.2.

Even as to state programs aimed at supporting nuclear generation, Petitioners' claim that other States "are considering similar measures," Pet. 15, cuts against—not for—*certiorari*. These programs differ in their design, so that a decision in this case may provide limited guidance to lower courts facing future challenges. New Jersey's program, for example, lacks the price-adjustment mechanism Petitioners claim is so important here. Pet. 11, 19; *see* N.J.S.A. §§ 48:3-87.3 to 48:3-87.7. Connecticut's program is not a zero-emissions credit program at all.[6] And Pennsylvania is considering still other alternatives, including a carbon pricing program.[7] If anything, those variations underscore the wisdom of allowing continued percolation, particularly given *Hughes*' recent vintage.

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[6] Conn. Dep't of Energy & Envtl. Protection, Notice of Request for Proposals from Private Developers for Zero Carbon Energy (July 31, 2018), https://bit.ly/2Q7kj0y.

[7] *See* Penn. Gen. Assembly Nuclear Energy Caucus, *Bicameral Nuclear Energy Caucus Report: 2017-2018 Session*, at 30 (Nov. 29, 2018).

III. This Case Is Rife With Vehicle Problems.

The Petition is also rife with vehicle problems.

A. This Case Does Not Present Petitioners' Question Presented.

Petitioners have lost in every court in part because they consistently misrepresent the way the ZEC Program works. *Zibelman*, 906 F.3d at 51; *see* Pet. App. 5a-6a, 41a-44a. That continues in this Court. And, as a result, this case does not present Petitioners' Question Presented.

1. Petitioners' build their Question Presented on the premise that ZEC plants have always "sold and necessarily must sell all of their output at wholesale" via "FERC-approved auctions." Pet. 3; *see* Pet. i. But that premise is false, and the lower courts were not bound to accept it even at the pleading stage. Not only do the ZEC programs not *require* ZEC plants to participate in wholesale auctions, but ZEC plants may "choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies." Pet. App. 6a; *see Zibelman*, 906 F.3d at 52 (where to sell is a "business decision").

Even as to what occurs *today*, Petitioners' assertion is simply untrue, contradicted by Petitioners' own allegations and orders subject to judicial notice on a motion to dismiss. First, one plant selected to receive ZECs—Quad Cities—is owned 25% by a vertically integrated utility that sells directly to retail customers and was eligible to apply for ZECs corresponding to its share of the plant's output. C.A. Appendix A.45 n.2.[8] Second, Exelon's 75% share of Quad Cities will still receive ZECs even though it failed to sell its capacity in the PJM capacity auction—the very result that the *Hughes* program was designed to prevent. Pet. App. 78a (¶ 55) (complaint of Petitioners). Third, both plants selected to receive ZECs have sold through bilateral contracts outside the auctions. C.A. Appendix A.142 (¶ 54) (complaint of industrial customers); *see* Pet. App. 70a-71a (¶ 37) (complaint of Petitioners). The courts below thus were not required to accept Petitioners' assertion that ZEC plants have and will always "sell their entire output via [wholesale] auctions." Pet. i. Indeed, the federal government's *amicus* brief noted that ZEC plants may "opt to" sell via "wholesale auction, bilateral contracts, or directly to retail customers," and that Petitioners' counsel had *conceded* at oral argument that ZEC plants had not always sold through the wholesale auctions. U.S. Br. 15-16; *id.* at 11 & n.3.

Petitioners lament that the circuit courts supposedly "brushed aside the complaint's well-pled allegations." Pet. 3. But this Court should not grant *certiorari* in a case where, in order to reach the Question Presented, the Court would first need to determine that the lower courts misapplied the well-settled pleading standard of

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[8] Petitioners wrongly predicted that this portion of Quad Cities would not be eligible for ZECs. C.A. Appendix A.45 n.2. The State's procurement plan allowed "facilities with costs recovered through regulated rates [to] participat[e]." Illinois Power Agency, *Zero Emission Standard Procurement Plan* 47 (July 31, 2017), https://www.illinois.gov/sites/ipa/Documents/2018ProcurementPlan/Zero-Emission-Standard-Procurement-Plan-ICC-Filing.pdf.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), on questions that Petitioners concede are "material" to the arguments they press. Pet. for Panel Reh'g at 5; *see* Pet. 21.

2. This case is an even worse vehicle because of Petitioners' concession that they do not challenge REC programs' legality. Pet. 10 n.2; *see* Pet'rs' 7th Cir. Br. 51 ("Plaintiffs do not allege that state Renewable Energy Credit ('REC') programs are preempted."). Yet many REC recipients sell their output exclusively at wholesale. *Zibelman*, 906 F.3d at 55. Under Plaintiffs' ostensible theory of the case, those REC payments should also be preempted. Petitioners' choice to disavow that conclusion means that their case does not actually present the Question Presented. Instead, the case (in Petitioners' true view) turns on alleged factual distinctions between REC programs and the ZEC Program that their Petition buries in marginalia. *Cf.* Pet. 10 n.2. The Court should be loath to grant *certiorari* when Petitioners' Question Presented is so transparently a Trojan horse for some fact-intensive theory they intend to litigate if the Court reaches the merits.

B. The Court Cannot Reach Petitioners' Question Presented Without Addressing Threshold Justiciability Barriers No Circuit Court Has Considered.

Before the Court could reach the merits, it would also need to grapple with two threshold justiciability barriers no circuit court has addressed. That is another reason to deny. This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

1. First, as both district courts held, Petitioners lack a cause of action to pursue their preemption claims. Pet. App. 30a-34a; *Zibelman*, 272 F. Supp. 3d at 563-67. In *Hughes*, no party "challenged whether [the] plaintiffs" had a cause of action, and so the Court "assume[d] without deciding that they may" sue. 136 S. Ct. at 1296 n.6. But here, Respondents have preserved (and will continue to assert) that argument. In this federalism case, it would be irresponsible to take up Petitioners' claim that Illinois and New York have transgressed federal law in the face of a preserved argument—and two square district court holdings—that federal courts cannot entertain Petitioners' challenge. Yet because neither the Seventh nor the Second Circuits addressed the issue (because they could affirm the district court without doing so), the Court would have to resolve that potentially far-reaching question with no circuit opinion. Instead, the Court should deny.

The district courts were correct that Petitioners have no cause of action. No statute provides such an action. The Supremacy Clause does not do so either. *Armstrong*, 135 S. Ct. at 1383-84. That means Petitioners' preemption claims may proceed only based on a "judge-made action at equity," *id.* at 1386, and only if they seek the type of relief that "courts of equity" historically provided against "illegal executive action," *id.* at 1384. Such relief, moreover, is unavailable if Congress "inten[ded] to foreclose" it. *Id.* at 1385.

Here, Petitioners do not bring a claim equity courts would have entertained. They invoked *Ex parte*

Young—but "*Ex parte Young* actions historically involved a party bringing a preemptive action … to challenge a possible enforcement proceeding under state law." Pet. App. 33a (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring)); *accord Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.) (similar). Petitioners "are not the potential target of any state enforcement proceedings." Pet. App. 33a. No one could indict them, sue them, or penalize them based on the ZEC Program. Rather, they claim a regulatory program will indirectly make them less profitable. That is not an *Ex parte Young* claim. *See Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 903-04 (10th Cir. 2017) (rejecting similar bystander suit).

Even if an *Ex parte Young* action were otherwise available, moreover, the district courts were also right that the FPA "foreclose[s] equitable relief." *Armstrong*, 135 S. Ct. at 1385. Each factor that yielded that result in *Armstrong* is present here. First, as in *Armstrong*, the FPA provides a detailed administrative scheme tailor-made to address complaints about how state actions affect FERC's markets. Pet. App. 33a-34a; *Zibelman*, 272 F. Supp. 3d at 565-66. Second, Congress in the FPA expressly provided federal-court causes of action in multiple places. But it nowhere authorized a suit like this one. Pet. App. 32a; *Zibelman*, 272 F. Supp. 3d at 565. Third, also like *Armstrong*, the "sheer complexity" of FERC's wholesale-market regulation confirms that Congress intended to foreclose suits like this one. 135 S. Ct. at 1385; *see* Pet. App. 34a. Petitioners complain about how ZEC programs supposedly affect FERC's markets. And that issue—regulating interconnected electricity markets and determining how they should interact with state authority—requires the "expertise, uniformity, widespread consultation, and resulting administrative guidance" that FERC's oversight brings. *Armstrong*, 135 S. Ct. at 1385.

Congress thus intended that claims like Petitioners' proceed, if at all, before FERC. If Petitioners are aggrieved by FERC's decision, they can then file a petition for review. *See* 16 U.S.C. § 825*l*(b); *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring); *see also* U.S. Br. 22; Pet. App. 7a. Congress designated that path because it allows courts to focus review on FERC's authoritative resolution of such claims, in light of a record created before the agency.

2. The second obstacle is jurisdictional. As the district court recognized, Petitioners lack Article III standing to raise one of their primary objections to the ZEC Program—the price-adjustment mechanism. Pet. App. 25a. Indeed, the Seventh Circuit understood Petitioners' *entire* preemption challenge to depend on this mechanism. Pet. App. 2a-3a (Petitioners "contend that the price-adjustment aspect of the state's system leads to preemption"). Petitioners claim that the ZEC pricing mechanism is unlawful because it relies on forecasts of wholesale electricity prices. Pet. 3, 4, 10 n.2, 11. But the price-adjustment mechanism can only reduce the ZEC price, thereby reducing the subsidy paid to ZEC plants. That can only lessen, not increase, any "distortion" of the wholesale markets—and so could only help, not hurt, Petitioners. For that reason, the district

court held that Petitioners lack Article III standing to challenge the price-adjustment mechanism. Pet. App. 24a-25a.

So, again: If the Court granted *certiorari*, it would find its consideration consumed not with any "question of exceptional importance to the regulation and efficient functioning of wholesale energy markets," Pet. 13, but with justiciability issues no circuit court has decided.

IV. The Decision Below Is Correct.

The decision below is also correct.

1. ZEC programs pay generators for what they produce, not what they sell in wholesale auctions—just like the REC programs FERC has approved. *Supra* at 6. These programs fall squarely within states' reserved authority over generation.

That holding is consistent with *Hughes*. There, Maryland argued that its payment was really one for constructing a generation facility in a particular location. In rejecting that argument, and finding that the payment was *actually* for wholesale sales, the Court deemed it dispositive that "the payments [were] conditioned on … capacity clearing the auction." 136 S. Ct. at 1297 n.9. That conditioning is why the payments in *Hughes* were "'received ... in connection with' interstate wholesale sales." *Id.*; *accord Elec. Power Supply Ass'n*, 136 S. Ct. at 777 ("To set a … electricity rate is … to establish the amount of money a consumer will hand over in exchange for power."). Contra Petitioners, the Court's emphasis on whether a state payment is conditioned upon a wholesale sale does not come only from *Hughes*' "final substantive paragraph," but is the test *Hughes* invokes at beginning, middle, and end. 136 S. Ct. at 1292, 1297 n.9, 1299. To avoid any doubt on that point, the Court underscored that "[n]othing in this opinion should be read to foreclose … States" from undertaking programs lacking this "fatal defect." *Id.* at 1299. Here, Illinois has not so conditioned its payments. So, *Hughes* does not preempt its program. The courts below properly rejected Petitioners' attempt to rewrite *Hughes* to hold something it did not.

2. Sound, functional reasons support this line. When States offer to pay if, but only if, generators sell capacity at wholesale, they are—in substance—paying *for* wholesale sales. And when States do not make payment contingent on wholesale sales, then they are paying for *something else*. The distinction matters, even if the recipient happens to sell only at wholesale when the program begins. After all, in the decade-plus these programs last, many things can change. Generators could choose to sell bilaterally, or directly at retail. Or FERC could modify its market rules to exclude the participating generators from the wholesale market (as FERC is considering today). Yet so long as the plant continues to produce, the State will continue to pay—no matter how or where the electricity is sold.

Indeed, Petitioners concede that—as a matter of substance—ZEC programs differ critically from the *Hughes* program. They recount that, in *Hughes*, "the State's goal was to increase long-term *wholesale* supply commitments" in the wholesale capacity markets in order to *reduce wholesale prices*. Pet. 17 (emphasis added); 136 S. Ct. at 1294. If generators did not clear the wholesale auction, they would not reduce wholesale prices. The "subsidized plant's participation in the capacity auction was therefore *necessary* to achieve Maryland's objective." Pet. 17 (emphasis added). Here, by contrast, the ZEC Program does not, and does not need to, hijack FERC's wholesale markets to accomplish its aims. Its goal is "to achieve the State's environmental objectives and reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens." SB2814 § 1.5 (SA.5). That goal is achieved whenever clean electricity is generated and consumed (thereby displacing fossil-fuel generation), whether the electricity is sold in auctions, bilateral contracts, or at retail. The ZEC Program does not require wholesale sales or wholesale auction participation because, unlike in *Hughes*, they are irrelevant to the program's success.

3. The FPA's history also accords with the line applied by the courts below, and it refutes Petitioners' theory that the FPA preempts state subsidies to generators that happen to sell exclusively at wholesale. Even before the FPA's enactment, this Court and Congress understood that electricity's production and its subsequent sale are often intertwined. In 1932, this Court held that States retain their authority over generation, even when the electricity is sold interstate. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 178 (1932). The Court knew it was drawing a fine line, acknowledging that electricity is "not stored in advance," so interstate transmission and sale are "substantially instantaneous" with production. *Id.* Nonetheless, the Court treated generation as "separable and distinct." *Id.*

The FPA carried forward this distinction between regulating electricity's production and regulating its wholesale sale. The initial Senate bill proposed stripping States of their *Utah Power* jurisdiction over the subset of "generating facilities" that "produce energy for interstate [wholesale] sale." S. Rep. No. 74-621, at 48 (1935) (discussing *Utah Power*). But Congress opted against that "usurpation" of existing "State regulatory authority," electing to preserve state authority over all generating facilities—including those selling *only* at wholesale. *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 526-27 (1945) (quoting H.R. Rep. No. 74-1318, at 8, 27 (1935)). Congress's choice forecloses Petitioners' theory: even if ZEC plants did sell exclusively at wholesale, that would not strip Illinois of its authority to subsidize those plants' production.

4. By contrast, accepting Petitioners' theory would have sweeping effects. Many state programs provide payments to generators that sell exclusively at wholesale, including the REC programs FERC has approved. *Supra* at 17. While Petitioners insist they do not challenge those programs, Pet. 10 n.2, they cannot so easily avoid their theory's implications. Petitioners' sweeping reading of *Hughes* cannot be squared with this Court's "limited" holding, which was so careful not to disturb the many "other measures States might employ to encourage development of new or clean generation." 136 S. Ct. at 1299. Nor can it be squared with FERC's understanding of the bounds of its own jurisdiction, which treats payments for production as falling on the state side of the line, even when the recipient sells exclusively at wholesale. U.S. Br. 10; *Zibelman*, 906

F.3d at 54-55 (discussing *WSPP*). That is a matter on which FERC receives deference.[9]

5. Petitioners' remaining arguments lack merit. They principally rely on non-FPA preemption cases, like *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636-37 (2013), and *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012). But those cases merely require a focus on "what the state law in fact does, not how the litigant might choose to describe it." *Wos*, 568 U.S. at 637. Thus, in *Harris*, the state law was preempted because it "function[ed] as a command" to slaughterhouses regarding their internal operations, which were within the federal field. 565 U.S. at 463-64. In both cases, the relevant question was what the *State* was requiring, explicitly or "function[ally]." Yet Plaintiffs do not argue that the *ZEC Program* "in fact does" mandate ZEC plants to sell at wholesale, *Wos*, 568 U.S. at 637, or that the ZEC Program effectively "functions as a command" to ZEC plants to sell at wholesale. Rather, they assert (incorrectly) that, for reasons entirely unrelated to Illinois, ZEC plants will always sell at wholesale. So, *Wos* and *Harris* are off point.

Petitioners also rely on *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963). As the Second Circuit explained, however, that case undermines their argument. In *Northern Natural*,

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[9] FERC's interpretation is entitled to *Chevron* deference, and so is "dispositive" "unless … inconsistent with clearly expressed congressional intent." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985); *see City of Arlington v. FCC*, 569 U.S. 290, 306-07 (2013).

much like in *Hughes*, the State directly regulated interstate gas pipelines' wholesale transactions by requiring them to purchase whole gas "ratably" from producers. *Id.* at 88-89, 92. Because the program "was 'unmistakably and unambiguously directed at purchasers [i.e., interstate pipelines],'" it was preempted. *Zibelman*, 906 F.3d at 53 (quoting *N. Nat.*, 372 U.S. at 92).

But in *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989), this Court held that States could achieve the "same end result" "by regulating the producers," *Zibelman*, 906 F.3d at 54—and they could do so even if those regulations would "affect[]" the wholesale market, *Nw. Cent.*, 489 U.S. at 514, and even if they were "'intended to influence' the [interstate] pipeline's purchasing decisions," *Zibelman*, 906 F.3d at 53 (quoting FERC brief in *Northwest Central*). Despite these intended effects on FERC's domain, the Court rejected the preemption challenge, emphasizing that "Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate rates of production." *Nw. Cent.*, 489 U.S. at 514. "[R]egulat[ing] production" was a matter "firmly on the States' side of that dividing line," and the Court held that it "must take seriously the lines Congress drew in establishing [this] dual regulatory system." *Id.* at 512-14. So it is again here.

CONCLUSION

The Court should deny the petition.

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