

Nos. 24-1304, 24-1318

In the Supreme Court of the United States

FIRSTENERGY SERVICE COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

AMERICAN ELECTRIC POWER SERVICE CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

***ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT***

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether federal law preempts an Ohio law that mandates that a utility that owns transmission assets and provides retail electric service within the state join a qualified transmission organization.

LIST OF DIRECTLY RELATED PROCEEDINGS

The petitions' lists of related proceedings are complete and correct.

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INTRODUCTION

When it comes to electricity regulation, the balance of power is settled. The Federal Energy Regulatory Commission gets to regulate interstate electricity markets. But Congress allowed, and this Court confirmed, that States can regulate *intrastate* electricity markets—even if their state-focused regulations incidentally affect *interstate* markets. See 16 U.S.C. §824(b); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385–87 (2015) (natural-gas regulation). The Sixth Circuit maintained this balance. It applied settled law when it held that the Federal Power Act does not preempt an Ohio law that requires utilities engaged in retail electric service to join an organization that will separately and independently manage the transmission of electricity (the “RTO mandate”). See Ohio Rev. Code §4928.12(A).

American Electric Power’s and FirstEnergy’s (“the Utilities”) assertion that the Sixth Circuit disregarded settled federal-preemption law, and that this case demands the Court’s attention, lacks juice. The Utilities frame their arguments in favor of certiorari at an exceedingly high level of generality, frequently asserting general background principles that the Sixth Circuit did not dispute and no one now contests. A similar analytical leap undermines the Utilities’ attempts to generate a circuit split. Their allegations of a split misread the Sixth Circuit’s decision—as well as the decisions of the other circuits with which they allege the Sixth Circuit’s decision conflicts. These flaws may explain why several respondents who have generally supported the Utilities’ petitions have *not* urged the Court to accept the federal-preemption question that the Utilities present. See Brief of Respondent Duke Energy Ohio, Inc. in Support of Certiorari at i; Brief of

PJM Interconnection, L.L.C. in Support of Certiorari at i.

Before proceeding, the Public Utilities Commission of Ohio (“PUCO”) must make two housekeeping points. *First*, American Electric Power Services Corporation and affiliated entities (which this brief refers to as “American Electric Power” or AEP) and FirstEnergy challenge the same Sixth Circuit judgment, but have filed separate appeals, with separate case numbers. Because the issues that they raise overlap, PUCO is filing the same brief in both cases. When citing the Sixth Circuit’s decision, PUCO cites to American Electric Power’s Petition Appendix. *Second*, PUCO, in this Brief in Opposition addresses only one of the Questions Presented in each petition: whether the Federal Power Act preempts Ohio’s Regional Transmission Organization (“RTO”) mandate. In the Sixth Circuit, PUCO focused exclusively on that question. It maintains that narrow focus here.

STATEMENT

I. The Federal Power Act and Ohio law establish independent requirements related to RTO membership.

Congress, through the Federal Power Act, directed the Federal Energy Regulatory Commission to establish incentives for electric utilities that join RTOs, which are organizations that coordinate the transmission of electricity across state lines. 16 U.S.C. §824s; *see* §824a. FERC implemented that requirement by creating an “adder” for utilities that join an RTO. 18 C.F.R. §35.35(e). This RTO adder allows utilities that voluntarily join an RTO to charge more when transmitting electricity to wholesale purchasers. *Id.*

Ohio, for its part, regulates “competitive *retail* electric service” (as opposed to wholesale service). Ohio Rev. Code §4928.12(A) (emphasis added). It has adopted its own requirements with respect to RTO membership. Specifically, to “improve[] service reliability within [the] state,” it requires utilities to join an RTO or other qualifying transmission entity if they are engaged in retail electric service in Ohio. *See* Ohio Rev. Code §4928.12(B)(4); *see also* Ohio Rev. Code §4928.02 (establishing state policies with respect to competitive retail electric service).

II. FERC declined to address whether the Federal Power Act preempts Ohio’s RTO mandate.

The Ohio Consumers’ Counsel is responsible for representing the interests of residential consumers of retail electricity. Ohio Rev. Code §4911.15. To that end, the Consumers’ Counsel filed a complaint with FERC, in which it asserted that certain Ohio utilities, including American Electric Power, FirstEnergy, and Duke Energy Ohio, were not entitled to receive the RTO adder. The Consumers’ Counsel asserted that, because Ohio law required the named utilities to join a qualified transmission organization, their membership was not voluntary. *See* AEP Pet.App.17a.

FERC agreed in part with the Consumers’ Counsel. It concluded that American Electric Power was not entitled to receive the RTO adder. AEP Pet.App.18a. FERC concluded, however, that FirstEnergy and Duke Energy were entitled to the adder because their rates resulted from settlements that the two utilities had negotiated. AEP Pet.App. 18a–19a. As is relevant to the federal-preemption question that PUCO addresses here, FERC declined to decide

whether the Federal Power Act preempts Ohio's RTO mandate. *See* AEP Pet.App.32a–33a.

III. The Sixth Circuit held that the Federal Power Act does not preempt Ohio's RTO mandate.

The Sixth Circuit, unlike FERC, did address preemption—and held that the Federal Power Act does not preempt Ohio law. AEP Pet.App.33a. It held that Ohio's RTO mandate did not conflict with federal law because “[n]o party” disputed that it was possible to comply “with both Ohio law and the [Federal Power Act].” AEP Pet.App.35a. It rejected the Utilities’ argument that Congress intended to pursue “the federal model of voluntary [RTO] membership” at “all costs,” concluding that Congress instead “may have wanted to prevent FERC from mandating membership via rule, not prevent Ohio from doing so.” AEP Pet.App.37a (quotation omitted).

The Sixth Circuit rejected the Utilities’ field preemption argument as well. It noted that the utilities had failed to carry their burden of showing that Congress occupied the field, in part because “Congress explicitly preserved state authority over certain transmission-related areas, including intrastate transmission.” AEP Pet.App.39a. Ohio's RTO mandate, the Sixth Circuit concluded, was merely an exercise of that authority because “Ohio law targets intrastate transmission,” and any effects on interstate electricity transmission were indirect. AEP Pet.App.40a–41a.

REASONS FOR DENYING THE PETITION

This case does not possess any of the characteristics that the Court looks for when deciding whether to grant a petition for a writ of certiorari. The Sixth

Circuit’s resolution of the preemption question did not create a circuit split nor did it disregard this Court’s federal-preemption jurisprudence. It instead properly applied the Court’s precedents and correctly concluded that federal law does not preempt Ohio’s RTO mandate.

I. There is no circuit conflict about whether the Federal Power Act preempts state RTO mandates.

The Sixth Circuit’s decision does not create a circuit split. It is, in fact, consistent with the only other circuit court decision to have considered the federal-preemption question presented here. To overcome this, the Utilities take the Sixth Circuit’s decision out of context and frame decisions of other circuits at a “high level of generality” in an attempt to manufacture a conflict. *Cf. Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (*per curiam*). That attempt falls short. The Utilities in many cases cite general factual discussions of energy generation and transmission, rather than a decision’s relevant legal holding. *See, e.g.,* FirstEnergy Pet.21–22 (citing *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49–50 (D.C. Cir. 2014) for its general discussion of how the electricity market has changed over time).

A. The only circuit that has addressed the preemption question has agreed that laws like Ohio’s RTO mandate are not preempted.

Only one circuit other than the Sixth has considered whether the Federal Power Act preempts state RTO mandates like the one found in Ohio Rev. Code §4928.12(A). That circuit, the Ninth, agreed that such mandates are not preempted. It recently held in

Pacific Gas & Electric Co. v. FERC that the Federal Power Act does not preempt a California statute that, like Ohio’s RTO mandate, requires membership in an organization that independently manages the electric grid. Nos. 24-2527 & 24-3786, 2025 WL 1912363, *2–3 (9th Cir. July 11, 2025); *see also* California Public Utilities Code Section 362(c). As the Sixth Circuit did here, the Ninth Circuit concluded that neither obstacle nor conflict preemption barred the California law in question. *Id.*

Significantly, the Ninth Circuit rejected the broad application of federal preemption that the Utilities assert here. Like the Sixth Circuit, *see* AEP Pet.App.39a–41a, it noted that the Federal Power Act leaves certain areas of traditional state authority untouched, including “regulation of intrastate wholesale markets and retail sales of electricity,” *Pacific Gas & Electric Co.*, 2025 WL 1912363 at *3. And it concluded that remains true even when a state regulation, like an RTO mandate, has “indirect effects” on the interstate electricity market. *Id.*

B. The Sixth Circuit’s decision does not conflict with the cases that the Utilities cite.

The Utilities’ attempt to manufacture a split with other circuits proceeds in two steps. They first take the Sixth Circuit’s decision out of context and imply that the Sixth Circuit questioned FERC’s exclusive authority to regulate the interstate electricity market. *See* FirstEnergy Pet.21; AEP Pet.16. Having done that, they then cite cases from other circuits that reaffirm the uncontroversial proposition that FERC alone is responsible for regulating the interstate

market. There is no conflict on that point, however, because it is not one that the Sixth Circuit rejected.

1. The Utilities assert that “FERC’s jurisdiction over the interstate transmission of electricity is exclusive.” AEP Pet.16; *see* FirstEnergy Pet.21. Everyone, including the Sixth Circuit, agrees. The Sixth Circuit noted below that FERC has “jurisdiction over all facilities for [interstate] transmission or sale of electric energy [at wholesale].” AEP Pet.App.38a–39a (quoting 16 U.S.C. §824(b)(1)) (brackets in petition).

The Utilities take the Sixth Circuit’s decision out of context when they suggest otherwise. American Electric Power, for example, cites a snippet of the Sixth Circuit’s decision in which it wrote that the Federal Power Act’s “text does not grant FERC *exclusive* jurisdiction over interstate transmission facilities.” AEP Pet.4 (quoting the Sixth Circuit’s decision) (emphasis added). Read in context, that quoted language merely says that States are not prevented from adopting regulations aimed at their *intrastate* electricity market simply because those regulations might have an “incidental” and “indirect” effect on interstate transmission. *See* Pet.App.39a–41a.

2. None of the alleged conflict cases, from the Third, Fifth, Eighth, and D.C. Circuits, involved intrastate regulations that had only an incidental or indirect interstate effect. Many cases that the Utilities cite instead involved state laws that, unlike Ohio’s RTO mandate, aimed to *directly* regulate the interstate electricity market, or otherwise intrude on FERC’s authority.

The Third Circuit rejected, for example, New Jersey’s attempt to interfere with the interstate price for electricity by providing additional payments to certain

electricity generators. *See PPL Energy Plus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014). It was this attempt to directly regulate an area committed to FERC’s exclusive jurisdiction—*interstate* electricity transmission—that the Third Circuit found problematic. *See id.* at 253. Highlighting the differences between that case and this one, the Third Circuit distinguished New Jersey’s impermissible direct regulation from other types of regulations that would have been permissible because they were targeted at *intrastate* activities and had only an “incidental effect” on interstate markets. *Id.* at 254.

The Fifth Circuit decision the Utilities cite also involved a law that directly interfered with FERC’s authority. Texas, in that case, made its own determination about whether a utility complied with a FERC tariff and adjusted retail rates on the basis that the utility had violated that tariff. *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 582 (5th Cir. 2006). The Fifth Circuit rejected Texas’s attempt to step into FERC’s shoes.

The two Eighth Circuit decisions the Utilities cite also do not conflict with the decision below. One case did not address federal preemption. *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 919–20 (8th Cir. 2009). The other invalidated a Minnesota law that purported to regulate “activity and transactions taking place *wholly outside* of Minnesota.” *North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016) (lead op.). But while the members of the *Heydinger* panel agreed that Minnesota’s law was invalid, they could not agree on *why* that was so. *See id.* at 919–22 (lead op.) (violation of the dormant Commerce Clause); *id.* at 926–27 (Murphy, J., concurring) (FERC preemption); *id.* at 928–29

(Colloton, J., concurring) (FERC and Clean Air Act preemption). The members of the panel that would have found that the Minnesota law intruded on FERC’s exclusive authority, however, would have done so because it banned “wholesale sales of electric energy in interstate commerce.” *Id.* at 926 (Murphy, J., concurring); *id.* at 928 (Colloton, J., concurring).

The three D.C. Circuit decisions that the Utilities cite across their two separate briefs are even less relevant. Two of them did not involve preemption questions. *See Portland Gen Elec. Co. v. FERC*, 854 F.3d 692 (D.C. Cir. 2017); *Green Dev., LLC v. FERC*, 77 F.4th 997 (D.C. Cir. 2023). The third, which only tangentially touched on preemption, recognized that States retain significant regulatory authority. It found that FERC had the authority to adopt a challenged rule because the rule did not “interfere with traditional state authority.” *See South Carolina Pub. Serv. Auth.*, 762 F.3d at 64. But, even then, the Utilities do not cite that portion of that D.C. Circuit decision. FirstEnergy cites the decision only for its factual background, not its holding. That background merely observed that the electricity market has changed over time as it has become less vertically integrated. *See* FirstEnergy Pet.21–22 (citing *South Carolina Pub. Serv. Auth.*, 762 F.3d at 49–50).

The flaws in the Utilities’ effort to generate a circuit conflict can be seen most clearly when it comes to the conflict that they allege with respect to the Ninth Circuit. The only Ninth Circuit decision that directly addressed the preemption question that is presented in this case is the one discussed above: *Pacific Gas & Electric Co.* And that decision, as already discussed, does not *conflict* with the Sixth Circuit’s decision. It

confirms it. *See above* 5–6; *see also Pacific Gas & Electric Co.*, 2025 WL 1912363 at *2–3.

American Electric Power is therefore wrong when it alleges that there is a conflict between the Sixth and Ninth Circuits. *See* AEP Pet.17. In arguing otherwise, it again cites decisions that involved entirely different questions than the preemption question presented here. *See Ass’n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1169 (9th Cir. 1997) (whether the Bonneville Power Administration, a federal agency, had the “statutory authority to transmit non-federal power”); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928–29 (9th Cir. 2002) (whether the Federal Power Act preempted state-law claims related to the interstate transmission of electricity that was explicitly approved of by FERC). It also again frames the relevant question at an improperly high level of generality, citing the Ninth Circuit decisions for the uncontroversial background principle that the “[i]nterstate transmission [of electricity] is clearly a federal matter.” AEP Pet.17 (quoting *Ass’n of Pub. Agency Customers*, 126 F.3d at 1173) (brackets in petition).

II. The Sixth Circuit’s decision does not conflict with this Court’s precedent.

The Utilities repeat their mistakes when they assert that the Sixth Circuit’s decision conflicts with this Court’s precedents. As with their alleged circuit conflict, they frame the relevant issue at an improperly high level of generality and again attempt to manufacture a conflict out of background discussions rather than case holdings.

As evidence of a conflict, the Utilities point to this Court’s statement in *New York v. FERC*, 535 U.S. 1, 7

(2002) that when electricity enters the grid it “immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.” See FirstEnergy Pet.21 (quoting *New York*); AEP Pet.18 (similar). That may be true scientifically. But the laws of preemption do not mirror the laws of physics. The comment that the Utilities quote comes from the Court’s background discussion of the history and development of the electricity market in the United States, not its holding. See *New York*, 535 U.S. at 5–9. *New York*’s holding focused on a different question than the one at issue here: whether FERC had exceeded its authority in regulating certain types of electricity transmission. Unlike this case, it did not “concern the validity of a conflicting state law or regulation.” See *id.* at 18.

Despite what the Utilities imply, the Court in *New York* did not decide whether FERC could assert jurisdiction over all retail transmissions of electricity. The Court noted that the Act gives States the authority to regulate retail electricity sales—including retail transmission—and wrote that any attempt by FERC to exclusively regulate all retail transmissions would raise difficult jurisdictional questions. *Id.* at 27–28. The Court opted not to answer those questions. See *id.* That is, it explicitly *did not* hold what the Utilities now suggest that it did.

The other two decisions that the Utilities cite also do not conflict with the Sixth Circuit’s decision. *Federal Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453 (1972) held only that the evidence presented *in that case* was sufficient to establish that electricity had moved in interstate commerce and that the Federal Power Commission therefore had jurisdiction over the Florida utility that generated it—even

though none of the utility’s equipment directly connected to out-of-state companies. *See id.* at 456–57. That decision did not address whether States lose their ability to regulate intrastate activity simply because that activity has an incidental and indirect effect on interstate electricity transmission.

Hughes v. Talen Energy, 578 U.S. 150 (2016) did not address that question either. The Court in that case rejected Maryland’s attempt to “disregard an interstate wholesale rate required by FERC.” *Id.* at 166. But even so, the Court’s holding in that case was “limited” to such direct intervention. *Id.* The Court reaffirmed that States “may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC’s domain.” *Id.* at 164.

That is what the Sixth Circuit held here. It held that the “indirect impacts” of Ohio’s efforts to improve the reliability of intrastate transmission of electricity and its efforts to improve reliability, options and competition “in the provision of retail electric service” do not trigger federal field preemption. *See* AEP Pet.App.40a–41a (second quotation citing Ohio Rev. Code §4928.12(B)(5)). The Sixth Circuit’s decision was consistent with the Court’s decision in *Hughes*, not in conflict with it. *See id.* at 42a–43a (distinguishing *Hughes*).

Finally, it is telling that, despite their allegations of a conflict with this Court’s decisions, the Utilities have little to say about the most relevant of the Court’s federal-preemption precedents: *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015). The Court in that case limited the scope of the field preemption in this area and held that federal law does not preempt state

regulation simply because it might have an indirect effect on interstate activity. *Id.* at 386–87. The relevant question “in determining whether [a State] law is pre-empted,” *Oneok* held, is “the *target* at which the state law *aims*.” *Id.* at 385 (emphasis in original).

The Utilities, in attempting to distinguish *Oneok*, assert that the target of Ohio’s RTO mandate is “the federal field of interstate transmission.” AEP Pet.23 (citing *Oneok*, 575 U.S. at 385); FirstEnergy Pet.23 (arguing that Ohio’s RTO mandate “acts directly, not incidentally” on interstate activity). But that is wrong. The State’s regulatory target is “retail electric service.” See Ohio Rev. Code §4928.02; §4928.12(B)(5). And that is an area which Congress explicitly left to the States; the Act “leaves to the States alone, the regulation of ‘any other sale’—most notably, any retail sale—of electricity.” *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 265 (2016) (quoting 16 U.S.C. §824(b)).

III. The Sixth Circuit’s decision was correct.

The Sixth Circuit correctly concluded that Ohio’s RTO mandate is not preempted by the Federal Power Act.

Congress may preempt state action expressly. Or it may do so implicitly through conflict or field preemption. See *Murphy v. NCAA*, 584 U.S. 453, 477 (2018). The Utilities bore the burden of demonstrating that the Federal Power Act preempts Ohio law. They failed to carry that burden. The Federal Power Act does not expressly preempt state laws like Ohio’s RTO mandate. And, for reasons discussed next, neither conflict preemption nor field preemption applies here. So the Sixth Circuit correctly held that the Utilities failed to carry their burden here. See AEP

Pet.App.38a (citing *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912–13 (6th Cir. 2007)).

Conflict preemption. Conflict preemption exists where “compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Oneok*, 575 U.S. at 377 (quotation omitted). Here, the former is easily dispatched: no party disputed that it is possible to comply with both Ohio’s RTO mandate and the Federal Power Act, and the Court below was correct to note as much. AEP Pet.App.35a.

The latter is harder. This Court has set “a high threshold” to establish that “a state law is to be preempted for conflicting with the purposes of a federal Act.” *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 607 (2011) (plurality op.) (quoting *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in judgment)); cf. *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment) (expressing skepticism of the Court’s “purposes and objectives pre-emption jurisprudence”). That makes sense. “Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law.” *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead op.). If it were, courts could “wind up displacing perfectly legitimate state laws on the strength of ‘purposes’ that only [they] can see” and that “lack the democratic provenance the Constitution demands before a federal law may be declared supreme.” *Id.* at 778 (lead op.).

Apply those principles to the Federal Power Act. Although the Act gives FERC the authority to encourage voluntary RTO membership, it says nothing about what the States may, or more relevant, *may not* do. See 16 U.S.C. §824a(a). So the Sixth Circuit was correct to refuse the Utilities’ invitation to divine from that statute a federal objective to pursue voluntary RTO membership “at all costs.” AEP Pet.App.37a (quoting *Wyeth*, 555 U.S. at 601 (Thomas, J., concurring in the judgment)). That argument, the court below noted, would require the type of “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” that this Court has rejected. *Id.* at 36a. (quoting *Whiting*, 563 U.S. at 607 (plurality op.)); see also *Wyeth*, 555 U.S. at 587 (Thomas, J., concurring in the judgment).

Field preemption. The Sixth Circuit correctly rejected the Utilities’ field preemption argument as well. “Field preemption occurs when federal law occupies a ‘field’ of regulation ‘so comprehensively that it has left no room for supplementary state legislation.’” *Murphy*, 584 U.S. at 479 (quotation omitted). The Federal Power Act does not. It does the opposite. As the Sixth Circuit noted, rather than clear the field, Congress explicitly reserved State authority in a variety of areas including “*intrastate* transmission.” See AEP Pet.App.39a (emphasis added).

The division of authority between the States and FERC is not always a clean one. “[W]hat states do in the exercise of their powers affects interstate sales, just as what the FERC does in the exercise of its powers affects the need for and economic feasibility of plants over which the states possess authority.” *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 523 (7th Cir. 2018). Recognizing that “each use of authorized power

necessarily affects tasks that have been assigned elsewhere,” *id.*, the Court has held that States “may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC’s domain,” *Hughes*, 578 U.S. at 164 (citing *Oneok*, 575 U.S. at 385).

That is what the Sixth Circuit held here. It noted that Ohio’s RTO mandate fits within the Federal Power Act’s regulatory scheme because “Ohio’s law ... primarily regulates intrastate transmission.” AEP Pet.App.40a. It further noted that Ohio’s laws focus on intrastate facilities and effects, including “the provision of retail electric service.” AEP Pet.App.41a (quoting Ohio Rev. Code §4928.12(B)(5)). Applying this Court’s precedent, the Sixth Circuit concluded that the Federal Power Act does not preempt Ohio’s RTO mandate because it is targeted at intrastate activity and has only incidental effects on the interstate transmission of electricity. AEP Pet.App.40a–41a (applying *Oneok*, 575 U.S. at 385).

It is in fact the Utilities, not the Sixth Circuit, that would depart from the Court’s precedent and rewrite the balance of power that the Federal Power Act strikes. They would have the Court hold that States that are connected to an electric grid that crosses their borders have no authority to regulate even intrastate retail transmission of electricity. *See FirstEnergy* Pet.21–22; AEP Pet.20. But, as the Utilities note, *see id.*, “[i]t is only in Hawaii and Alaska and on the ‘Texas Interconnect’ ... that electricity is distributed entirely within a single State.” *New York*, 535 U.S. at 7. If the Utilities are correct, then the Federal Power Act would preempt state regulation in nearly every state in the country. Interpreting statutory language that was intended to *preserve* state power as leaving

all but three states powerless, would squeeze the largest elephant in the smallest mousehole. *See Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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