No. 18-879

IN THE
Supreme Court of the United States

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

v.

JOHN B. RHODES, in his official capacity as Chair of the New York Public Service Commission, GREGG C. SAYRE, in his official capacity as Chair of the New York Public Service Commission, DIANE X. BURMAN, in her official capacity as Commissioner of the New York Public Service Commission, JAMES S. ALESI, in his official capacity as Commissioner of the New York Public Service Commission, and EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC,
Respondents.

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents state as follows:

Constellation Energy Nuclear Group, LLC, is not a public company. Exelon Corporation indirectly owns a 50.01% share in Constellation Energy Nuclear Group, LLC, and is publicly held. Électricité de France SA indirectly owns a 49.99% share in Constellation Energy Nuclear Group, LLC, and is publicly held.

Exelon Corporation is a publicly held company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

R.E. Ginna Nuclear Power Plant LLC is not a public company. Its indirect parent, Constellation Energy Nuclear Group, LLC, is indirectly owned by Exelon Corporation and Électricité de France SA, two publicly held companies.

Nine Mile Point Nuclear Station LLC is not a public company. Its indirect parent, Constellation Energy Nuclear Group, LLC, is indirectly owned by Exelon Corporation and Électricité de France SA, two publicly held companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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 New York and Illinois. 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 New York and Illinois). 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 Second and Seventh Circuits have applied that decision, and each has interpreted *Hughes* and the FPA in the same way.

Each affected sovereign also agrees. In a companion case from the Seventh Circuit, presenting the same question and also pending before this Court on a petition for *certiorari*, No. 18-868, 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, Nos. 17-2433, 17-2445 (7th Cir. May 29, 2018), 2018 WL 2746229 ("U.S. Br."). Also urging the same result was a coalition of eight States as *amici*.

Petitioners cry that ZEC programs will destroy FERC's markets, but that is belied by FERC's own words. In their brief, 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. U.S. Br. 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. 23. 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, both district courts concluded that Petitioners lacked a cause of action under *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), and one district court found they lacked Article III standing in part. Without addressing those issues, the Court cannot responsibly 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 New York, 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. 104a.

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, P22 (2017). States also "grant loans, subsidies, or tax credits" to encourage cleaner generation, or impose costs on generators that pollute. Pet. App. 26a (quotation marks omitted). FERC accepts these policies even though they "driv[e] significant changes in the mix of resources" in wholesale markets. *Id.*; *Conn. Dep't 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.*

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. 22a. In particular, 29 States (including New York) 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. Pet. App. 24a.

B. The ZEC Program.

1. In August 2016, New York adopted the ZEC Program as part of a comprehensive energy reform aimed at reducing greenhouse-gas emissions. C.A. Appendix A-86. In addition to the ZEC Program, New York required new REC procurements and financial support for "certain existing at-risk" and new renewable facilities. *Id.* at A-86, 101-02.

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. Nuclear plant retirements result in "significantly increase[d] air emissions due to heavier reliance on existing fossil-fueled plants." *Id.* at A-103.

To address this crisis, the ZEC Program "valu[es] and pay[s] for the zero-emissions attributes" of nuclear generators at risk of retirement—that is, the value of the positive environmental externalities created by their continued operation. *Id.* at A-133. A ZEC, like a REC, is a "credit for the zero-emissions attributes of one megawatt-hour of electricity production by" a participating nuclear plant. Pet. App. 8a. The New York Public Service Commission ("PSC") selected three plants to receive the first two-year tranche of ZECs after considering five criteria, including potential recipient plants' likely avoidance of carbon emissions. *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. In practice, ZEC plants have historically sold their electricity in a variety of ways, including outside FERC's auctions. *See infra* at 23-24.

3. The ZEC price is capped at the social cost of carbon—a federal interagency task force's estimate of damage from carbon emissions. Pet. App. 9a. The PSC used that figure to measure the harm that would result from nuclear plants' closure. *Id.* For the Program's first

two years, the price is fixed based on the social cost of carbon. *Id.* at 9a, 16a.

Beginning in 2019, a new price is fixed for each subsequent two-year period. Two adjustments can reduce the ZEC price below the social cost of carbon. First, the price falls if there is "additional renewable energy penetration." *Id.* at 9a. That is because, as the mix of generators that would replace nuclear generators gets cleaner, the air emissions avoided by nuclear plants declines. Second, to ensure the Program remains affordable even if consumers' electricity bills are forecast to rise, *id.*; *see* C.A. Appendix A-212, the price fixed for each two-year period can adjust downward based on forecast wholesale prices at the start of the two-year period. Those forecast prices are never paid to ZEC plants. Indeed, ZEC plants' own revenues are unlikely to ever match forecasted prices from two years earlier. C.A. Appendix A-212, 222-23.

C. Proceedings Below.

1. In October 2016, Petitioners and other plaintiffs sued, claiming that the FPA preempts the ZEC Program. The district court dismissed Petitioners' claims. *See* Pet. App. 34a-91a. The court first concluded that Petitioners lacked a cause of action to bring their FPA preemption claim. *Id.* 45a-51a. The court also rejected Petitioners' preemption claims on the merits. *Id.* 51a-78a.

2. Petitioners appealed. A broad coalition of stakeholders—eight 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. These organizations recognized that Petitioners' theory would "cast a pall of uncertainty over a wide range of long-standing and effective strategies states have traditionally employed to promote the use of clean energy and further the welfare and well-being of their citizens." NRDC 2d Cir. Br. 15.

Respondents also lodged with the Second Circuit the *amicus* brief that the United States and FERC had filed with the Seventh Circuit in a nearly identical suit brought by Petitioners against a ZEC program in Illinois, now also pending before this Court on petition for writ of *certiorari*. *See Electric Power Supply Ass'n v. Star*, No. 18-868. The United States and FERC—with the Solicitor General's approval, *see* 28 C.F.R. § 0.20—agreed with Respondents that the ZEC "program is not preempted." U.S. Br. 7. They 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. *Id.* at 8, 21-22.

The Second Circuit panel, composed of Judges Jacobs, Livingston, and Chen (sitting by designation), unanimously affirmed the district court's dismissal. Pet. App. 1a-31a. The court declined to address whether Petitioners have a cause of action. *Id.* at 12a. Instead, the court addressed and rejected Petitioners' argument that *Hughes* preempted the ZEC Program. It explained that, unlike the *Hughes* program, nothing in the ZEC Program required ZEC recipients to sell electricity at wholesale. *Id.* at 18a; *id.* at 18a-22a. The Second Circuit also concluded that the ZEC price did not "insulate [] generators from fluctuations in wholesale prices," *id.* at 16a, and that there was "no support for [Petitioners'] contention that the 'subsidy varies in almost exactly the same manner' as in *Hughes*," *id.* at 17a. The Second Circuit deemed it "telling" that Petitioners "cannot persuasively explain why FERC's holding" that RECs fall outside its jurisdiction "does not apply equally to ZECs." *Id.* at 24a-25a.

As to conflict preemption, the Second Circuit noted that "FERC itself has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction." Pet. App. 26a. Thus, while "FERC uses auctions to set wholesale prices and to promote efficiency," it does so "with the background assumption that … states engage in public policies that affect the wholesale markets." *Id.* at 28a.

Shortly before the Second Circuit's unanimous decision, the Seventh Circuit also unanimously rejected Petitioners' challenge to Illinois' ZEC program. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (Easterbrook, J., joined by Sykes, J., and Reagan, D.J.), *reh'g denied* (Oct. 9, 2018), *petition for cert. filed*, 87 U.S.L.W. 3279 (U.S. Jan. 8, 2019) (No. 18-868).

3. Meanwhile, Petitioner EPSA sought relief from FERC. In January 2017, it asked FERC to "modify" its existing rules governing the wholesale markets in both New York and Illinois to apply a "minimum offer price rule" to ZEC plants, which would have the effect of

excluding ZEC plants from FERC's capacity markets.[1] That relief, it said, would "address" the "threat" posed by the Program without FERC needing to "address preemption."[2]

FERC is still considering EPSA's petitions. It has taken no action in New York. Regarding Illinois, in June 2018 FERC proposed changes to the rules for the market operated by PJM Interconnection, L.L.C., which covers Illinois and twelve other States. 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. v. PJM Interconnection, L.L.C.*, 163 FERC ¶61,236, P.8 (2018). 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 ongoing.

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.

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1 Request for Expedited Action at 6, 15-16, *IPPNY, Inc. v. NYISO, Inc.*, Docket EL13-62-002 (FERC Jan. 9, 2017) ("New York Complaint"); 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").

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

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.

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

1. Petitioners claim that the New York and Illinois programs are preempted because they are "just like the Maryland subsidy program" in *Hughes*. Pet. 14. According to Petitioners, that is because ZEC plants supposedly, "as a practical matter, sell all their electricity into the wholesale market," and because the ZEC price supposedly is "tethered to wholesale market prices." *Id.* at 14, 23-24. These programs, Petitioners contend, thus "guarantee" ZEC plants a price "for the electricity [they] sell at wholesale," and so are preempted under *Hughes*. *Id.* at 14.

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. *Id.* at 21, 24. 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.* (ellipsis in original).

Here, each court applied the same test and reached the opposite result because—as is undisputed—neither New York nor Illinois imposed any such condition. Pet. App. 18a, 59a; *Star*, 904 F.3d at 523. 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 they had accepted a "form-over-substance" evasion. Pet. 28. 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 "zero-emission attributes of [how] electricity [is] produced." Pet. App. 2a.

The courts also all rejected the argument that preemption should turn on whether generators "as a practical matter" sell at wholesale. Pet. 4. Where to sell is a "business decision that does not give rise to preemption." Pet. App. 18a. So far as New York and Illinois are concerned, a "ZEC plant may … sell directly to consumers," or sell via bilateral contracts, "and still receive ZECs." *Id.* This indifference shows that the States are not paying for wholesale sales. *See Star*, 904 F.3d at 523 ("To receive a credit, a firm must *generate* power, but how it sells that power is up to it.… 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.").

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. Pet. 4. 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." Pet. App. 24a; *see* Pet. App. 64a. 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. 15a, 55a; *Star*, 904 F.3d at 523; *Village of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289, at *11 (N.D. Ill. July 14, 2017), *aff'd sub nom. Star*, 904 F.3d 518.

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. 14, 19, 21 (quotation marks and alterations omitted).

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. 17a; *Star*, 904 F.3d at 523-24. 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. 17a. *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: "[Petitioners] concede that the ZEC program 'does not expressly mandate that the plants receiving ZEC subsidies bid into the NYISO auctions.'" Pet. App. 19a (quoting Br. of Appellants 8).

Regardless, Petitioners' price-tethering argument depends upon "mischaracteriz[ing] *Hughes* and the ZEC program," Pet. App. 16a, in order to hide their differences. 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 different. As the Second

Circuit explained:

- "[T]he ZEC price is fixed for two-year periods, and does not fluctuate during those periods to match the wholesale clearing price." Pet. App. 16a.
- "Because the fixed ZEC price is capped based on an independent variable (the social cost of carbon), generators are exposed to market risk in the event that energy prices fall." *Id.*
- "[After 2019], the price may be fixed below the social cost of carbon, but only on the basis of *forecast* wholesale prices—forecasts based on futures prices that FERC does not regulate…" *Id.*
- Those forecast prices are for an area of New York different from the one in which the plants receiving ZECs are located. C.A. Appendix A-223.
- "[T]here is no true-up to reconcile forecasts with actual rates." Pet. App. 16a-17a.
- "The ZEC price also adjusts based on the amount of renewable generation in New York." *Id.* at 17a.

Thus, the Second Circuit held, "there is no support for [Petitioners'] contention that the 'subsidy varies in almost exactly the same manner' as in *Hughes*." Pet. App. 17a (quoting Br. of Appellants 38). *Accord Star*, 904 F.3d at 522.

2. Conceding "the absence of any circuit conflict," Petitioners claim the Court should grant *certiorari*

anyway because it did so in *Hughes*. Pet. 34. 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 at the Seventh Circuit's invitation, FERC and the United States filed an *amicus* brief urging the same result and the same rationale the circuit courts adopted.

The federal government's view is that ZEC programs are "not preempted" and instead fall within the authority the FPA reserves to the States. U.S. Br. 7; *id.* at 27. These 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.[3]

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 Pet. App. 59a).

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[3] Nor is the United States' present position a *new* position, as Petitioners imply. Pet. 32. Although the United States urged preemption in *Hughes*, it advocated there the same line that *Hughes* adopted and that every 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).

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. 34.

The answer to this argument is the one FERC and the United States gave the Seventh Circuit: 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 to the extent Petitioners disagree with FERC's resolution of that issue, they can obtain judicial review at that time by petitioning for review of FERC's order. *Infra* at 27-28.

FERC could not have been clearer in rejecting Petitioners' claim that FERC's markets are at a "critical inflection point," Pet. 33, 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. 33. 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 the Second and Seventh Circuits understood, "[c]ourts must avoid mistaking the 'congressionally designed interplay between state and federal regulation for impermissible tension that requires pre-emption under the Supremacy Clause.'" Pet. App. 14a (quoting *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring)); *Star*, 904 F.3d at 524 ("[T]he 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."). 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.'" Pet. App. 26a (quoting *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 481).

Petitioners' claims about "serious distortions" to FERC's markets, Pet. 17, 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. 17, 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. 13-14; *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.[4] And Pennsylvania is considering still other alternatives, including a carbon pricing

[4] 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.

program.[5] If anything, those variations underscore the wisdom of allowing continued percolation, particularly given *Hughes*' recent vintage.

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. Pet. App. 16a ("Plaintiffs mischaracterize … the ZEC program."). 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[] the ZEC plants to participate in the wholesale market," but ZEC plants could make the "business decision" "to sell directly to consumers" at retail, or sell via bilateral contracts, "and still receive ZECs." Pet. App. 18a; *see Star*, 904 F.3d at 523 (similar).

Even as to what occurs *today*, Petitioners' assertion

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

is simply untrue, contradicted by FERC orders that are subject to judicial notice on a motion to dismiss. One ZEC plant is co-owned by the Long Island Power Authority, which delivers its share of the plant's electricity directly to retail customers—and ZECs are received for that electricity. C.A. Appendix A-144, 231-32. Several ZEC plants have recently sold electricity through bilateral contracts at negotiated prices, outside the auctions.[6] And one ZEC plant has in the past produced power at one of its units that is immediately consumed at its other unit, which involves no wholesale sale.[7] 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 United States and FERC *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

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[6] *See R.E. Ginna Nuclear Power Plant, LLC*, 151 FERC ¶61,023, P.2 (2015); *Entergy Nuclear FitzPatrick, LLC*, 118 FERC ¶62,085, at 64,222 (2007). The FitzPatrick plant continues today to sell through a bilateral contract. While Petitioners insist that bilateral contracts are indistinguishable from auction sales, Pet. 24 n.9, this Court thought otherwise in *Hughes*: It deemed it "significant" that Maryland's contract-for-differences "differs from traditional bilateral contracts." 136 S. Ct. at 1299. For good reason: Bilateral contracts are subject to *ex post* "reasonableness review" by FERC, which will ensure that the price they set is just and reasonable. *Id.*; *see Allco*, 861 F.3d at 100.

[7] *See Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶61,033, P.3 (2005); *Calpine Corp. v. FERC*, 702 F.3d 41, 42, 47-50 (D.C. Cir. 2012).

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 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See* Pet. 23-24.

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' 2d Cir. Br. 40 ("Plaintiffs do not allege that state Renewable Energy Credit ('REC') programs are preempted."). Yet many REC recipients sell their output exclusively at wholesale. Pet. App. 24a. 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. 45a-51a; *Star*, 2017 WL 3008289, at *8-10. 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 New York and Illinois 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 Second nor the Seventh Circuit 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." *Star*, 2017 WL 3008289, at *9 (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).[8] Petitioners "are not the potential target of any state enforcement proceedings." *Star*, 2017 WL 3008289, at *9. No one could indict them, sue them, or penalize them based on the ZEC Program.

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[8] Those cases fell within equity's historic jurisdiction because an injunction to stop an enforcement proceeding is an anti-suit injunction, a type of action recognized by equity courts for centuries. *See* 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, § 1360, at 2699-2700 (3d ed. 1905) ("The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction…."); 2 Joseph Story, *Commentaries on Equity Jurisprudence*, § 875, at 190 (13th ed. 1886) (discussing anti-suit injunctions); John Harrison, Ex parte Young, 60 Stan. L. Rev. 989, 997-1001 (2008) (same).

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. 47a-49a; *Star*, 2017 WL 3008289, at *9. 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. 48a-49a; *Star*, 2017 WL 3008289, at *8-9. 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 Star*, 2017 WL 3008289, at *8. 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 1389-90 (Breyer, J., concurring); *see also* U.S. Br. 22. 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 Illinois district court recognized, Petitioners lack Article III standing to raise one of their primary objections to these ZEC programs. *Star*, 2017 WL 3008289, at *5-6. Petitioners claim that the ZEC pricing mechanism is unlawful because it relies on forecasts of wholesale electricity prices. Pet. 13-14, 26. 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 Illinois district court held that Petitioners lack Article III standing to challenge the price-adjustment mechanism.

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. 15, 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.* (ellipsis in original); *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, New York 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. 19 (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. 19 (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 "fight climate change and … reduce carbon emissions." C.A. Appendix A-234. 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, 178-79 (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 New York 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 14. 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; Pet. App. 22a-25a (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

[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).

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 New York, 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*, 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. Pet. App. 20a (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," Pet. App. 21a—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," Pet. App. 21a (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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