NOS. 14-634, 14-694

In the
Supreme Court of the United States

CPV POWER DEVELOPMENT, INC., *et al.*,
Petitioners,
v.
PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

JOSEPH L. FIORDALISO, *et al.*,
Petitioners,
v.
PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that a novel state scheme that guarantees select generators a price different from the price approved by the Federal Energy Regulatory Commission ("FERC") for their capacity sales into the federally regulated wholesale market intrudes upon FERC's exclusive jurisdiction over rates "received … for or in connection" with wholesale sales. 16 U.S.C. §824d(a).

PARTIES TO THE PROCEEDING

Petitioners are CPV Power Development, Inc.; EIF Newark, LLC (formerly Hess Newark LLC); and the President and Commissioners of the New Jersey Board of Public Utilities (at the time of the relevant orders, Lee A. Solomon, Joseph L. Fiordaliso, Jeanne M. Fox, and Nicholas V. Asselta), who were sued in their official capacities.

Respondents are PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC, PPL New Jersey Biogas, LLC, and PPL Renewable Energy, LLC; Calpine Energy Services L.P., Calpine Mid–Atlantic Generation, LLC, Calpine New Jersey Generation, LLC, Calpine Bethlehem, LLC, Calpine Mid–Merit, LLC, Calpine Vineland Solar, LLC, Calpine Mid–Atlantic Marketing, LLC, and Calpine Newark, LLC; Exelon Generation Company, LLC; Atlantic City Electric Company; Public Service Electric & Gas Company (PSEG Power LLC); and Essential Power, LLC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents state:

PPL EnergyPlus LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC ("PPL Parties") are wholly owned, indirect subsidiaries of PPL Corporation, a publicly traded Pennsylvania corporation. No other publicly held company has a 10% or greater ownership interest in the PPL Parties or PPL Corporation.

Calpine Energy Services L.P.; Calpine Mid-Atlantic Generation, LLC; Calpine New Jersey Generation, LLC; Calpine Bethlehem, LLC; Calpine Mid-Merit, LLC; Calpine Vineland Solar, LLC; Calpine Mid-Atlantic Marketing, LLC; and Calpine Newark, LLC ("Calpine Parties") are wholly owned subsidiaries of Calpine Corporation, a publicly traded a Delaware corporation. No other publicly held company has a 10% or greater ownership interest in the Calpine Parties or Calpine Corporation.

Exelon Generation Co., LLC is a Pennsylvania limited liability company and a wholly owned subsidiary of Exelon Ventures Company, LLC, which in turn is a wholly owned subsidiary of Exelon Corporation, a publicly traded corporation. No other publicly held company has a 10% or greater ownership interest in the Exelon Generation Company, LLC, Exelon Ventures Company, LLC or Exelon Corporation.

Atlantic City Electric Company is a wholly owned subsidiary of Conectiv, LLC ("Conectiv"), which in turn is a wholly owned subsidiary of Pepco Holdings, Inc., a publicly traded corporation. No other publicly held company has a 10% or greater ownership interest in Atlantic City Electric Company, Conectiv or Pepco Holdings, Inc.

Public Service Electric and Gas Company ("PSE&G") is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated, a publicly traded corporation. No other publicly held company has a 10% or greater ownership interest in Public Service Electric and Gas Company or Public Service Enterprise Group Incorporated.

Essential Power, LLC, formerly known as North American Energy Alliance, LLC, is a Delaware limited liability company. No publicly held corporation holds an interest in Essential Power, LLC.

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INTRODUCTION

This case involves a consciously narrow decision resolving a factbound preemption question on which there is no division in authority. Indeed, although New Jersey and Maryland embarked on a similar course that was challenged in cases on parallel tracks through the Third and Fourth Circuits, the unanimous judgment of all four courts—two district and two circuit—and all eight judges who have weighed in on the issue is that the novel state-mandated contractual mechanisms adopted by New Jersey and Maryland are preempted. The courts have all recognized that these naked efforts to guarantee in-state generators a price for wholesale electricity sales into the federally regulated wholesale market that is different from the rate set by the prevailing federal regulatory mechanisms are squarely preempted. That conclusion is a straightforward application of the unremarkable proposition that, even when it comes to matters within the states' legitimate authority, such as regulating or incentivizing generating facilities, means matter as well as ends. And whatever else a state may do to encourage new generation, it may not dictate the rates and terms of wholesale sales.

In fact, petitioners do not even dispute that legal principle; instead, they largely just fight the premise that New Jersey actually set wholesale rates. But the courts below resolved that dispute in respondents' favor for good reason: By forcing in-state utilities to guarantee new generators a rate fixed by the state for each unit of electricity or capacity that they sell into the interstate wholesale market for 15 years—regardless of the prices set by that market through its

FERC-approved auction mechanism—New Jersey simply replaced FERC's rates and terms with ones more to its liking. Moreover, New Jersey made no secret about the fact that it guaranteed generators this fixed, long-term price in an effort to "improve" on a federal marketplace with which the state was dissatisfied. Indeed, the state resorted to legislation only after FERC explicitly rejected its request to adopt the very same long-term pricing guarantee mechanism as a federal regulatory solution. The first five of the state legislative findings, moreover, criticize the federal regulatory regime. It does not take an "extravagant" view of the Federal Power Act to recognize that it preempts this direct and transparent incursion on FERC's exclusive authority over rates "received … for or in connection with" wholesale sales.

That does not mean that states are without tools to incentivize new generation. States retain substantial latitude in such matters—including latitude to retreat from the federal wholesale market entirely if they no longer believe that it is serving their interests. FERC itself stressed this point in its *amicus* brief opining that New Jersey's program is preempted, and every court to consider this issue has been at pains to emphasize the same. Petitioners' dire warnings that the decision below endangers various other incentive schemes thus falls flat. Indeed, the Third Circuit explicitly disclaimed any suggestion that every law that has the potential to affect wholesale rates is preempted. The court instead based its decision solely on the bedrock rule that, whether for the best of reasons, the worst of reasons, or any reason in between, states simply do not have the authority to set the rates and terms of wholesale transactions. That manifestly correct conclusion does not warrant this Court's review.

STATEMENT OF THE CASE

A. Federal Regulatory Background

Historically, state electricity markets were "vertically integrated," meaning utilities were responsible both for delivering electricity to customers and for generating the electricity that they delivered. *See New York v. FERC*, 535 U.S. 1, 5 (2002). Because their operations were almost exclusively intrastate, these vertically integrated markets were heavily regulated by states, which set the rates that a utility could charge retail customers based on costs the utility incurred in generating, transmitting, and delivering electricity.

Because electricity demand fluctuates at different times of year, an electricity supplier must be equipped to serve not just relatively static demand, but also significantly increased demand during peak periods. Traditionally, vertically integrated utilities did this by building generating plants intended to operate only when demand was at its peak—even if that meant they operated as little as 20 or 30 hours a year. The obvious inefficiencies of numerous companies with underutilized peak generating facilities soon led utilities to look for ways to sell excess electricity to each other, in hopes of diminishing costs attributable to too many plants spending most of the year idle. To facilitate this "wholesale" market, utilities began building high voltage transmission lines across which electricity could be transferred from utility to utility for ultimate retail sale.

As these wholesale transactions began to cross state lines, the question arose whether states had authority to regulate them, or whether the dormant Commerce Clause reserved this nascent interstate market to the federal government. This Court answered that question in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927). Reasoning that these wholesale transactions are "fundamentally interstate from beginning to end," the Court concluded that the dormant Commerce Clause prohibited states from regulating them, and held that such regulation could come only from "exercise of the power vested in Congress." *Id.* at 89-90.

Congress responded with the Federal Power Act of 1935 ("FPA"), which established a new federal agency (then the Federal Power Commission, now FERC) charged with providing "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). Section 201(b) of the FPA grants FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce," including the power to determine what "rates and charges made, demanded, or received … for or in connection with the transmission or sale" of electricity at wholesale are "just and reasonable." 16 U.S.C. §§824(b), 824d(a), 824e.

Section 201(b) further provides that FERC has jurisdiction over "all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of this chapter*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* §824(b)(1) (emphasis added). That proviso underscored that while Congress preserved traditional state authority over generation and intrastate transmission, it recognized the interrelationship between in-state generation and interstate sales and transmission and subordinated state authority to FERC's power to regulate interstate transmissions and wholesale sales. *See Miss. Indus. v. FERC*, 808 F.2d 1525, 1545 n.74 (D.C. Cir. 1987) ("[FERC] has been awarded jurisdiction over generation facilities 'to the extent provided in other sections,' including jurisdiction necessary to effectuate regulation of interstate wholesale rates").

B. The Rapid Expansion of the Federal Wholesale Market

Although the wholesale market continued to expand modestly over the years, it remained largely ancillary to the traditional vertically integrated regime. That began to change, however, in recent decades with several federal initiatives that forced the vertically integrated utilities that owned the interstate transmission lines to provide wholesale generators with access to those lines on a non-discriminatory basis. *See generally New York*, 535 U.S. at 6-10. These and other regulatory measures paved the way for explosive growth in wholesale transactions over the past two decades.

As this expanded wholesale marketplace took shape, states began to question whether vertical integration still made sense. Many (but by no means all) states ultimately opted to restructure their electricity industries by disentangling their utilities' generation, transmission, and distribution functions and ordering utilities to open their distribution networks to competitors. By allowing generators to sell the bulk of their electricity into, and retail suppliers to purchase the bulk of their electricity out of, the interstate wholesale market, these states reaped the benefits of lower prices resulting from a more competitive market. At the same time, by rendering their electricity markets largely dependent on the federally regulated wholesale market, states necessarily ceded much of their traditional regulatory authority.

In 1999, New Jersey embraced this new model. Through the Electric Discount and Energy Competition Act ("EDECA"), it restructured its market so that electricity sold to New Jersey consumers would be purchased from the interstate wholesale market, rather than generated by utilities. Consumers, in turn, would have an array of retail suppliers, known as load serving entities ("LSEs"), from which to purchase electricity, rather than receiving it from the local monopoly. Although these LSEs procure the electricity and sell it to consumers, a common carrier known as an electric distribution company ("EDC") delivers that electricity to consumers over local distribution networks. Thus, in a typical post-EDECA situation, a generating company sells electricity to the wholesale market, an LSE purchases electricity from the wholesale market for resale to retail customers, and the local EDC delivers that electricity to those customers.

The significance of its decision to do away with vertical integration was not lost on New Jersey. The EDECA expressly acknowledged that the Act "would effectively end the system of government regulation of the electricity generation industry, which has existed in New Jersey since the years when Woodrow Wilson served as Governor." P.L. 1999, c.23, Advance Law A.16, at 109 (1999), http://perma.cc/rv5q-lytz. By "[p]lac[ing] greater reliance on competitive markets … to deliver energy services to consumers," the Act recognized, the state was knowingly opening itself up to "the benefits as well as the risks of participation" in a federal market that the state could not regulate. *Id.* at 1, 110. In its 2008 Energy Master Plan, the state candidly acknowledged that, as a consequence of its voluntary dependence on the wholesale market, New Jersey "has much less authority over the supply and price of electricity than it used to." PX45-0009. In effect, New Jersey "no longer regulates the generation of power." PX45-0009-10.

C. PJM and the Reliability Pricing Model

As the interstate wholesale market expanded, FERC encouraged participants to organize regional transmission organizations ("RTOs") to facilitate wholesale market operations in large portions of the country. PJM Interconnection, LLC, ("PJM") is the RTO that operates the wholesale market for a region comprising all or part of 13 states, including New

Jersey. Subject to FERC's oversight and approval, PJM ensures that its wholesale market will supply all retail sellers within PJM enough electricity to meet consumer demand.

Among other things, PJM operates a wholesale electricity market in which generation resources sell electricity to PJM. PJM then sells that electricity to the LSEs, which resell it to consumers to meet energy demands. To participate in this market, generation resources bid their electricity into a market for delivery either in the next hour or the next 24 hours. PJM then accepts bids from lowest to highest until it has enough electricity. The highest bid PJM must accept to satisfy the region's needs becomes the "market clearing price." Each resource that bid at or below that price will be paid the market clearing price for all of its electricity, even if its bid was lower.

PJM also operates a market for "capacity"—that is, for the option to buy electricity to satisfy future demand. To ensure that sufficient capacity will be available throughout the region, PJM employs an auction mechanism known as the reliability pricing model ("RPM"). RPM's central feature is a competitive auction that PJM holds annually for a year three years in the future. PJM determines how much capacity the region will need for the relevant year, then holds an auction at which sellers commit to sell, and PJM commits to purchase, the targeted amount from all types of generation resources for subsequent resale to retail suppliers. The capacity auction operates much like the electricity markets, with PJM accepting bids from lowest to highest until it has the requisite capacity, and making the highest bid accepted the market clearing price. Each capacity resource that cleared the market must sell PJM all the capacity it bid, and, in return, will get paid the market clearing price for all of that capacity. This forward market is designed to provide price signals that encourage new generation three years in advance (which is sufficient time to construct a new generating facility).

In both its electricity and its capacity markets, PJM uses a pricing model that is designed to reflect the value of the energy at the specific location and time it is delivered. *See* Pet.App.63a-64a.[1] The clearing price may be higher, for instance, in a zone where transmission lines are congested, and generating facilities will receive higher revenues for servicing those areas. These different prices for different zones are designed to establish price signals that encourage new generation sources to locate in areas where they will receive higher prices. Relying on these signals, generation companies make decisions about how much capacity development or transmission planning is needed, what sources will provide that new electricity, and where new power plants will be located.

FERC recognizes that, in certain circumstances and areas, the auction's price signals alone may be insufficient to incentivize new generation in certain areas. To address those circumstances within the PJM market construct, PJM established, and FERC approved, the new entry price adjustment ("NEPA") for new resources that satisfy specific size and

[1] Unless otherwise noted, all Petitioner-Appendix citations are to the CPV petition's appendix in No. 14-634.

locational conditions. The NEPA provides a special three-year revenue guarantee to the new resources in an effort to "provide support to the new entrant until sufficient load growth would be expected to" do so. *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157, at ¶101 (2009). The NEPA is the one exception to PJM's general policy of non-discrimination—*i.e.*, of seeking to obtain the most cost-effective electricity, whether it comes from new resources or existing ones. *See id.* ¶102 ("Both new entry and retention of existing efficient capacity are necessary to ensure reliability").

D. New Jersey's Long Term Capacity Pilot Program

Although New Jersey voluntarily abandoned vertical integration to reap the efficiencies of the interstate wholesale market, New Jersey took issue with PJM's reliability pricing model from the outset. In New Jersey's view, the RPM does too little to encourage development of new generation in New Jersey. Because New Jersey believed that "new generators should be given assurances to overcome fears regarding the risk of long term financing packages of potential financiers," it encouraged PJM not to adopt the RPM. JA50. When that failed, New Jersey recommended, *inter alia*, that the NEPA be revised to guarantee new generators a fixed revenue stream for *ten* years, arguing that this longer guarantee "could provide the certainty required to encourage new generation projects" in New Jersey. JA1834; *see also* JA1764.

FERC considered and rejected New Jersey's arguments. *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, at ¶146 (2009). Although it "recognize[d] that a longer commitment period may aid the developer in financing a project," FERC concluded that "giving new suppliers longer payments and assurances unavailable to existing suppliers" would upset the market's "balance" between new and existing generation and "long-term forward price signals." *Id.* ¶¶149-50; *see also id.* ¶150 (auction "was designed to provide long-term forward price signals and not necessarily long-term revenue assurance").

At that point, New Jersey decided to take matters into its own hands. In 2011, it enacted the Long Term Capacity Agreement Pilot Program Act ("LCAPP" or "Act"), which gave certain New Jersey generators the long-term pricing guarantee FERC refused to provide. Indeed, the LCAPP's findings candidly acknowledge that it is designed to achieve through "State policy" the kinds of "structural changes" in the federal wholesale market that were "previously denied by FERC." N.J.S.A. §48:3-98.2(c)-(d); *see also id.* §48:3-98(d) (purporting "[t]o address the lack of incentives under the reliability pricing model" for "construction of new, efficient generation").

The LCAPP operates by mandating the creation of contracts that will guarantee eligible new generators a 15-year fixed revenue stream for their wholesale capacity sales to PJM. To be eligible for these contracts, known as "standard offer capacity agreements" ("SOCAs"), a generator must agree to "participate in and clear the annual base residual action conducted by the PJM" each year. *Id.* §48:3-98.3(c)(5), (12). The SOCAs then guarantee each LCAPP generator a "standard offer capacity price"

("SOCP") for its capacity sales into the PJM market, regardless of what the PJM market clearing price is.

Payments under the SOCAs do not come from the state. The LCAPP instead orders New Jersey's four EDCs (the private companies that deliver electricity from LSEs to end-users) to enter into SOCAs that require them to pay LCAPP generators the difference between the capacity price established by New Jersey and the capacity price established by the PJM auction for their sales to PJM. JA57. These payments are "for a defined amount of electric capacity"—they guarantee a specific price for each unit of capacity that the generator actually sells to PJM. N.J.S.A. §48:3-51. If an LCAPP generator fails to clear the PJM market, the EDC is not required to pay the generator anything. If the generator clears the market, it is guaranteed a per-unit price for its sales to PJM that differs from the PJM clearing price. EDCs may then pass along to ratepayers whatever costs or credits the SOCAs produce. *Id.* §48:3-98.3(d).

The state ultimately selected three proposals—Newark Energy Company ("Hess"), Old Bridge Energy Center ("NRG"), and Woodbridge Energy Center ("CPV")—to participate in the LCAPP and build new generating facilities in New Jersey.[2] The state then ordered the EDCs to execute 15-year SOCAs with each of these generators, which they did under protest.

E. Procedural Background

Respondents are generating companies that sell capacity in the PJM auction and EDCs in New Jersey.

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[2] NRG ultimately abandoned its project after its bid failed to clear the PJM auction.

The generating companies rely on the PJM auction's long-term price signals to make determinations about investments in both existing and new generating facilities. The EDCs, meanwhile, have been forced to enter into SOCAs with LCAPP generators. Because the LCAPP fundamentally disrupts the markets in which they participate, respondents challenged the Act in the U.S. District Court for the District of New Jersey.

After a 13-day trial that included extensive presentation of evidence and testimony, the district court held the Act preempted by federal law. The court first concluded that the Act "intrudes upon the exclusive jurisdiction of the Commission, by establishing the price that LCAPP generators will receive for their sales of capacity" into the wholesale market and thus "invades the field occupied by Congress." Pet.App.106a. It further concluded that the Act's "imposition of a government imposed price" "creates an obstacle to the Commission's preferred method for the wholesale sale of electricity in interstate commerce." Pet.App.108a-109a.

On appeal, the U.S. Court of Appeals for the Third Circuit solicited the federal government's views on whether the LCAPP is preempted. In response, the United States and FERC filed an *amicus* brief stating their position that "the New Jersey Act is preempted to the extent that it sets rates for wholesale sales of capacity." U.S. Br.15 (Mar. 20, 2014). The government's brief emphasized that the LCAPP intrudes on FERC's exclusive jurisdiction by "requir[ing] that selected generators bid into and clear the PJM auction" and tying payments under the

SOCA "directly to the market-clearing price." *Id.* at 10. FERC thus joined respondents in urging the Third Circuit to affirm the decision below. *Id.* at 20.

In a unanimous decision, the Third Circuit affirmed. Like the district court, the Third Circuit concluded that the LCAPP is "field preempted because it sets capacity rates." Pet.App.30a. Although the court stressed that "New Jersey does have authority over local energy matters, including the construction of power plants," it concluded that New Jersey's particular choice of "means to achieve its policy goals" impermissibly "strayed into the exclusive federal area of interstate wholesale rates." Pet.App.19a, 26a. In doing so, the Third Circuit specifically rejected petitioners' attempts to recharacterize payments under the SOCAs as mere "regulat[ion] [of] the construction of new power plants." Pet.App.27a. Instead, it concluded that the payments "incentivize[] the construction of new power plants *by regulating the rates new electric generators will receive for their capacity*" sales to PJM. Pet.App.26a. As the court explained, "New Jersey cannot excuse LCAPP's interference with capacity prices as incidental to its scheme because the statute's explicit objective is to supplement capacity prices." Pet.App.27a.

In so holding, the Third Circuit emphasized its "focuse[d]" rather than "broad[]" rationale. Pet.App.28a. For instance, the court expressly rejected the notion that field preemption occurs "whenever a state's legislation indirectly affects matters within FERC's jurisdiction" or simply "influences interstate rates." Pet.App.29a-30a. And the court reiterated repeatedly that "the states maintain a regulatory role in the nation's electric energy markets," and that it had "no occasion to conclude that PJM's markets preempt any state act that might intersect a market rule." Pet.App.28a, 30a. In fact, the court noted that "New Jersey could have used other means to achieve its policy goals," such as "directly subsidiz[ing] generators" or using "'tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, and the relaxing or acceleration of permit approvals.'" Pet.App.26a & n.4. The court concluded only that the particular means New Jersey selected was preempted "because [the LCAPP] sets capacity rates." Pet.App.30a.

The Third Circuit's decision followed a unanimous decision by the U.S. Court of Appeals for the Fourth Circuit on a near-identical Maryland scheme. The Fourth Circuit likewise deemed the Maryland scheme "field preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction" and "supersedes the PJM rates that CPV would otherwise earn." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (2014) (petitions for *certiorari* in Nos. 14-614 and 14-623 pending).

REASONS FOR DENYING THE PETITIONS

I. This Factbound, Splitless Case Does Not Merit This Court's Review.

A. The Carefully Circumscribed Decision Below Accords With Well-Settled and Unchallenged Preemption Principles.

Petitioners ask this Court to review a consciously narrow decision applying settled legal principles to a novel state scheme. Petitioners do not and cannot claim any division of authority on whether that scheme is preempted by federal law, as every court—indeed, every judge—to consider the question has agreed that the scheme is preempted. As challenges to the New Jersey and Maryland pricing schemes have wound their ways through the federal courts, eight judges out of eight have found the laws preempted, and the pleas for *en banc* review of those decisions were denied without dissent. None of this is surprising. There may well be some difficult questions about the overlap between state authority over generation and federal authority over wholesale rates. But whether a state may avowedly provide in-state generators a different and more stable wholesale rate than prevails on the federally regulated wholesale market is not one of them.

It is beyond cavil that FERC has exclusive regulatory power over the field of interstate wholesale electricity sales. The FPA expressly grants FERC jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. §824(a). That broad authority encompasses exclusive jurisdiction to regulate "rates and charges made, demanded, or received … for or in connection with" interstate wholesale transactions. *See id.* §824d(a). In sum, "the wholesale price for capacity … is squarely, and indeed, exclusively within FERC's jurisdiction." Pet.App.20a. That principle is so settled that even petitioners readily concede that "States may *not* … set the price … at which electricity or capacity is sold at wholesale." CPV-Pet.9.

Petitioners' principal dispute is instead with the lower courts' *factual* finding that the LCAPP sets wholesale rates—hardly a promising basis for seeking this Court's review. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (this Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). But petitioners' arguments are readily refuted by the LCAPP itself, which explicitly authorizes the Board to establish a "Standard Offer Capacity Price" applicable to the LCAPP generators. *See* Pet.App.125a, 130a. On its face, the Act "ensures that [LCAPP] generators will receive the Standard Offer Capacity Rate for each quantity of capacity offered at [the PJM] auction and not solely the auction price they would have otherwise received." Pet.App.24a; *see also* N.J.S.A. §48:3-51 (describing SOCAs as providing "payments ... for a defined amount of electric capacity"). It is difficult to imagine a more clear-cut example of a state determining the rate that a generator "receive[s] … for or in connection with" its wholesale transactions. 16 U.S.C. §824d(a).

Indeed, the whole point of the LCAPP is to ensure that "generators receive a different price for the capacity they clear through PJM than what FERC intended." Pet.App.28a. Any generator that clears the auction already is entitled to the market clearing price for its sales to PJM, so the contracts make sense only if they guarantee generators something other than what PJM would pay them for those sales—namely, a price set by New Jersey rather than PJM's FERC-approved auction mechanism. As the courts below correctly concluded, that blatant effort to "exercise[] control over the field of interstate capacity prices … cannot stand." Pet.App.25a.

And to make matters worse, New Jersey guaranteed select generators this fixed, state-set rate for 15 years even though FERC expressly rejected New Jersey's request to expand NEPA's three-year fixed revenue guarantee to encourage more new generation. FERC did so out of concern that "giving new suppliers longer payments and assurances unavailable to existing suppliers" would upset the PJM market's careful "balance" between new and existing generation. *PJM Interconnection*, 126 FERC ¶61,275, at ¶¶149-50; *see also id.* ¶150 (auction "was designed to provide long-term forward price signals and not necessarily long-term revenue assurance"). New Jersey's scheme thus not only intrudes on an exclusively federal field, but does so in a manner that conflicts overtly with FERC's regulation of that field. As the Fourth Circuit concluded in rejecting Maryland's analogous actions, that makes field and conflict preemption principles "mutually reinforcing" here, as Maryland and New Jersey have both interfered with FERC's exclusive authority over wholesale rates and created a "direct and transparent impediment to the functioning of the PJM markets." CPV-Md. Pet.App.21a, 25a.

In short, the incursion on FERC's authority in this case is neither "indirect[]" nor "incidental," as the LCAPP's "explicit objective" is to alter the FERC-approved price that generators will receive for their capacity sales to PJM. Pet.App.27a. Indeed, New Jersey made no secret of the fact that the LCAPP was designed to achieve through "State policy" the kinds of "structural changes" in PJM's pricing model that New Jersey previously sought and that were "previously denied by FERC." N.J.S.A. §48:3-98.2(c)-(d); *see also id.* §48:3-98.2(d) (purporting "[t]o address the lack of incentives under [PJM's] reliability pricing model" for "construction of new, efficient generation").

It requires no "extravagant" view of FERC's jurisdiction, CPV-Pet.20, to recognize that this "is simply a bridge too far." CPV-Md. Pet.App.25a. To be sure, "the states maintain a regulatory role" in incentivizing generation and have numerous avenues through which they may do so. Pet.App.30a. But means matter as well as ends. And states simply do not have the power to "incentivize[] the construction of new power plants by regulating the rates new electric generators will receive for their capacity." Pet.App.26a. The decision below does nothing more than reaffirm that unremarkable proposition.

B. The Decision Accords With FERC's Own View.

The decision below accords not only with settled preemption principles, but with FERC's own view. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-96 (1996) ("the federal agency to which Congress has delegated its authority … is uniquely qualified to determine whether a particular form of state law … should be pre-empted"). Petitioners barely engage with the fact that FERC has already weighed in on the LCAPP and opined that it is a preempted intrusion on FERC's exclusive jurisdiction.

Although FERC was not a party to this case, the Third Circuit invited the federal government to submit a brief providing its views. FERC responded by opining in no uncertain terms that the LCAPP is preempted by federal law. By "tying the subsidy explicitly and directly to … wholesale rates," FERC explained, the LCAPP marks an impermissible "intrusion upon the Commission's exclusive jurisdiction to regulate wholesale rates and practices 'affecting' rates." U.S. Br.5 n.3, 14-15. In doing so, however, FERC made a point of reiterating that "states have numerous ways to incentivize construction of new generation facilities that do not directly affect the setting of FERC-jurisdictional wholesale rates." *Id.* at 18.

In short, FERC's bottom line could not have been clearer: The LCAPP is preempted. Petitioners' contrary view thus has been refuted not only by every judge to consider it, but by the federal agency that oversees the wholesale market. To the extent FERC offered a preemption theory broader than the one adopted by the Third Circuit, *see* Pet.App.29a, that hardly strengthens petitioners' case for review. To the contrary, the Third Circuit's explicit rejection of any suggestion that the FPA preempts every state law that "affects the market clearing price," Pet.App.29a, only underscores that the court carefully eschewed the kinds of sweeping pronouncements on which petitioners' request for this Court's intervention rely.[3]

C. Petitioners' Pleas for Error Correction Recycle Arguments That Were Soundly Rejected Below.

Petitioners' continued efforts to find fault with the decision below succeed only in revealing that they, not the Third Circuit, suffer from "basic misunderstandings about the FPA regulatory framework." CPV-Pet.21. For instance, petitioners insist that the SOCAs do not intrude on FERC's exclusive jurisdiction because they do not set the rate that LCAPP generators will receive *from PJM*, but rather set only the rate that they will receive *from New Jersey's local utilities* for each unit of capacity that they sell to PJM. *See* CPV-Pet.25; State-Pet.11. That crabbed view of FERC's jurisdiction as extending only to the rate paid by the direct purchaser of capacity is defeated by the plain text of the FPA, which grants FERC jurisdiction over "[a]ll rates and charges made, demanded, *or received* … for *or in connection with*" wholesale sales. 16 U.S.C. §824d(a) (emphasis added). A contract that requires a third party to ensure that a seller receives a particular price for each

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[3] In suggesting that the decision below "prevented FERC from reviewing [the SOCAs] to determine whether they are just and reasonable," CPV-Pet.31 & n.27, CPV ignores the fact that it *chose* not to seek FERC review of the contracts until after they had been invalidated by the courts below. At that point, FERC quite logically concluded that, even setting aside preemption concerns, it could not review contracts that were no longer in force.

unit of capacity that it sells to PJM plainly establishes the "rate" that the seller "receive[s] … for or in connection with" that wholesale sale.[4]

Petitioners' repeated emphasis of the fact that "New Jersey's local utilities do not purchase electricity or capacity [from CPV] under the SOCAs," CPV-Pet.22, thus succeeds only in distinguishing the SOCAs from the types of bilateral contracts to which petitioners analogize. Bilateral contracts are contracts between buyers and sellers for the sale of capacity *from one party to the other*. In other words, they are arms-length transactions between a willing seller and buyer for actual sales of capacity. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.,* 554 U.S. 527, 531, 537 (2008) (bilateral contracts are entered into under tariffs that "simply state that the seller will enter into *freely negotiated contracts with purchasers*" (emphasis added)). Here, by contrast, as petitioners stress, the LCAPP generators sell their capacity not to the utility,

[4] As the Fourth Circuit noted in *Nazarian*, that conclusion follows directly not just from the statutory text but also from this Court's decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). There, the Court made clear that a state may not use its jurisdiction over retail sales to prevent utilities from recovering from their consumers FERC-mandated rates for their wholesale electricity purchases. *Id.* at 373. Such state interference was "preempted because it denied full effect to the rates set by FERC." CPV-Md. Pet.App.18a. *A fortiori*, a state directive that third parties pay generators a different rate for their wholesale sales to PJM denies full effect to the PJM rates approved by FERC. *See* CPV-Md. Pet.App.18a ("If states are required to give full effect to FERC-mandated wholesale rates on the demand side of the equation, it stands to reason that they are also required to do so on the supply side.").

but to PJM. CPV-Pet.22; State-Pet.12. Contracts between sellers and *non*-buyers that have merely been obligated (under protest) to subsidize sales of capacity *to someone else* are nothing at all like any kind of bilateral contract FERC has approved.

Nor does it help CPV that a party who purchases capacity through a bilateral contract may proceed to sell that same capacity into the PJM market. A party that purchases capacity at one price and then sells it to PJM at another has not received two different prices for its sale *to PJM*. As PJM's own rules make clear, "the capacity that is the subject of the [bilateral contract] shall pass to the buyer" and "[i]n no event shall the purchase and sale … constitute a transaction with [PJM]." PJM Tariff 4.6(a)(i)-(ii). The buyer's subsequent sale to PJM is another capacity transaction entirely, and none of the wholesale prices it pays or receives is set by a state. Here, by contrast, there is only one *capacity* transaction taking place—the transaction with PJM—and the state has overridden FERC's determination of what rate the generator should receive for that transaction. The problem here thus is not that LCAPP generators are receiving more revenue than the PJM auction supplies, *see* CPV-Pet.23; it is that they are doing so even though they are selling capacity to no one *other than PJM*.

Petitioners fare no better with their strained efforts to recast the SOCAs as something other than payments for the sale of capacity to PJM. Petitioners contend, first, that payments under the SOCAs are payments not for sales of capacity, but for "building a new power plant." CPV-Pet.22. That is in the teeth of the factual findings of both courts below—not mention the LCAPP itself. Payments are due under the SOCAs *only if* the LCAPP generators physically deliver capacity to PJM. If a generator constructed a plant but failed to clear PJM, it would get nothing. The Third Circuit thus correctly concluded that "LCAPP does not regulate the construction of new power plants, causing an incidental effect on the interstate price of capacity. Rather, LCAPP sets a price of capacity that will lead to the construction of new power plants." Pet.App.27a. Indeed, even petitioners' own witnesses conceded that the LCAPP operates by guaranteeing a "price for the offered capacity," not for the mere act of building a plant. JA831, 837; *see also* JA778 ("SOCA prices, are the price that [CPV] receive[s] per megawatt day of capacity sold to PJM").

Nor can petitioners escape preemption by attempting to paint SOCA payments as a mere "financial hedge" or "financial incentive." CPV-Pet.22; State-Pet.14. Once again, both courts thoroughly considered and rejected that argument. As the Third Circuit explained, "[t]rue, LCAPP's price assurance insulates LCAPP generators from market volatility and thus eliminates their risk." Pet.App.24a. But the SOCAs "provide more than risk-hedging," as they "ensure[] that the generators will receive the Standard Offer Capacity Rate for each quantity of capacity offered at auction and not solely the auction price they would have otherwise received." Pet.App.24a. Accordingly, the Third Circuit agreed with the district court that, as a factual matter, the SOCAs are no mere financial agreements but rather "'set[] a price for wholesale energy sales' for LCAPP generators." Pet.App.24a (quoting JA78); *see also* Pet.App.105a (crediting testimony of respondent's expert witness "that, in economics, a purely financial arrangement is one that does not 'involve any real performance'").

Petitioners alternatively contend that even if the LCAPP does set a rate, that rate should be subject to "just and reasonable" review by FERC. CPV-Pet.12. At the outset, to the extent petitioners mean to suggest that a state may set rates for FERC to review, they are sorely mistaken. It is black-letter law that "*any* state law falling within [an exclusively federal] field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). That is so even if the law purports to be "complementary" to federal regulation. *Arizona v. United States*, 132 S. Ct. 2492, 2501-02 (2012). Indeed, it is so even if the federal government has decided not to regulate at all. *See Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-84 (1983). By giving FERC exclusive power to determine what wholesale rates are "just and reasonable," 16 U.S.C. §824d(a), Congress necessarily foreclosed efforts by states to engage in their own process of setting or reviewing the reasonableness of wholesale rates—even if FERC might not object to whatever rate a state would set. *See Entergy Servs., Inc.*, 120 FERC ¶61,020, at ¶28 (2007) (reiterating that FERC's "ratemaking obligations under the FPA cannot be delegated to a state").

Petitioners thus are forced to resort to fighting the lower courts' factual finding that the rate established by the SOCAs was set by the state. CPV-Pet.25-26. But the courts below resolved that dispute in respondents' favor for good reason: The contract price, while initially proposed as part of a procurement, became operative only after being reviewed, evaluated, and accepted by New Jersey's Board of Public Utilities. *See* N.J.S.A. §48:3-98.3(c)(4). New Jersey had the right to select none of the proposed prices. Moreover, the price New Jersey selected was forced not upon a purchaser of capacity, but rather upon third parties who purchase nothing from the LCAPP generators. To portray that as a price arrived at through competitive forces blinks reality.

Finally, to the extent petitioners suggest that the decision below conflicts with *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) ("*CDPUC*"), that suggestion is meritless. *CDPUC* dealt with whether FERC had jurisdiction to review a feature of the New England bulk power system that estimated the target amount of capacity the system would need. Although *CDPUC* did involve the line between FERC's jurisdiction over wholesale rates and states' jurisdiction over generation, it resoundingly affirmed that FERC's jurisdiction over capacity rates remains exclusive even when it has the potential to affect generation-related ends. As the court explained, FERC "may *directly* establish prices for capacity … *even for the express purpose of incentivizing construction of new generation facilities*," and thus likewise has "the power to do so indirectly by setting a target for capacity demand." *Id.* at 482 (emphasis added). If anything, then, *CDPUC* only bolsters the decision below.

At bottom, no creative refashioning can change the fact that the LCAPP by both design and intent supplants FERC-approved rates "received … for or in connection with" wholesale sales to PJM. 16 U.S.C.

§824d(a). There is no need for this Court to disturb the Third Circuit's manifestly conclusion that, whatever else a state may do to incentivize generation, it may not do that.[5]

II. The Decision Below Is Consciously Narrow And Lacks Exceptional Importance.

As a straightforward application of settled law to a novel state program—one that deliberately and directly set out to reform a market over which FERC concededly has exclusive regulatory jurisdiction—the decision below has far less legal or practical significance than petitioners suggest. Indeed, the Third Circuit carefully avoided precisely the kinds of broad-brush pronouncements that petitioners seek to attribute to it in their efforts to magnify the importance of this case. Petitioners' dire warnings that the decision below "hobbles" the ability of states to support new generation therefore fall flat. CPV-Pet.18.

At the outset, the Third Circuit's decision in no way suggests that state programs are preempted merely "because they affect matters within FERC's jurisdiction." CPV-Pet.20. In fact, the court underscored that "FERC's authority over interstate rates does not carry with it exclusive control over any

[5] That is particularly so given that the LCAPP is invalid for the additional reason that it violates the dormant Commerce Clause. *See* Appellees' Br.49-58 (Feb. 18, 2014); Appellees' Br.51-60, *PPL EnergyPlus, LLC v. Nazarian*, No. 13-2419 (4th Cir. Mar. 10, 2014). While the Third Circuit had no need to reach that issue in light of its holding that the Act was preempted, Pet.App.10a, that remains an alternative basis for affirming the District Court's injunction.

and every force that influences interstate rates." Pet.App.29a-30a; *see also, e.g.*, Pet.App.29a (explicitly declining to "endorse the argument that LCAPP has been field preempted merely because it affects the market clearing price"). The court simply concluded that the states' power to incentivize generation does not encompass the power to set wholesale rates. *See* Pet.App.30a. In reaching that conclusion, however, the court took pains to emphasize the many other means through which states may seek to incentivize new generation. *See* Pet.App.26a & n.4.

Indeed, although petitioners continue to largely ignore them, there is no question that states retain numerous other avenues for encouraging—or even ordering—new generation. For instance, New Jersey could have procured capacity outside of the PJM auction through FERC's fixed resource requirement option, which allows distributors to do so through true bilateral contracts (*i.e.*, contracts between two parties for the actual sale of electricity) or by constructing their own generation facilities. It could have established an agency to build state-owned power plants and sell directly to New Jersey's retail consumers. It could have bypassed the wholesale market altogether and returned to the vertically integrated regime that many states still retain. Nothing in the decision below casts doubt on the continued validity of those and other alternatives.

Nor is there any merit to petitioners' contention that the decision below somehow jeopardizes various other state incentive schemes that are not at issue in this case. *See* CPV-Pet.29-30. Petitioners conspicuously fail to identify a single one of these programs (other than Maryland's materially analogous one) that has been invalidated. Moreover, for the most part, the programs they invoke involve different factual circumstances, such as contracts for electricity or capacity sales outside of an RTO's market mechanism. In any event, whether the lower courts will confine the decision below to this specific scheme or construe it to have implications for other factual scenarios remains to be seen. For this Court to wade into those issues now therefore would be premature—particularly when every single federal judge to consider *this* specific scheme has agreed that the preemption problem could not be clearer.

Petitioners fare no better with their suggestion that the particular incentive scheme at issue here is critical to the development of new generation. That suggestion is belied by the numerous other options state retain and the paucity of states that have insisted on attempting anything like this. It also is belied by the developments in this very case: After insisting that they would not and could not build a new generating facility without the fixed revenue stream that the SOCAs guarantee, both CPV and Hess proceeded with their plans to build their plants even after the SOCAs were invalidated. *See, e.g.*, Tom Johnson, *CPV Breaks Ground for New Power Plant—Though Subsidies Are In Doubt*, NJToday.net (Oct. 24, 2013); Scott DiSavino, *U.S. court overrules New Jersey law subsidizing new power plants*, Reuters (Oct. 14, 2013).

In short, as the Third Circuit correctly recognized, this case is not about whether states retain power to regulate or incentivize generating facilities. Of course they do. This case is instead about the much narrower question of whether states may incentivize generation by setting their own rates for wholesale transactions. Even petitioners concede that they may not. In doing so, they effectively concede that this case is ultimately about an even narrower question—namely, whether the particular state scheme at issue here does in fact set the rate that LCAPP generators "receive[] … for or in connection with" their sales of capacity to PJM. 16 U.S.C. §824d(a). As both courts below recognized, there can be no serious dispute that it does. That factbound, splitless, and manifestly correct conclusion by four federal courts and eight judges on what really amounts to a question of fact does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for certiorari.

Respectfully submitted,

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