Nos. 14-614 and 14-623

IN THE

Supreme Court of the United States

W. KEVIN HUGHES, *ET AL.*,

Petitioners,

v.

PPL ENERGYPLUS, L.L.C., *ET AL.*,

Respondents.

CPV MARYLAND, LLC,

Petitioners,

v.

PPL ENERGYPLUS, L.L.C., *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization with members and supporters nationwide. Since its founding in 1971, Public Citizen has appeared on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues and worked for enactment and enforcement of laws protecting consumers, workers, and the public.

As relevant to this case, Public Citizen is particularly concerned with protecting the interests of retail electricity customers. Those consumers have a critical interest in the development of adequate generation capacity to ensure that their need for electricity is met. They also have a direct interest in the justness and reasonableness of the rates paid for wholesale power capacity, as those wholesale rates are ultimately passed on to consumers as a component of the retail rates they pay. Public Citizen has therefore been involved in a number of cases in this Court and the lower courts involving the authority and obligation of the Federal Energy Regulatory Commission (FERC) to enforce the fundamental policy of the Federal Power Act (FPA) that rates be just and reasonable.[2]

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

[2] *See, e.g., NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008); *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012); *Public Citizen v. FERC*, No. 14-1244 (D.C. Cir.) (pending).

Public Citizen is also keenly interested in issues of federal preemption, including implied preemption. Claims of preemption of state laws and regulatory actions based on the expansive assertion that they intrude into exclusively federal fields or pose obstacles to the achievement of federal policy often prevent states from protecting their citizens while promoting no clearly enunciated congressional policies. Public Citizen therefore frequently participates in cases in this Court and the lower federal courts to urge that the courts give full effect to the presumption against preemption of state law and exercise caution in concluding that purported federal policies not written into law impliedly negate state laws and action.[3]

These interests converge in this case. The State of Maryland has acted to promote the interests of its citizens in an adequate supply of electricity by requiring its retail utilities to contract with a willing provider of new generation capacity to meet the state's long-term needs for additional power. It has done so in a way that gives full scope to FERC's authority over wholesale power rates and contracts. Nonetheless, the court of appeals held that the FPA impliedly preempts those contracts, on the theory that they venture into the field of wholesale electricity rate regulation exclusively assigned to FERC and stand as an obstacle to the congressional purposes embodied in the FPA. Because that ruling rests on a distorted view of the FPA's policies and an unduly intrusive approach to implied preemption, Public Citizen submits this brief in support of petitioners.

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[3] *See, e.g., Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Maryland has sought to ensure adequate electric supply for its citizens by exercising its authority over retail electric utilities to require them to enter into long-term contracts with a supplier of new generation capacity. The price specified in those contracts is the product not of state regulation, but of a bid voluntarily submitted by the supplier; absent a willing bidder capable of supplying power at the specified price, there would be no contracts. The contracts are subject to FPA filing requirements and have been filed with FERC. They are also subject to the substantive requirements of sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d & 824e, which require that all rates and charges for wholesale electricity, as well as all rules, regulations, practices, and contracts affecting rates and charges, be just and reasonable.

In addition, the contracts require that the power supplier participate in the capacity auctions conducted by PJM, the regional transmission organization that manages the transmission grid for Maryland and neighboring states. FERC has full authority over the rules under which those auctions are conducted, as well as over the lawfulness of the resulting rates, and it has exercised that authority to approve revisions of the rules that in its view are necessary to ensure that the support Maryland has given to the construction of the needed generation capacity does not adversely affect the auction process.

Nonetheless, the Fourth Circuit held that the Maryland power supply contracts were impliedly preempted by the FPA, because they supposedly infringe FERC's exclusive authority over wholesale rate

regulation and pose an obstacle to the achievement of the Act's purposes and objectives.

Such a finding of implied preemption, under this Court's precedents, requires a clear showing that Congress intended to supersede the operation of state law or the exercise of state authority, and demands careful attention to the policies actually embodied in federal law. The preeminent policy of the relevant federal statute, the FPA, is that wholesale power rates and contracts be filed with FERC so that it may determine whether rates are just and reasonable. The contracts at issue here by no means conflict with that policy: The justness and reasonableness of the contracts themselves and the wholesale capacity auction rates that they affect remain fully subject to FERC's procedural and substantive authority. The Fourth Circuit's novel finding that contracts *subject to FERC's regulatory authority under the FPA* nonetheless conflict with the Act reflects an untenable expansion of implied preemption and must be reversed.

ARGUMENT

I. The presumption against preemption allows implied field and conflict preemption only when necessary to implement clearly manifested congressional intent.

Any application of implied preemption must take as a starting-point that where, as here, a state has acted within the scope of its traditional police or regulatory authority—here, its authority to require retail utilities to take steps reasonably necessary to procure power for their customers and to incur prudent obligations to that end—there is a strong presumption that federal law does not supersede that authority "unless that was the clear and manifest purpose of

Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). In all cases raising issues of federal preemption—including issues of implied conflict preemption—"the purpose of Congress is the ultimate touchstone." *Id*.

Congressional intent to preempt conflicting state laws can most readily be discerned when there is a direct conflict between state and federal law—that is, when the directives of state and federal law contradict one another such that compliance with state law would violate federal law, or vice versa. *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577–78 (2011). Where, as here, that showing is not made or attempted, a party claiming implied preemption faces a "demanding" burden. *Wyeth*, 555 U.S. at 573. A clear showing that state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may suffice for preemption, *see id*. at 563–64, but the Court treads near the boundaries of legitimate statutory and constitutional construction when it engages in such a "potentially boundless" inquiry. *Id*. at 587 (Thomas, J., concurring in the judgment) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting)). As a result, adjudication of a claim of "obstacle" preemption requires careful consideration of the federal statutory and regulatory framework to determine whether federal legislation in fact reflects a clear and manifest "purpose of Congress" to preempt the particular exercise of state authority at issue. *Id*. at 566 (majority opinion).

II. The FPA's core policy is that wholesale power rates and contracts must be filed with FERC so that it can determine whether they are just and reasonable.

This Court is thoroughly familiar with the federal statute at issue, the FPA, as cases under the Act have repeatedly reached this Court in the 80 years since its enactment. The Court most recently described the regulatory structure created by the FPA in its opinions in *NRG Power Marketing, LLC v. Maine Public Utilities Comm'n*, 558 U.S. 165, 171 (2010), and *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 531–32 (2008). As the Court summarized in *NRG*:

> The FPA gives FERC authority to regulate the "sale of electric energy at wholesale in interstate commerce." *See* 16 U.S.C. § 824(b)(1). The Act allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract. See § 824d(c), (d). Whether set by tariff or contract, however, all rates must be "just and reasonable." § 824d(a). Rates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect. §§ 824d(e), 824e(a). Following a hearing, the Commission may set aside any rate found "unjust, unreasonable, unduly discriminatory or preferential," and replace it with a just and reasonable rate. § 824e(a).

558 U.S. at 170. Rates and contracts properly filed with FERC, and not suspended or set aside by the agency, are effective in accordance with the terms of the filing and receive legal protection under the "'filed

rate' doctrine." *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962–67 (1986).[4]

In recent years, FERC has claimed to exercise its authority over wholesale rates by authorizing "market-based" mechanisms for establishing rates, including wholesale capacity auctions. *See NRG*, 558 U.S. at 168–70; *see also Morgan Stanley*, 554 U.S. at 535–38. Although the lawfulness of some features of FERC's market-based "innovations" (*id.* at 535) under the FPA is subject to dispute,[5] FERC at least exercises regulatory authority in reviewing and approving the procedures used in wholesale power auctions and revising them as it perceives necessary to lead to rates that FERC predicts will be just and reasonable. And because rates always remain subject to the statutory requirements of justness and reasonableness, *see id.* at 545, the courts of appeals have held that FERC must retain its power to review the actual rates resulting from market mechanisms, although FERC has

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[4] The justness and reasonableness of rates established through contracts voluntarily entered between willing buyers and sellers is assessed (unless a contract or tariff provides otherwise) under the "*Mobile-Sierra* doctrine," under which the agreed rate is presumed to be just and reasonable unless the rate would adversely affect the "public interest." *See Morgan Stanley*, 554 U.S. at 532–33 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)). Whether the contracts at issue would qualify for review under *Mobile-Sierra* is uncertain, but is not at issue and does not affect preemption analysis.

[5] *See, e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012); *see also Morgan Stanley*, 554 U.S. at 548 ("[W]e do not address the lawfulness of FERC's market-based rates scheme, which assuredly has its critics.").

unfortunately not always recognized its obligation to exercise that power. *See Cal. ex rel. Harris v. FERC*, 784 F.3d 1267, 1272–75 (9th Cir. 2015).

In short, the congressional design of the FPA subjects wholesale electricity rates, and contracts setting forth or affecting such rates, to FERC's authority, both procedurally and substantively, by requiring that rates and contracts be filed with FERC and by providing that FERC must set them aside if they are not just and reasonable.

III. The contracts at issue neither infringe FERC's authority nor pose an obstacle to achievement of the FPA's purposes.

It is difficult to understand how the contracts at issue could be said to conflict with the FPA's statutory scheme, or with the policies it embodies. Maryland has not sought to displace either FERC's procedural or substantive authority under the FPA, nor do the contracts have the effect of doing so. The contracts are subject to the FPA's filing requirement and have been filed with FERC. Nothing prevents FERC from reviewing their justness and reasonableness and invalidating them if it determines that they fail to meet the FPA's substantive requirements.

Moreover, to the extent that the contracts affect the PJM wholesale capacity auctions and the resulting rates, they also do not conflict with FERC's authority over those rates. FERC retains and has exercised authority to determine the terms under which the power supplier may bid its capacity into the auction and to establish auction procedures that in its view can be expected to produce just and reasonable rates. *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 86 (3d Cir. 2014) (reviewing and affirming FERC's

order directing PJM to revise its auction rules to ensure that participation by suppliers with contracts like the ones at issue here would not distort capacity auction prices). FERC also retains full authority to review the rates resulting from PJM capacity auctions and to set them aside and fix new rates (or establish new procedures to set a new rate) if it determines that the auction results are not just and reasonable.

The Fourth Circuit suggested that the very fact that FERC took steps that, in FERC's view, ensured the fairness of the auction results in light of the participation of suppliers with contracts like the ones here confirms that the contracts conflict with the FPA. Pet. App. 27a. That view makes little sense: FERC's job is to ensure just and reasonable rates, and if the contracts do not prevent it from doing so, any conflict with the FPA is illusory. Whether FERC has adequately exercised its authority to ensure that capacity auctions are conducted under conditions likely to lead to just and reasonable rates, and that the rates actually are just and reasonable, is another issue. Regardless of whether FERC has done its job properly, however, these contracts have not prevented it from doing so.

The Fourth Circuit's view that the contracts were, nonetheless, subject to implied field preemption rested on its view that Maryland had sought to share FERC's exclusive authority to regulate wholesale rates—which makes no sense given the Maryland neither dictated the rate offered by the supplier nor displaced FERC's authority over the contracts and the wholesale capacity rates that they affect through the supplier's participation in the PJM auctions. And the court's conclusion that the contracts conflict with the

purposes and objectives of Congress reflects its own judgment that the contracts might "distort the PJM auction's price signals, thus 'interfer[ing] with the method by which the federal statute was designed to reach its goals.'" Pet. App. 25a (No. 14-614). Such a policy argument by no means establishes a clear intention by Congress to preempt contracts that effectively provide the supplier a guaranteed price in return for a long-term commitment to provide power. Indeed, nothing in the statute suggests that Congress in any way "designed [it] to reach its goals" through "price signals" sent by auctions. Congress designed the statute to reach its goals by providing for filing of wholesale rates and contracts with FERC and by subjecting those rates and contracts to the standard of justness and reasonableness.[6]

Moreover, even if the court had focused on the actual statutory criteria and concluded that the contracts were likely to interfere with the real congressional objective of just and reasonable rates, such a judicial determination would not be a proper basis for a finding of implied conflict preemption in view of the regulatory structure of the FPA. Under the FPA, "FERC has exclusive jurisdiction to determine the reasonableness of wholesale rates," and outside of proceedings for judicial review of the Commission's

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[6] The Fourth Circuit's invocation of a feature of the PJM auction rules guaranteeing that certain new resources will receive a fixed price for three years does not suggest that a power supplier's ability to bargain for a longer-term rate must be displaced. Pet. App. 11a–12a (No. 14-614). Such reasoning confuses a minimum standard with a maximum standard, a slender basis for inferring conflict with congressional objectives. *See Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 335 (2011).

orders, federal courts are bound by FERC's determination. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988). If FERC's ability to exercise that exclusive authority is not displaced, there can be no conflict with the FPA except to the extent FERC itself fails properly to exercise its authority—which would pose an issue of administrative law concerning the propriety of FERC's action, not federal preemption of state law.

What *would* conflict with the FPA's purposes and objectives would be for a court, outside of the FPA's provisions for judicial review of FERC actions, to determine that a contract subject to FERC's authority may lead to unjust and unreasonable rates where FERC has made no such determination. *See Mont.-Dak. Utils. Co. v. N.W. Pub. Serv. Co.*, 341 U.S. 246, 251–52 (1951). The claim that contracts filed with and subject to review by FERC are nonetheless preempted by the FPA because a court thinks they may distort rates reflects an attempt to "separate what Congress has joined together"—namely, the substantive and procedural requirements of the FPA. *Id.* at 251. Because "the right to a reasonable rate is the right to the rate which the Commission files or fixes," *id.* at 252, a contract filed with the FPA and subject to FERC's rate-review authority cannot be said to be in conflict with the FPA (outside of proceedings for judicial review of a FERC action concerning the contract). A court has no authority to review a filed rate's or contract's compliance with the FPA except in proceedings for review of some action or inaction by FERC. Indeed, this Court has long recognized that such judicial action would be "wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon

that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440–41 (1907).

The extraordinary nature of the implied preemption ruling here can be illustrated by contrasting the procedural and substantive circumstances of this case with cases that have held state regulatory actions or the application of state laws to be impliedly preempted by the FPA. The typical FPA preemption case involves a claim that the application of state law would be in derogation of a rate approved by or properly filed with FERC and would thus be preempted by the filed rate doctrine. *See, e.g., Nantahala*, 476 U.S. at 962; *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981).

Such claims are typically made in procedural circumstances in which FERC is unable itself to enforce the requirements of the FPA. For example, a state utility commission, acting in a proceeding involving retail utilities over which it, not FERC, has ratemaking authority, may deny the utility the right to recover from its ratepayers payments it has made to a wholesale supplier under a FERC-filed or FERC-approved contract or tariff, or pursuant to some other action taken by FERC, on the ground that the wholesale rate accepted or approved by FERC is unreasonable. In judicial review proceedings involving that state agency order, the utility then may argue that the agency's action is in conflict with FERC's exclusive authority over wholesale power rates (or contracts and practices affecting rates). *See*, *e.g.*, *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *Miss. Power & Light*, 487 U.S. at 370;

Nantahala, 476 U.S. at 961–62. In such circumstances, a judicial determination that the state agency's action is in conflict with FERC's authority, made in a proceeding to review the state agency action that is properly justiciable, is the only practical way for the supremacy of federal law to be vindicated.

Similarly, a conflict preemption issue may arise as a defense to a lawsuit making claims under state law that, if allowed, would be inconsistent with the filed rate doctrine (because, for example, the claims would treat payments that were, as a matter of federal law, lawful under the filed rate doctrine as legally cognizable damages). *See*, *e.g.*, *Ark. La. Gas*, 453 U.S. at 577–85 (1981). Again, in such cases, recognizing a defense to a claim based on preemption is essential to give effect to the Commission's authority.

Here, the situation is very different. The claim is not presented in a review proceeding involving a state agency action that would otherwise evade federal authority because of FERC's inability directly to set aside the agency's action, nor does it arise as a defense to a claim in court that FERC would otherwise be powerless to influence (except, possibly, by intervening to present a preemption argument, *cf. FPC v. La. Power & Light Co.*, 406 U.S. 621 (1972)). Rather, the claim appears to assert a stand-alone right of action based on the Supremacy Clause, urging the courts to determine for themselves whether contracts and rates that FERC itself could review directly are in conflict with the FPA.

In light of last Term's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), that there is no implied right of action under the Supremacy Clause, the basis for the cognizability of such

a claim is unclear. Although *Armstrong* recognized that state officials may in some circumstances be enjoined from violating federal law, there is no reason to think that the FPA requires recognition of such an action for injunctive relief where any potential violation of the FPA may be redressed directly by FERC itself. *See id.* at 1385 (holding the existence of a structure for administrative enforcement of federal law displaced the courts' equitable power to enjoin potential violations by state officials). The argument for deferring to such administrative mechanisms for enforcement of federal law is particularly powerful in "the complex rate-setting area," *id*. at 1389 (Breyer, J., concurring), and especially when the agency has the authority to modify rules (such as the auction procedures here) to ensure that the objectives of federal law are met. *See id*. at 1389–90. Thus, this Court has held that an agency's power to suspend and determine the lawfulness of rates displaces judicial authority to enjoin the effectiveness of those rates outside of proceedings to review the agency's action. *Arrow Transp. Co. v. S. Ry.*, 372 U.S. 658 (1963).

Moreover, even if an action such as this one were judicially cognizable, the question whether the contracts violate the FPA's substantive requirements is an issue that, at a minimum, would appear to fall within FERC's primary jurisdiction—a circumstance that ordinarily calls for a court to stay its hand to allow the agency to exercise its power to make a determination in the first instance. *See*, *e.g.*, *FPC v. La. Power*, 406 U.S. at 647; *City of Osceola v. Entergy Ark., Inc.*, 791 F.3d 904, 908–09 (8th Cir. 2015).

We realize that whether there is a right of action and whether the lower courts should have deferred to

FERC's primary jurisdiction are not questions presented here. We emphasize these procedural points to underscore the extraordinary nature of what the lower courts did: Even though FERC is fully capable of determining whether the contracts here would result in rates that violate the FPA—and in fact has already acted to try to ensure that they would not by altering PJM's auction procedures to take into account the effects of the contracts—the lower courts undertook to exercise for themselves FERC's exclusive authority to determine, in the first instance, whether a contract is lawful under the FPA.

Whether the lower courts' action is viewed through the lens of implied preemption, primary jurisdiction, or the availability of a right of action, the result is the same: If the state has not interfered with FERC's ability to exercise its powers under the FPA, a court cannot set aside the contracts at issue. A state action that complies with the FPA's procedural requirements and allows FERC to exercise the full scope of its statutory powers to set aside contracts and rates that violate the FPA neither intrudes on FERC's domain nor poses obstacles to the achievement of Congress's purposes and objectives in enacting the FPA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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