No. 24-1318

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Review is now even more warranted than when the petition was filed, as the briefs in opposition confirm. On the first question, the Ninth Circuit and the Federal Energy Regulatory Commission ("FERC") itself have embraced the split-creating theory the Sixth Circuit pioneered: They say federal jurisdiction over operation of interstate transmission facilities is not "exclusive," Pet. App. 39a, and states can regulate such facilities within their borders on the theory that they are "primarily regulat[ing] intrastate transmission," Pet. App. 40a; *see* FERC BIO 24; *PG&E Co. v. FERC*, No. 24-2527, 2025 WL1912363, at *3 (9th Cir. July 11, 2025). That conflicts with cases recognizing that the "federal government has exclusive control over interstate rates and transmission," Pet. 16 (quotation marks omitted), and that transmission lines connected to the national grid are in interstate (not *intra*state) commerce, Pet. 17-18. No small thing, that theory also conflicts with the text: The Federal Power Act ("FPA") preserves state jurisdiction over facilities used "only for" intrastate transmission. 16 U.S.C. § 824(b)(1). Nobody claims the facilities here are used only for intrastate transmission, or defends rewriting "only" into "primarily."

Respondents do not refute the deepening circuit conflict on this basic rule of jurisdiction. Nor can they deny that the damage from that rule is all the greater because of how the Sixth Circuit answered the second question—rewriting Congress's command to promulgate a "rule [that] provides for incentives *to each … utility that joins*" an RTO to include a voluntariness

requirement. 16 U.S.C. § 824s(c). These holdings license states to intervene in the federal sphere—regulating service, adjusting rates, and picking winners and losers.

This is happening. After FERC awarded three California utilities an adder for their RTO participation, California enacted a statute whose sole purpose (as interpreted by FERC) was to reduce their federal rate by imposing a paper RTO participation mandate. Meanwhile, favored utilities exempted from this mandate keep the adder Congress mandated *everyone* should receive. And California has driven a truck through the hole in the federal regulatory scheme created by the Sixth and Ninth Circuits—asserting authority to require utilities to withdraw from federal regulated markets if the federal regulator approves rules California believes conflict with its own policies.[1] Granting review on both questions is imperative.

ARGUMENT

I. THE COURT SHOULD REVIEW THE SIXTH CIRCUIT'S PREEMPTION HOLDING.

Although Respondents bob and weave, they cannot dodge the revolution the Sixth Circuit launched. Before, the law was clear and uniform: The federal government had "exclusive" jurisdiction over operation of "all facilities" for "transmission of electric energy in interstate commerce" (as the FPA provides, 16 U.S.C.

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[1] *E.g.*, Assemb. Bill No. 825, ch. 116, § 4(a), 2025-2026 Reg. Sess. (Cal. enacted Sept. 19, 2025) (requiring utilities to leave "an independent regional organization" if its rules do not "provide greenhouse gas emissions information and protocols").

§ 824(b)(1)), Pet. 16-17, and everyone understood that "facilities used … only for the transmission of electric energy in intrastate commerce" existed only in Alaska, Hawaii, and part of Texas, Pet. 18 (quoting 16 U.S.C. § 824(b)(1)).

Under that law, this case was easy: As FERC concedes, "the facilities at issue here are engaged in the interstate transmission of electricity insofar as they are serving the interconnected nationwide electric grid." FERC BIO 27. Ohio's statute commands utilities to *turn over* operational control of these facilities to someone else. That plainly *regulates* the operation of those facilities. No Respondent argues otherwise. So it should have followed that Ohio's law is preempted.

The Sixth Circuit disagreed only by adopting different rules of jurisdiction, rejecting the rules prevailing in other circuits. It rejected the principle that FERC's jurisdiction over interstate transmission, where applicable, is "exclusive." Pet. App. 39a. It invented a new theory by which states can regulate interstate transmission facilities—positing that because Petitioner's facilities are physically located in Ohio, the state is "primarily regulating intrastate transmission." *Id.* at 40a. And the Sixth Circuit justified that new theory via an unmoored inquiry into intent, positing that if states claim they seek to improve "intrastate … reliability, efficiency, and costs," they may regulate interstate transmission. *Id.*

The Ninth Circuit's recent *PG&E* decision only deepens the conflict. Embracing the Sixth Circuit's theory, the Ninth Circuit described FERC's exclusive

jurisdiction as limited to "interstate wholesale rates" and indicated that California's RTO mandate falls "within the domain Congress assigned to the states," which it described as encompassing "intrastate wholesale markets and retail sales." 2025 WL1912363, at *2-3 (citing 16 U.S.C. § 824(b)(1)). A petition for writ of certiorari has been filed but, as of this writing, not yet docketed. *Cf.* Order at 2, *San Diego Gas & Electric Co. v. FERC*, Nos. 25-1980, 25-5064 (9th Cir. Sept. 30, 2025) (noting forthcoming petition).

FERC in its orders has now also endorsed the Sixth Circuit's theory, authorizing states to directly regulate interstate transmission if "legislative findings" recite a concern with in-state reliability, rates, or services. *San Diego Gas & Elec. Co.*, 192 FERC ¶ 61,015 at P 36 (2025). True, the government's opposition is decidedly more circumspect, contradicting the Sixth Circuit's statement that the facilities here are somehow intrastate and averring only that the Sixth Circuit's bottom-line conclusion was "reasonabl[e]" and "need not be read to" diminish the Commission's exclusive jurisdiction. FERC BIO 26-27. But the government's equivocation just underscores how indefensible is the decision below. And there is no hiding from the rule of law the Sixth Circuit, Ninth Circuit, and FERC's orders embrace.[2]

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[2] The government descends into incoherence with its citation to a footnote in its *San Diego* order asserting that "the *Dayton* decision does not limit the Commission's exclusive jurisdiction." Pet. 35. The *body* of that order embraces without caveat the Sixth Circuit's untenable holdings that FERC's "jurisdiction over transmission is

Respondents do not refute the conflicting rule of federal jurisdiction the recent decisions embrace. Nor does this conflict become less significant or acute because the other circuits have not addressed the precise *facts* of a "state-law [RTO] membership requirement." FERC BIO 25; *see* PUCO BIO 5; OCC BIO 24-25. And with FERC's exclusive jurisdiction over interstate transmission so settled, it is no surprise that circuit courts for decades have taken that bedrock principle as an uncontroversial building block. So while FERC observes (at 25) that one D.C. Circuit decision recited that principle in its "Background" section, the D.C. Circuit has applied the same principle to reject a FERC position that (as here) too narrowly read its own exclusive authority. *Orangeburg v. FERC*, 862 F.3d 1071, 1086 (D.C. Cir. 2017).

Indeed, Respondents' attempts at distinctions fail to erase more specific conflicts with the decision below. In *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), the Third Circuit rejected New Jersey's argument that it could regulate matters within FERC's exclusive jurisdiction—there, interstate wholesale rates—on the ground that New Jersey professed to act "for local purposes" and its "policy goals" included "promot[ing] new generation resources." *Id.* at 253; *see* 16 U.S.C. § 824(b)(1). "New Jersey's reasons for regulating in the federal field," the Third Circuit explained, "cannot save its effort," 766 F.3d at 253-54—rejecting the argument

… not exclusive" and that RTO mandates "primarily regulate[] intrastate transmission." *San Diego Gas*, 192 FERC ¶ 61,015 at PP 35-36.

the Sixth Circuit, with its emphasis on Ohio's "primary concern," accepted, Pet. App. 41a.

Ohio glosses *AEP Texas North Co. v. Texas Industrial Energy Consumers*, 473 F.3d 581, 582 (5th Cir. 2006), as involving an attempt to "directly interfere[] with FERC's authority" by "adjust[ing] retail rates on the basis" of Texas's determinations about interstate electricity service. PUCO BIO 8. The instant case is, if anything, more egregious—as Ohio has directly regulated in the federal field and leveraged this regulation to adjust *wholesale* transmission rates. Nor does Ohio get anywhere with its observation that in *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016), the two "members of the panel that would have found that the Minnesota law intruded on FERC's exclusive authority … would have done so because it banned 'wholesale sales of electric energy in interstate commerce.'" Ohio BIO 9 (quoting *Heydinger*, 825 F.3d at 926 (Murphy, J., concurring)); *see* 825 F.3d at 928 (Colloton, J., concurring). Here, Ohio has likewise banned interstate wholesale transmission, unless utilities comply with its RTO membership diktat.

These decisions are correct, and the Sixth Circuit was wrong. Pet. App. 41a. Preemption analysis turns on "what the state law in fact does, not how the litigant"—or court—"might choose to describe it." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636–37 (2013); *accord Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012). Indeed, *Hughes* addressed the same argument in a near-identical context: "That Maryland was attempting to encourage construction of new in-state

generation," an issue generally within states' domain, did "not save its program"—because "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 164 (2016).

The decision in *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015), which the Sixth Circuit and Respondents invoke, *e.g.*, FERC BIO 24; PUCO BIO 12-13; OCC BIO 28-29, only underscores their error. That case asked whether California could apply generally applicable antitrust laws to conduct regulated by the Natural Gas Act. *Oneok* instructed courts to look at the "*target* at which the state law *aims*"—emphasizing that antitrust laws "are not aimed at natural-gas companies in particular, but all businesses in the marketplace." 575 U.S. at 385-87. *Oneok* does not suggest that states can regulate the federal field specifically and escape preemption by claiming they had state-jurisdictional reasons for doing so.

A sure-fire sign of the error and confusion in the decision below is that Respondents cannot agree among themselves. No Respondent actually *defends* the Sixth Circuit's rewriting of the statute—which reserves to states authority over "facilities used … *only for*" intrastate transmission, 16 U.S.C. § 824(b)(1) (emphasis added)—to create its "primarily regulates" test. Distancing itself from that holding, OCC says Ohio aimed at "retail electric service." OCC BIO 1, 31. But that implausible claim is irreconcilable with the Ohio statute's express regulation of interstate transmission.

The Public Utility Commission of Ohio suggests Ohio has regulated "intrastate retail transmission," PUCO BIO 16, and it glosses this Court's decision in *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972), as a fact-specific decision holding "only that the evidence presented *in that case* was sufficient to establish that electricity had moved in interstate commerce." PUCO BIO 11-12. But again, the Ohio statute regulates all interstate transmission facilities, whether engaged in wholesale or retail transmissions. And *Florida Power & Light* is no fact-specific curiosity but the foundation for perhaps the most fundamental rule of modern transmission jurisdiction—that today intra-state transmission exists "only in Hawaii and Alaska and on the 'Texas Interconnect.'" *New York v. FERC*, 535 U.S. 1, 6-7 (2002).

Respondents fare no better with their observation that states may generally regulate within their sphere despite "indirect" or "incidental" effects on the federal domain. *E.g.*, FERC BIO 24; PUCO BIO 6, 12. Ohio, by commanding utilities to hand over control of their interstate facilities, is regulating those facilities—a direct regulation. Nor does it matter that the FPA preserves states' jurisdiction in *other* ways, such as retail service, generation facilities, and local distribution. *E.g.*, FERC BIO 23; OCC BIO 28-29; PUCO BIO 16; *see* Pet. App. 39a. Ohio is not regulating those things. It is regulating interstate transmission.

Nor do Respondents have any answer to how RTO mandates conflict with Congress's directive that FERC provide for "regional districts for the *voluntary*

interconnection and coordination of facilities." 16 U.S.C. § 824a(a) (emphasis added). FERC buries its non-response in a footnote that ignores how Ohio's law thwarts Congress's command. If states mandate RTO membership, FERC cannot "encourage" "voluntary interconnection" as Congress envisioned. *Id.* If states say their utilities must remain in particular RTOs, FERC cannot make sure that RTOs "embrace an area which, *in the judgment of the Commission*," is appropriate; states instead decide. *Id.* (emphasis added). And if states become deciders, they exceed the merely consultative role that Congress gave them—a "reasonable opportunity to present … views." *Id.* Moreover, with Congress having expressly barred even its designated federal regulator from dictating this aspect of interstate transmission, it makes zero sense to say that Congress silently authorized states to leap beyond their sphere.

The government's makeweight vehicle arguments (at 25-26) only underscore why this case is an ideal vehicle. If a utility subject to an RTO mandate is actually *trying to leave* (or not join), the weighty preemption issues will get litigated in an emergency posture, and by the time this Court can weigh the merits, the years-long delay may moot the issue and thwart the benefits the utility is seeking. Here, because the legal issue arises from FERC's decision "denying the RTO adder," FERC BIO 25, the case can proceed with deliberation.

II. THE COURT SHOULD REVIEW WHETHER THE SIXTH CIRCUIT CORRECTLY ADDED A NONTEXTUAL VOLUNTARINESS REQUIREMENT TO SECTION 219(c).

The government does not deny that two FERC Chairmen have disagreed with the Sixth Circuit's reading of Section 219(c). And it cannot gainsay that, if anything, this issue is more important today than when Chairman Chatterjee warned of "creat[ing] an uneven playing field in the competition for investment capital." *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 at P 2 n.151 (2021) (Chatterjee, Comm'r, dissenting). The government itself acknowledges the national energy emergency, Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025), and the grave concern that "lack of reliability in the electric grid puts the national and economic security of the American people at risk," Exec. Order No. 14262, § 1, 90 Fed. Reg. 15,521 (Apr. 8, 2025). Yet in the midst of this emergency, the decisions of the Sixth and Ninth Circuits are creating a checkerboard. At least eight states have RTO mandates, with two more in the offing. Pet. 30.

The government also cannot deny that the manipulation invited by FERC's newfound approach is already happening, as the *PG&E* decision shows. After the Ninth Circuit initially held that California's investor-owned utilities were entitled to the adder, *Cal. Pub. Utils. Comm'n v. FERC*, 29 F.4th 454, 466 (9th Cir. 2022), California enacted a statute that (as interpreted by FERC) has the sole purpose and effect of depriving these utilities of the adder. *PG&E*, 2025 WL 1912363, at

*4. Meanwhile, other favored companies continue to receive the adder. *Horizon W. Transmission, LLC*, 192 FERC ¶ 61,093 at P 25 (2025). So now states, rather than Congress or FERC, control transmission rates of return—control they can exercise to favor or disfavor utilities at whim. It is no wonder, then, that multiple Respondents join Petitioners in urging review. *See* Brief of Respondent Duke Energy Ohio, Inc. in Support of Certiorari; Brief of Respondent PJM Interconnection, L.L.C., in Support of Certiorari.

The government's unpersuasive merits response underscores the need for review. The government has little to say about the text commanding that FERC "*shall*" issue a "rule" to provide an incentive "to *each*" utility "*that* joins" an RTO. 16 U.S.C. § 824s(c). Its only argument is that "the term 'incentive[]' … connotes an inducement to voluntary conduct." FERC BIO 21. But Section 219(c) requires a "rule" that provides "incentives." And such a rule continues to provide inducements to voluntary conduct even if some *individual utilities* face state RTO mandates.

The government's example proves the point. The government says "it would be strange to describe veterans benefits as an 'incentive' to join the military with respect to soldiers who are drafted." FERC BIO 16. But it would not be strange—instead, it would be perfectly natural—to describe the veterans benefits *statute* as providing incentives even if some soldiers are drafted.

"[S]tatutory context," FERC BIO 16, again only reinforces the decision below's error. The government

says the reference to "incentive-based rate treatments" in Section 219(a), and certain directives in Section 219(b), "presuppose a degree of voluntariness." FERC BIO 17. But even accepting that reading, Congress in Section 219(c) omitted any similar requirement. And when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," the "specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks omitted). If anything, Congress's decision to limit *other* parts of Section 219 to payments inducing particular conduct, *see* 16 U.S.C. § 824s(b)(2), makes it *more* telling that Congress omitted any similar requirement from Section 219(c).

Respondents also have no answer to another piece of context: When Congress enacted Section 219(c), several states, including Ohio, already purported to impose RTO mandates. *See* 220 ILCS 5/16-126(a) (1997); Ohio Rev. Code Ann. § 4928.12(A) (1999). "We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"—an observation this Court made about Ohio state law *specifically*. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Against that backdrop, it is inconceivable that the Congress that commanded FERC to adopt rules granting incentives "to each" utility "that joins" *really* meant to allow FERC to grant incentives to only some utilities. Either Congress understood that those mandates were preempted, or Congress understood that utilities would continue to receive the adder despite such mandates. That is why FERC for a decade routinely

granted the adder to RTO members, as the statute contemplates, and changed course only after it (incorrectly) concluded that a Ninth Circuit decision compelled a different result—a reality that Respondents downplay but cannot deny. FERC BIO 7 (acknowledging that FERC had "been summarily granting each applicant a 50-basis-point RTO adder").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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