Nos. 24-1304 and 24-1318

In the Supreme Court of the United States

FIRSTENERGY SERVICE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

AMERICAN ELECTRIC POWER SERVICE CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under Section 219(c) of the Federal Power Act, 16 U.S.C. 791a *et seq.*, the Federal Energy Regulatory Commission (FERC) "shall * * * provide for incentives to each transmitting utility or electric utility that joins" a regional transmission organization. 16 U.S.C. 824s(c). In 2006, to implement Section 219(c), FERC issued an order allowing utilities that join or maintain membership in a regional transmission organization to apply to FERC for an increase in their otherwise-allowed rates. The questions presented are as follows:

1. Whether the incentives provided under Section 219(c) are available to utilities, such as petitioners, that are required by state law to be members of a regional transmission organization.

2. Whether federal law preempts the Ohio law that requires petitioners to be members of a regional transmission organization.

3. Whether FERC acted arbitrarily or capriciously in distinguishing between petitioners American Electric Power Service Corp. and FirstEnergy Service Co. for purposes of eligibility for the incentives established under Section 219(c), based on the specific circumstances of each utility's prior rate-setting proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 126 F.4th 1107.[1] The court's opinion addressed consolidated petitions for review of two sets of orders issued by the Federal Energy Regulatory Commission. The orders of the Commission in *Dayton*

[1] All citations to the petition appendix refer to No. 24-1304.

Power & Light Company (Pet. App. 157a-210a, 213a-244a) are reported at 176 FERC ¶ 61,025 and 178 FERC ¶ 61,102. The orders of the Commission in *Office of the Ohio Consumers' Counsel* (Pet. App. 64a-120a, 122a-156a) are reported at 181 FERC ¶ 61,214 and 183 FERC ¶ 61,034.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2025. Petitions for rehearing were denied on March 26, 2025 (Pet. App. 63a). The petitions for writs of certiorari were filed on June 20, 2025, and June 24, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, vests the Federal Energy Regulatory Commission (FERC or Commission) with jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. 824. The FPA requires FERC to ensure that rates are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b), and (e).

When Congress enacted the FPA in 1935, "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems." *New York* v. *FERC*, 535 U.S. 1, 5 (2002). Those vertically integrated firms typically "operated as separate, local monopolies." *Ibid.* Since the 1970s, however, a combination of technological advances and policy reforms have fostered greatly increased market competition. See *id.* at 7. The electricity market today includes many "[i]ndependent power plants" that do not own their own transmission

lines but instead supply power to an "interconnected 'grid' of near-nationwide scope." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (citation omitted).

FERC has taken a number of steps to facilitate greater competition among power suppliers. In the 1990s, the Commission required utilities that owned or controlled transmission facilities to "offer transmission service to all customers on an equal basis," thus putting independent power generators on equal footing with utilities that own their own transmission lines. *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 536 (2008). A utility that owns or controls transmission facilities must now have on file with FERC "tariffs providing for nondiscriminatory open-access transmission services." *New York*, 535 U.S. at 10 (citation omitted); see *id.* at 11-12.

The Commission also "encouraged transmission providers to establish 'Regional Transmission Organizations,'" or RTOs. *Morgan Stanley Capital Grp.*, 554 U.S. at 536 (quoting 65 Fed. Reg. 810, 811 (Jan. 6, 2000)). RTOs operate a portion of the transmission grid on behalf of transmission-owning member utilities, who agree to "transfer operational control of their facilities" to the RTO "for the purpose of efficient coordination" and enhanced reliability. *Ibid.* Each RTO also operates a market in which utilities "submit bids or offers for generation directly to the RTO, which evaluates and matches buyers and sellers." Pet. App. 7a.

There are currently seven RTOs, which together provide transmission services for approximately two-thirds of the population of the United States. Office of Energy Policy & Innovation, FERC, *Energy Primer: A Handbook for Energy Market Basics* 66 (Dec. 2023).

"One of the largest RTOs in the country is PJM Interconnection (PJM), which coordinates the movement of wholesale electricity across a region that includes Ohio and all or parts of 12 other states plus the District of Columbia." Pet. App. 7a.

b. When FERC first issued a rule encouraging the formation of RTOs, the agency adopted a "voluntary approach" for utilities to form and join such organizations. 65 Fed. Reg. at 834; see *id.* at 831-834. Congress later supplemented the agency's approach in the Energy Policy Act of 2005 (2005 Act), Pub. L. No. 109-58, 119 Stat. 594. That law added to the FPA a new Section 219, which directed FERC to provide certain incentives for utilities to join RTOs. See 2005 Act § 1241, 119 Stat. 961-962.

Specifically, Section 219(a) directs FERC to "establish, by rule, incentive-based * * * rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. 824s(a). Within that broader program of incentives for infrastructure improvements, Section 219(c) specifies that the Commission shall "provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization." 16 U.S.C. 824s(c); see 16 U.S.C. 796(29) (defining "Transmission Organization" to include RTOs). Section 219(d) provides that "[a]ll rates approved under the rules adopted pursuant to this section" are subject to the FPA's requirements "that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential." 16 U.S.C. 824s(d).

In 2006, the Commission issued Order No. 679 to establish the rate treatment incentives contemplated by Section 219. See *Promoting Transmission Investment through Pricing Reform*, 116 FERC ¶ 61,057 (July 20, 2006) (Order No. 679), modified in part on reh'g, 117 FERC ¶ 61,345 (Dec. 22, 2006) (Order No. 679-A), clarified, 119 FERC ¶ 61,062 (Apr. 19, 2007). With respect to RTOs, the Commission adopted a rule stating that FERC "will authorize an incentive-based rate treatment" for a utility that "join[s]" an RTO, "if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory." 18 C.F.R. 35.35(e). The rule specifies that, for these purposes, "an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join" an RTO. *Ibid.*

"Return on equity" is a metric that FERC uses to set a utility's rates based on how much the "utility would need to earn to continue to attract investment." Pet. App. 7a-8a. The "rate treatment" in 18 C.F.R. 35.35(e) is, effectively, authorization from the Commission for a utility to charge its customers more than the base rate that FERC would otherwise approve using the return-on-equity metric. That rate treatment has come to be known as the "RTO adder." Pet. App. 3a; cf. *International Transmission Co.* v. *FERC*, 988 F.3d 471, 474 (D.C. Cir. 2021) (explaining FERC's rate-setting practice of using "adders" on top of base-level rates as a way of "incentivizing needed actions" by utilities).

In Order No. 679, FERC stated that the new rule "does not grant outright any incentives to any public utility." Order No. 679 ¶ 1. To qualify for any of the incentive-based rate treatments in the rule, including

the RTO adder, a utility must apply to the Commission, must meet the specified criteria for that incentive, and must demonstrate that "the incentive package as a whole results in a just and reasonable rate." *Id.* ¶ 2; see *id.* ¶¶ 1, 4-5. FERC stated that it would consider such applications "on a case-by-case basis" and would "require each applicant to justify the incentives it requests." *Id.* ¶ 43; see *id.* ¶¶ 93, 326. With respect to incentives for joining an RTO, the Commission stated that a utility "will be presumed to be eligible for the incentive if it can demonstrate that it has joined an RTO * * * and that its membership is on-going." *Id.* ¶ 327.

On rehearing, the Commission confirmed that the RTO adder would be available to utilities that had already joined an RTO before the rulemaking. Order No. 679-A ¶¶ 80-90. FERC explained that, in its view, the incentive effect of the RTO adder is "equally important" for inducing utilities to both "join and remain" in RTOs. *Id.* ¶ 86 n.142. The Commission therefore declined to limit the RTO adder to utilities that had not yet joined RTOs, observing that doing so would "offer[] no inducement to stay in these organizations for members with the option to withdraw" and thus would "risk[] reducing [RTO] membership and its attendant benefits to consumers." *Id.* ¶ 86.

c. In *California Public Utilities Commission* v. *FERC*, 879 F.3d 966 (9th Cir. 2018) (*CPUC*), a California state agency challenged the Commission's decision to approve an application for the RTO adder submitted by a utility operating in California, see *id.* at 970-972. The state agency contended that California law required the utility to maintain membership in an RTO, and that granting it an RTO adder was arbitrary and capricious. *Id.* at 970; see *id.* at 971-973.

The Ninth Circuit granted the state agency's petition for review and remanded to FERC for further proceedings. *CPUC*, 879 F.3d at 980. The court found that, in practice, the Commission had not been conducting a "case-by-case" review of applications for RTO adders, but had instead been summarily granting each applicant a 50-basis-point RTO adder—that is, a 0.5% upward adjustment of the utility's base rates—upon a showing that the applicant is an RTO member. *Id.* at 974, 978-979. The court observed that Order No. 679 states that a utility will be "presumed to be eligible" for the RTO adder based on membership in an RTO. *Id.* at 974 (citation omitted). In the court's view, the agency had arbitrarily departed from the presumption described in Order No. 679 and had instead begun treating ongoing RTO membership as the "sole criterion" necessary and sufficient to justify the adder. *Id.* at 975.

The Ninth Circuit also concluded that Order No. 679 requires FERC to consider, in its case-by-case analysis, any properly presented arguments about "the voluntariness of a utility's membership in a transmission organization." *CPUC*, 879 F.3d at 975. The Ninth Circuit stated that "[w]hen membership is not voluntary, the incentive is presumably not justified," because the RTO adder cannot serve its purpose of inducing RTO membership if such membership "is already legally mandated." *Id.* at 974.

2. The present dispute arises from consolidated petitions for review of two sets of FERC proceedings, both of which concerned utilities that are required by Ohio law to be members of a transmission organization. Pet. App. 7a. Each of the utilities at issue is a member of PJM, the RTO that encompasses Ohio. *Ibid.* As explained below, the Commission generally concluded,

consistent with the Ninth Circuit's interpretation of Order No. 679 in *CPUC*, that the Ohio utilities are not eligible for the RTO adder because their RTO membership is involuntary. But the Commission declined to remove the RTO adder from the rates that it had previously approved for two of the utilities at issue because those utilities' rates (including the RTO adder) had been approved as part of comprehensive settlements.

a. In 2020, Dayton Power & Light Company (Dayton) applied to FERC for approval of a package of rate incentives, including the RTO adder. Pet. App. 13a-14a. The Public Utilities Commission of Ohio and the Office of the Ohio Consumers' Counsel (OCC) both objected to Dayton's request for the RTO adder, maintaining that the "incentive was unnecessary as, under an Ohio statute, all transmission owners with facilities in Ohio are required to be members of PJM" or another transmission organization. *Id.* at 159a.

FERC denied Dayton's application for the RTO adder, with Commissioners Chatterjee and Danly dissenting. Pet. App. 157a-210a. The Commission determined that Ohio law "requires Dayton to be a member of a Transmission Organization," such as an RTO. *Id.* at 192a; see *id.* at 192a-200a. FERC also confirmed that "voluntariness" is a "necessary consideration in granting the RTO adder." *Id.* at 174a. FERC explained that Section 219 directs the agency to provide "incentives" to utilities that "join[] a Transmission Organization," *id.* at 171a (quoting 16 U.S.C. 824s(c)), and that Order No. 679 implements that directive by providing an "'*inducement*'" for utilities to join or remain members of RTOs where doing so is "voluntary," *id.* at 172a (citation omitted). The Commission stated that it would not be "appropriate to award an incentive for an action that the

requesting entity is required by law to take." *Id.* at 176a.

Dayton had contended that, if Ohio law is understood to require it to be a member of an RTO, then "Ohio law is preempted by the FPA," such that Dayton's ongoing RTO membership should be deemed voluntary. Pet. App. 200a. The Commission declined to address that argument, stating that an agency proceeding concerning an application for rate incentives was "not an appropriate procedural vehicle" for doing so. *Id.* at 204a.

Various parties sought rehearing, which FERC denied over Commissioner Danly's dissent. Pet. App. 213a-244a. The Commission adhered to its view that utilities seeking an RTO adder "must demonstrate voluntariness in order to qualify." *Id.* at 219a. Dayton and several intervenors—including FirstEnergy Service Co. (FirstEnergy) and American Electric Power Service Corp. (AEP), see *id.* at 162a-163a, 217a & n.15—had contended that interpreting Order No. 679 to require a showing of voluntary RTO membership would be "in conflict with the plain language of section 219(c)," *id.* at 222a. The Commission declined to consider that argument, finding it to be a "collateral attack" on Order No. 679 and "beyond the scope" of the *Dayton Power* proceeding. *Ibid.*

b. In 2022, OCC filed a complaint before the Commission concerning FirstEnergy, AEP, and Duke Energy, whose FERC-approved rates already included the RTO adder. Pet. App. 16a.[2] OCC contended that the

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[2] More precisely, OCC's complaint concerned the RTO adder for various Ohio subsidiaries or affiliates of FirstEnergy, AEP, and Duke Energy. See Pet. App. 64a & n.3, 70a. Because that corporate distinction is irrelevant here, this brief refers to the parent companies for simplicity. Cf. FirstEnergy Pet. 1 n.1; AEP Pet. 10.

utilities were ineligible for the incentive "because, like Dayton Power, their RTO participation is legally mandated." *Ibid.* FirstEnergy, AEP, and Duke maintained that they were differently situated than Dayton because their current rates had "resulted from settlement negotiations and removing the [RTO] adder would undermine those agreements." *Ibid.*

FERC granted the complaint in part and denied it in part, with Commissioner Christie concurring and Commissioner Danly concurring in part and dissenting in part. Pet. App. 64a-120a. With respect to AEP, the Commission found that in prior proceedings FERC had made a "specific determination" to grant the RTO adder, *id.* at 96a; that AEP's RTO membership was not voluntary but was instead mandated by the same Ohio statute at issue in *Dayton Power*, *id.* at 98a; and that the RTO adder was "unjust and unreasonable," given the lack of voluntariness, *id.* at 99a.

With respect to FirstEnergy and Duke Energy, however, FERC explained that it had approved an RTO adder as part of "a comprehensive settlement package submitted to the Commission to resolve a complex, multi-issue dispute among those entities, their customers, and other affected parties." Pet. App. 99a. The Commission observed that it could not know "the precise trade-offs and concessions" that had been made by the settling parties, and it declined to "change unilaterally a single aspect of such a comprehensive settlement." *Ibid.* And FERC again declined to consider any argument that the Ohio statute mandating RTO membership is preempted by federal law. See *id.* at 112a-113a.

FERC adhered to those conclusions on rehearing, with Commissioner Danly concurring in part and dis-

senting in part. Pet. App. 122a-156a. Among other things, the Commission reiterated that removing the RTO adder for FirstEnergy and Duke Energy would "strip[] out a single component of an intricate financial package." *Id.* at 140a.

3. Dayton, FirstEnergy, and AEP filed petitions for review of FERC's *Dayton Power* orders in the Sixth Circuit. Pet. App. 18a. AEP and OCC filed petitions for review of FERC's *Consumers' Counsel* orders. *Ibid.* The Sixth Circuit consolidated the petitions for review and affirmed, except that a majority of the panel concluded that FERC had acted arbitrarily and capriciously in declining to remove the RTO adder for FirstEnergy and Duke Energy. *Id.* at 1a-62a. The court of appeals therefore granted the petitions for review of FERC's orders in *Consumers' Counsel* to the extent that the Commission had "declin[ed] to revoke the RTO adder from Duke's and FirstEnergy's adder-inclusive settlement rates," and the court remanded for further proceedings. *Id.* at 48a.

As relevant here, the utilities argued on appeal that Section 219(c) "requires FERC to award RTO adders 'to each' utility 'that joins' an RTO, regardless of whether their participation was voluntary." Pet. App. 20a (citation omitted). Although the Commission in *Dayton Power* had rejected that argument as an impermissible collateral attack on the validity of Order No. 679, the court of appeals held that the continuing application of Order No. 679 could be challenged in later ratemaking proceedings. See *id.* at 21a-23a. On the merits, however, the court rejected the utilities' arguments as inconsistent with "the 'best reading' of the statute." *Id.* at 23a (quoting *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 400 (2024)). After analyzing

the statutory text, context, and purpose, the court determined that "the 'best reading' of Section 219(c) * * * is that the RTO adder is reserved for those utilities that voluntarily choose to join an RTO." *Id.* at 30a.

The court of appeals emphasized that Section 219(c) directs FERC to provide "incentives" to each utility that "joins" an RTO. Pet. App. 23a-24a (quoting 16 U.S.C. 824s(c)). The court explained that, although the term "join" can encompass "mandatory participation," it generally "connote[s] voluntary action." *Id.* at 24a. The court further explained that the term "'[i]ncentive' carries an even stronger connotation of voluntariness." *Ibid.* And the court agreed with the Ninth Circuit that, because "'[a]n incentive cannot "induce" behavior that is already legally mandated,'" Section 219(c)'s plain text indicates that the incentives authorized by that provision are available only if "joining an RTO * * * is voluntary." *Id.* at 24a-25a (quoting *CPUC*, 879 F.3d at 974).

The court of appeals also rejected the utilities' preemption arguments. Pet. App. 30a-40a; cf. *id.* at 55a (Moore, J., concurring in part and dissenting in part). The court saw no conflict between the FPA and Ohio law, explaining that "Congress's decision not to mandate RTO membership federally doesn't necessarily imply an intent to prevent states from imposing such requirements, especially when the state laws further Congress's overall goal of increasing RTO participation." *Id.* at 35a. The court also saw no basis for field preemption. See *id.* at 35a-40a.

With respect to *Consumers' Counsel*, the court of appeals affirmed the Commission's decision to remove AEP's RTO adder. Pet. App. 42a-43a. But a majority of the panel concluded that FERC had acted arbitrarily and capriciously in declining to remove the RTO adder

for FirstEnergy and Duke Energy. *Id.* at 43a-46a. The Commission had viewed FirstEnergy and Duke Energy as differently situated than AEP because FERC had approved the RTO adder for the first two utilities only as a component of a comprehensive settlement, whereas FERC had approved the RTO adder for AEP in a discrete proceeding before later approving a broader settlement. See *id.* at 44a-45a; see also p. 10, *supra*. The panel majority concluded that all three utilities were similarly situated, observing that the RTO adder had an unknowable effect on the settling parties' "trade-offs and concessions." Pet. App. 46a (citation omitted). The majority therefore saw no sound basis for treating the three utilities differently for these purposes, and it concluded that all three are equally ineligible for the RTO adder. *Ibid.*

Judge Nalbandian joined the panel opinion in full and issued a separate concurring opinion to address the continuing relevance of "*Skidmore* deference" after this Court's decision in *Loper Bright*, *supra*. Pet. App. 49a; see *id.* at 49a-54a.

Judge Moore concurred in part and dissented in part. Pet. App. 55a-62a. She would have affirmed the Commission's orders in all respects. In particular, she concluded that FERC had acted reasonably in choosing to "preserve the integrity of Duke's and FirstEnergy's [settlement] agreements by declining to strip out each's RTO adder," and by treating AEP differently based on differing circumstances. *Id.* at 59a.

After the panel's decision, FirstEnergy, AEP, and Duke Energy petitioned for rehearing en banc. The court of appeals denied the three petitions, after no member of the court requested a vote on rehearing en banc. Pet. App. 63a.

ARGUMENT

Petitioners FirstEnergy (Pet. 15-20) and AEP (Pet. 24-28) contend that, in implementing Section 219(c) of the Federal Power Act, FERC may not limit the agency's incentive-based rate treatment (the RTO adder) to utilities whose membership in a regional transmission organization is voluntary. Petitioners further contend, in the alternative, that the Ohio statute requiring them to be members of a transmission organization is preempted by federal law. FirstEnergy Pet. 20-24; AEP Pet. 15-23. FirstEnergy additionally challenges (Pet. 11-15) the court of appeals' holding that FERC acted arbitrarily and capriciously by declining to remove the RTO adder it had previously granted to FirstEnergy.

Those contentions do not warrant further review. The court of appeals correctly upheld the Commission's authority to deny an application for an RTO adder when a utility fails to show that its ongoing membership in an RTO is voluntary. That aspect of the decision below accords with the interpretation of Section 219(c) endorsed by the Ninth Circuit—the only other court of appeals to consider the issue. The Sixth Circuit also correctly rejected petitioners' alternative contention that the FPA preempts Ohio's RTO-membership requirement. And although FERC disagrees with the court's conclusion that the Commission lacked a reasonable basis for declining to remove the RTO adder for FirstEnergy, that holding turned on case-specific aspects of particular prior ratemaking proceedings and does not satisfy this Court's traditional certiorari criteria. See Sup. Ct. R. 10.

1. The court of appeals correctly held that FERC may deny or remove RTO adders for utilities that are

required by state law to participate in an RTO or other transmission organization. Pet. App. 23a-30a, 42a-43a. The court concluded that "[t]he 'single, best' reading of Section 219(c) is that the RTO adder requires voluntary membership." *Id.* at 23a (quoting *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 400 (2024)). After the Sixth Circuit's decision here, the Ninth Circuit issued an unpublished decision that endorsed the same interpretation of Section 219(c). See *Pacific Gas & Elec. Co.* v. *FERC*, No. 24-2527, 2025 WL 1912363, at *3 (9th Cir. July 11, 2025) (*PG&E*). No other court of appeals has addressed the Section 219(c) question.

a. Section 219 of the FPA directs the Commission to adopt "incentive-based * * * rate treatments for the transmission of electric energy in interstate commerce" in order to encourage infrastructure investments and other measures for the ultimate purpose of "benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. 824s(a); see 16 U.S.C. 824s(b). Within that program, Section 219(c) requires FERC to "provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization," including an RTO. 16 U.S.C. 824s(c).

Petitioners emphasize that a utility can be said to "join[]" an RTO, 16 U.S.C. 824s(c), even when state law requires such membership, just as a soldier who is drafted can be said to have joined the army. AEP Pet. 26; see FirstEnergy Pet. 16. As the court of appeals explained, however, the term "join[]" appears here alongside the term "incentive[]," 16 U.S.C. 824s(c), which connotes an "inducement to undertake an action" that a party otherwise might decline to take, Pet. App. 28a. An "incentive" is "something that incites or en-

courages action" or that "spurs someone * * * to seek an outcome." *Id.* at 24a (brackets omitted) (quoting *Black's Law Dictionary* 907 (12th ed. 2024)); see, *e.g.*, *The American Heritage Dictionary of the English Language* 885 (4th ed. 2006) (defining an "incentive" as "[s]omething, such as the fear of punishment or the expectation of reward, that induces action or motivates effort"). To reprise petitioners' example, it would be strange to describe veterans benefits as an "incentive" to join the military with respect to soldiers who are drafted and who therefore cannot decline to join.

Reading the term "incentive" in Section 219(c) to connote an inducement to undertake a voluntary action is also consistent with the broader statutory context. Section 219(a) directs FERC to establish "incentive-based" rate treatments for utilities, 16 U.S.C. 824s(a), and Section 219(c) makes clear that the incentives to be made available for RTO membership are a subset of the broader incentives described in Section 219(a). See 16 U.S.C. 824s(c) (providing for RTO-related incentives "[i]n the rule issued under this section"). Accordingly, the incentives made available under Section 219(c) "must be in the form of an 'incentive-based' rate treatment, as dictated by Section 219(a)." Pet. App. 25a. Petitioners do not explain how allowing utilities to charge higher rates based on RTO membership provides any form of "incentive-based" treatment for utilities whose continued membership is required by state law. To the contrary, "[i]n the context of utilities," incentive-based rate treatments generally refer "to regulations offering an award to a utility that *voluntarily* takes some future action." *Ibid.*

Section 219(b) likewise supports the court of appeals' construction of Section 219(a). Section 219(b) directs

the Commission to provide incentive-based rate treatments in order to, among other things, "promot[e] capital investment" and "encourage deployment" of new technologies to improve the transmission grid. 16 U.S.C. 824s(b). As the court of appeals observed, those incentive-based rate treatments likewise presuppose a degree of voluntariness: The Commission "can 'promote' or 'encourage' only voluntary choices to invest, not mandatory ones." Pet. App. 26a.

In the proceedings below, the utilities contended that their interpretation gives effect to the understanding that "incentive" connotes voluntariness because, in their view, Section 219(c) is designed to provide an incentive "for construction and investment in new transmission" facilities rather than an incentive for RTO membership. Pet. App. 28a. To the extent that petitioners continue to press that argument (cf. AEP Pet. 27), they do not explain how the RTO adder could provide an incentive for investment on their reading of the statute, where utilities would be eligible to receive the adder "without constructing new lines or making new investments." Pet. App. 29a. In any event, Section 219(c) is explicitly designed to induce the conduct of "join[ing] a Transmission Organization." 16 U.S.C. 824s(c). Congress addressed rate incentives for investment and infrastructure construction in Section 219(b), not Section 219(c). See Pet. App. 29a-30a.

b. The Sixth Circuit's decision here is consistent with the Ninth Circuit's unpublished decision in *PG&E*—the only other appellate decision that has addressed whether FERC must make the RTO adder available to utilities whose RTO membership is required by state law. As explained above (see pp. 6-7, *supra*), the Ninth Circuit had previously construed Order No. 679 to require FERC to

make a case-by-case determination of whether a particular utility is eligible for the RTO adder, see *California Pub. Utils. Comm'n* v. *FERC*, 879 F.3d 966, 978-979 (2018), and had stated that the "voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder," *id.* at 975. The Ninth Circuit had focused in that case on whether granting the RTO adder without regard to voluntariness was consistent with the terms of Order No. 679 itself. See *id.* at 974-977.

After *CPUC*, FERC determined that the utilities in that case were *not* required by California law to be members of an RTO and were therefore eligible for the RTO adder; the Ninth Circuit agreed with that understanding of California law; and the California legislature then amended state law to make RTO participation mandatory. See *PG&E*, 2025 WL 1912363, at *1-*2 (describing prior proceedings). In light of that change in state law, the Commission subsequently denied various California utilities' requests for the RTO adder, and the Ninth Circuit affirmed. *Id.* at *1. As particularly relevant here, the utilities argued "that 'the plain text of Section 219(c) of the FPA awards the adder to all utilities regardless of whether their participation is compelled by state law.'" *Id.* at *3 (brackets omitted). The Ninth Circuit disagreed. *Ibid.*

Exercising its "'independent judgment' based on the 'best reading' of the statute," the Ninth Circuit concluded that the "single, best reading of Section 219(c) is that [the] RTO adder requires voluntary membership" in an RTO. *PG&E*, 2025 WL 1912363, at *3 (quoting *Loper Bright*, 603 U.S. at 399, 400, 412). The court explained that "[a]n 'incentive' is 'something that incites or has a tendency to incite determination or action,'"

ibid. (citation omitted), and that the term does not encompass a reward for behavior "that is already legally mandated," *ibid.* (quoting *CPUC*, 879 F.3d at 974). And like the Sixth Circuit here, the Ninth Circuit viewed its interpretation of Section 219(c) as confirmed by the surrounding provisions. See *ibid.* (discussing Section 219(a), (b), and (d)). The Ninth Circuit concluded that, "[v]iewed as a whole, the 'best' reading of Section 219 is that the statutory provision provides incentives for a variety of voluntary actions by utilities, with an overarching goal of benefitting consumers." *Ibid.*

c. Petitioners do not identify any circuit conflict on Section 219(c)'s application to membership in state-mandated RTOs. Nor do they suggest that the decision below conflicts with any decision of this Court. Petitioners' various criticisms of the decision below lack merit and provide no sound reason for further review of the question presented.

FirstEnergy (Pet. 16) and AEP (Pet. 24-25) contend that the decision below reflects a departure or about-face from the interpretation of Section 219 that FERC had previously endorsed. As the Ninth Circuit explained in *CPUC*, however, the Commission's Order No. 679—the order by which the Commission first implemented Section 219(c)—referred in various places to the provision of incentives for "'voluntary'" conduct and declined to adopt an across-the-board "generic" adder for all transmission-organization members. 879 F.3d at 978 (quoting Order No. 679 ¶ 331). In *CPUC*, the Ninth Circuit held that FERC had departed from Order No. 679 by granting the RTO adder to all RTO members without a case-by-case assessment and without considering voluntariness. See *id.* at 973-979. When the agency later focused on the issue of volutariness, it reasonably

concluded that "voluntariness * * * is a necessary consideration in granting the RTO Adder." Pet. App. 174a (*Dayton Power*).

Petitioners are correct (*e.g.*, AEP Pet. 24) that dissenting Members of the Commission took a different view of Section 219(c). See Pet. App. 209a (Danly, Comm'r, dissenting) (concluding that Congress "could have established" a voluntariness limitation in Section 219(c) "but Congress did not"); cf. *id.* at 206a-208a (Chatterjee, Comm'r, dissenting) (urging FERC to address voluntariness in a future rulemaking rather than in individual ratemaking proceedings). But Order No. 679 itself did not endorse petitioners' current view that voluntariness is irrelevant to eligibility for the RTO adder. And to the extent the agency changed course after *CPUC*, it explained its reasons for doing so.

In any event, the Section 219(c) question presented here concerns the "best meaning" of the statute, *Loper Bright*, 603 U.S. at 400, and the Sixth Circuit resolved that question without any deference to the Commission's views. See Pet. App. 23a (applying *Loper Bright* in rejecting petitioners' proposed interpretation); accord *PG&E*, 2025 WL 1912363, at *3 (same). And because FERC itself has implemented Section 219(c) to authorize the RTO adder only for utilities that voluntarily join or remain members of an RTO, the Sixth Circuit declined to address "how much leeway Congress gave FERC" to implement the statute in a different manner. Pet. App. 23a n.11. The decision below therefore stands for the proposition that FERC may deny the RTO adder to a utility whose RTO membership is mandated by state law, without necessarily foreclosing the possibility that the Commission might have statutory authority to adopt and justify a different approach in some circum-

stances. See *ibid.* (repeating this Court's observation that the single best reading of a statute might be that the statute "leaves the agency 'flexibility'") (quoting *Loper Bright*, 603 U.S. at 395).

Petitioners' remaining criticisms likewise lack merit. The Sixth Circuit did not "ignore[] the word 'shall'" (AEP Pet. 26), misread the term "'join'" (*ibid.*), or render any portion of Section 219(c) inoperative or superfluous (*id.* at 27). Cf. FirstEnergy Pet. 16-17. Fundamentally, as the court explained, petitioners' interpretation of Section 219(c) does not reflect the ordinary understanding of the term "incentive," which connotes an inducement to voluntary conduct. See Pet. App. 24a, 28a-30a; pp. 15-16, *supra*. To the extent that individual States' decisions to mandate RTO membership may bear on which utilities attract investment (see AEP Pet. 31; FirstEnergy Pet. 17, 19), Section 219(b) authorizes FERC to establish incentive-based rate treatments to encourage capital investment. Section 219(c), by contrast, directs FERC to provide "incentives" for utilities to "join[]" RTOs. 16 U.S.C. 824s(c).

2. The court of appeals also rejected petitioners' alternative argument that their participation in an RTO should be considered voluntary because the FPA preempts the Ohio law that requires them to be members. See Pet. App. 30a-40a. That aspect of the decision below is correct, does not conflict with any decision of this Court or another court of appeals, and does not otherwise warrant further review.

a. The relevant Ohio statute provides, with specified exceptions, that "no entity shall own or control transmission facilities * * * located in this state * * * unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission

entities." Ohio Rev. Code § 4928.12(A) (1999); see *id.* § 4928.12(A) and (B) (listing the requirements for a "qualifying transmission entity"). Petitioners no longer dispute that the Ohio law, if not preempted, "compels their * * * membership" in a transmission organization. Pet. App. 13a-14a & n.7; cf. AEP Pet. 10; FirstEnergy Pet. 1. No FPA provision expressly preempts such a state-law requirement, and petitioners do not dispute that "compliance with both Ohio law and the FPA is possible." Pet. App. 33a.

Petitioners nonetheless contend that the Ohio statute conflicts with federal law because it poses "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. App. 33a (quoting *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000)); see FirstEnergy Pet. 23-24; AEP Pet. 19. The court of appeals correctly rejected that argument. Section 219 reflects Congress's determination that RTO membership is desirable and can "benefit[] consumers by ensuring reliability and reducing the cost of delivered power." 16 U.S.C. 824s(a). Section 219 also shows that Congress chose to encourage rather than mandate RTO membership, consistent with FERC's approach before Section 219 was enacted. See p. 4, *supra*. But Congress never "command[ed] that RTO membership remain voluntary" notwithstanding States' contrary preferences. AEP Pet. 19.[3]

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[3] Petitioners (AEP Pet. 21; FirstEnergy Pet. 23-24) also rely on 16 U.S.C. 824a(a), which directs the Commission to divide the United States into "regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy." That provision does not require that all forms of interconnection remain voluntary as a matter of state law,

Nor is there any logical inconsistency between Congress's decision not to require RTO membership as a matter of federal law and its decision not to preclude individual States from requiring membership. State laws requiring RTO membership "further Congress's overall goal of increasing RTO participation" and thus pose no obstacle to the accomplishment of Congress's purposes. Pet. App. 35a; see *PG&E*, 2025 WL 1912363, at *3 ("That Congress chose to incentivize, rather than mandate, RTO membership does not necessarily imply an intent to prevent states from mandating it.").

Petitioners' field-preemption arguments are likewise without merit. See AEP Pet. 18-21; FirstEnergy Pet. 20-24. To establish field preemption, the party resisting application of state law must show that "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016). That standard is not satisfied here.

The FPA authorizes FERC to regulate interstate transmission of electrical energy, but the statute also "limits FERC's regulatory reach" and thereby recognizes a role for state regulation. *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 266 (2016). For example, the statute restricts the Commission's authority to regulate facilities used for generation, local distribution, transmission in intrastate commerce, and energy consumed wholly by the transmitter. 16 U.S.C. 824(b)(1). And the FPA's opening provision describing FERC's role states that federal regulation under the FPA will "extend only to those matters which are not

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but instead simply requires FERC to take steps to facilitate voluntary interconnection among and between discrete regions.

subject to regulation by the States." 16 U.S.C. 824(a); see Pet. App. 37a ("Congress, in a single sentence, both granted and limited FERC's jurisdiction.").

The court of appeals concluded that "Ohio's law fits within this scheme because it primarily regulates intrastate transmission." Pet. App. 37a. Specifically, "the statute's attention to improving options and reliability for Ohio consumers * * * points to a primary concern with intrastate matters." *Id.* at 38a. State efforts to improve reliability, efficiency, and costs of intrastate transmission by mandating RTO membership may also have a salutary effect on interstate transmission. But "such indirect impacts" are not sufficient, standing alone, to "trigger field preemption" under the FPA. *Id.* at 37a; accord *PG&E*, 2025 WL 1912363, at *3.

Nor do considerations of legislative purpose support petitioners' field-preemption arguments. This Court's decisions resolving preemption issues under the FPA's sister statute, the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, have "emphasize[d] the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." *Oneok, Inc.* v. *Learjet, Inc.*, 575 U.S. 373, 385 (2015); cf. *Talen Energy Mktg.*, 578 U.S at 164 n.10 (observing that "[t]his Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa"). Here, petitioners have not shown that the challenged Ohio-law mandate is aimed at regulating the interstate activities that are within FERC's exclusive authority. FirstEnergy points (Pet. 23) to the Ohio statute's reliance on federal law to define the affected transmission facilities. But the Sixth Circuit recognized that "Ohio's incorporation of federal standards reflects an intent to cooperate with, rather than contradict, federal law." Pet. App. 39a.

b. The court of appeals' preemption holding does not implicate any division of authority warranting this Court's review. The only other circuit to have addressed an analogous preemption argument rejected it. See *PG&E*, 2025 WL 1912363, at *2-*3 (9th Cir.) (finding that a California law requiring RTO membership "is not preempted by federal law," and rejecting both obstacle- and field-preemption theories).

Petitioners' asserted circuit conflict on preemption rests on a series of decisions recognizing that "FERC's jurisdiction over the interstate transmission of electricity is exclusive." AEP Pet. 16; cf. FirstEnergy Pet. 21-22. For example, petitioners invoke (AEP Pet. 21) the D.C. Circuit's observation in *Green Development, LLC* v. *FERC*, 77 F.4th 997 (2023), that the FPA "grants FERC exclusive jurisdiction of the transmission and wholesale sale of electricity in interstate commerce," *id.* at 1000 (citing 16 U.S.C. 824(b)). That observation was made in the opening sentence of the "Background" section of the court's decision, and the D.C. Circuit did not address any question of preemption. See *ibid.*

The only state-law requirement whose validity is at issue here is Ohio's requirement that transmission owners with facilities in the State must join a transmission organization. Petitioners do not contend that any other circuit has found a comparable state-law membership requirement to be preempted. Petitioners, moreover, have expressed no desire to withdraw from RTO membership. Their only apparent practical harm from the Ohio-law mandate is that FERC has treated the involuntary character of petitioners' own RTO membership as a ground for denying the RTO adder. The limited nature of the state-law requirement at issue here, and the idiosyncratic character of petitioners' reason for

challenging that requirement, would make this case a poor vehicle for clarifying the general scope of States' authority to regulate transmission of electricity.

c. In any event, petitioners are wrong to suggest that any conflict in approach exists between the decision below and prior decisions of other circuits (or of this Court, see FirstEnergy Pet. 21-22) recognizing FERC's zone of exclusive authority. The Sixth Circuit acknowledged the relevant FPA provisions, but it viewed the particular Ohio law at issue here as an application of the State's retained authority to regulate intrastate transmission activities. See Pet. App. 36a-37a (observing that the FPA gives FERC "jurisdiction over all facilities for [interstate] transmission or sale of electric energy [at wholesale]," while also recognizing "states' role in transmission regulation") (alterations in original).

In particular, the court of appeals reasonably concluded that the Ohio law primarily aims to "improve intrastate transmission reliability, efficiency, and costs," and that it "fits within" the zone of regulatory authority that the FPA leaves open to States. Pet. App. 37a. That conclusion does not suggest that the Sixth Circuit has committed itself to the view that States may directly regulate the interstate market for electric energy. Indeed, FERC has recognized in a later administrative proceeding that the Sixth Circuit's decision "does not limit the Commission's exclusive jurisdiction over the rates, terms, and conditions of service for transmitting electricity in interstate commerce." *San Diego Gas & Elec. Co.*, 192 FERC ¶ 61,015 P 36 n.102 (2025).

Petitioners observe that "'electrons flow freely without regard to state borders' and that, accordingly, transmission facilities that operate as part of the interstate grid are *interstate* facilities, even though they are

physically located in a particular state." AEP Pet. 17-18 (citation omitted); see FirstEnergy Pet. 22 (positing that "*intrastate* transmission * * * is not even a possibility in Ohio," at least where (as here) the relevant facilities are "connected to the interstate grid"). Petitioners are correct that the facilities at issue here are engaged in the interstate transmission of electricity insofar as they are serving the interconnected nationwide electrical grid, and that the facilities are therefore subject to regulation by FERC. But the Sixth Circuit's opinion need not be read to suggest otherwise.

The court of appeals' judgment rested instead on the narrower conclusion that Congress has not occupied the field to the extent of ousting Ohio from requiring the owners and operators of transmission facilities located within that State to join RTOs for the benefit of Ohio consumers. See Pet. App. 38a (stressing the Ohio law's "primary concern with intrastate matters"); cf. *San Diego*, 192 FERC ¶ 61,015 P 36 (agreeing with the Sixth Circuit's analysis and explaining that, although a State's efforts to "improve transmission reliability and efficiency" within the State by mandating RTO membership "may affect interstate transmission," such "'indirect impacts don't trigger field preemption'") (citation omitted). That conclusion does not create any circuit conflict or otherwise warrant further review.

3. Finally, FirstEnergy seeks further review of the court of appeals' determination that FERC acted arbitrarily and capriciously in declining to remove the RTO adder for FirstEnergy and Duke Energy, where the adder had been previously approved as part of a comprehensive settlement. See FirstEnergy Pet. 11-14 & n.6; cf. Duke Energy Br. of Resp. in Supp. of Cert. 8-13 (urging review of the same issue).

As noted above, FERC disagrees with that aspect of the court of appeals' decision. See Pet. App. 96a-101a, 138a-142a (setting forth the Commission's reasons for treating FirstEnergy and Duke Energy differently from AEP, given the differing circumstances under which the Commission had previously approved settlements that include the RTO adder in the authorized rates for each utility); see also *id.* at 56a-62a (Moore, J., concurring in part and dissenting in part) (agreeing with the Commission's approach). But the question whether FERC had a reasonable and well-explained basis for declining to remove the RTO adder from the previously approved rates for FirstEnergy and Duke Energy is highly case-specific and does not implicate any broader question of national importance warranting this Court's review. The Sixth Circuit's decision focused on the particular history of these administrative proceedings and lacks any significant prospective importance for judicial review of future FERC-approved settlements in other contexts. Contra FirstEnergy Pet. 12-13. Further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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