Nos. 17-2443, 17-2445

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VILLAGE OF OLD MILL CREEK, *et al.*, Plaintiffs-Appellants, v. ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency Defendant-Appellee, and EXELON GENERATION COMPANY, LLC, Intervening Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 17-cv-1163 The Honorable MANISH S. SHAH, Judge Presiding
ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*, Plaintiffs-Appellants, v. ANTHONY STAR, in his official capacity as Director of The Illinois Power Agency, *et al.*, Defendants-Appellees, and EXELON GENERATION COMPANY, LLC, Intervening Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 17-cv-1164 The Honorable MANISH S. SHAH, Judge Presiding

AMICI CURIAE BRIEF OF CALIFORNIA, CONNECTICUT, MASSACHUSETTS, NEW YORK, OREGON, VERMONT, AND WASHINGTON IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST OF THE AMICI CURIAE

The undersigned States and state agencies (collectively, the "Amici States") file this brief, pursuant to Fed. R. App. P. 29(a), in support of the Illinois Defendants-Appellees. The Amici States have a strong interest in defending state authority to support electricity generators that provide air quality or other environmental benefits to States and their citizens.

Illinois created the Zero Emission Credit ("ZEC") program at issue in this case to allow nuclear facilities that historically have provided Illinois with air pollution benefits along with electricity to remain in operation. The ZEC program was created after a report, requested by Illinois' Legislature, indicated that keeping these nuclear facilities operational would prevent thousands of tons of sulfur dioxide and nitrogen oxide emissions as well as millions of tons of carbon dioxide emissions.[1]

Like Illinois, the Amici States have adopted programs, including some that promote specific forms of electricity generation (such as solar, wind, and hydroelectric), to protect our citizens from hazards associated with poor air quality and climate change, as well as to ensure that available generation is sufficient. While each of these programs is unique, reflecting the particular needs and circumstances of diverse States, these programs generally involve policy determinations of the

[1] *See* Potential Nuclear Power Plant Closings In Illinois, Response to Illinois General Assembly Concerning House Resolution 1146, Appendix C at p. 9, *available at* www.icc.illinois.gov/downloads/public/HR1146%20Report.pdf, last visited October 29, 2017.

kinds Illinois made here—that certain forms of electric generation best serve the State's goals. Regardless of their views regarding nuclear power, the Amici States have a significant interest in ensuring the proper application of Federal Power Act preemption and dormant Commerce Clause principles to state programs—to preserve the long-standing authority and discretion States have traditionally exercised to protect the health of our citizens and the environment and to ensure sufficiency of electric generation.

ARGUMENT

The Illinois ZEC program will provide support to qualifying generators in order to ensure that those generators continue to provide important air quality benefits to Illinois and its residents. The Federal Power Act ("FPA"), 16 U.S.C. § 791a et seq., does not preempt the Illinois ZEC program because the program fits squarely within the confines of authority left to the States in the cooperative federalism scheme intrinsic to the Act. Further, Illinois' ZEC program does not violate the dormant Commerce Clause because it distinguishes between generators based on their ability to provide air quality benefits and their need for financial assistance to do so. This is neither economic protectionism nor an undue burden on interstate commerce. The district court decision correctly dismissed the complaints, and that decision should be affirmed.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE ILLINOIS ZEC STATUTE IS NOT PREEMPTED BY THE FEDERAL POWER ACT.

Plaintiffs' preemption arguments ignore the cooperative federalism scheme that underlies the FPA, misapply recent Supreme Court precedent, and misconstrue Illinois' statute.

There is a strong presumption against finding that a federal statutory scheme preempts the States' powers, particularly when the statutory scheme provides for state and federal roles. Where "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *Hughes v. Talen Energy Marketing*, LLC, 136 S.Ct. 1288, 1300 (2016) (Sotomayor, J., concurring), citing *New York State Dep't of Soc. Servs. v. Dublino,* 413 U.S. 405, 421 (1973). The "Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence. Pre-emption inquiries related to such collaborative programs are particularly delicate." *Id.* The Seventh Circuit has applied this presumption against preemption in cases involving other federal statutes. *See*, *e.g.*, *Frank Bros., Inc. v. Wisconsin Dep't of Transportation,* 409 F.3d 880, 888 (7th Cir. 2005) (state prevailing wage law not preempted by Davis Bacon Act, where Congress understood state involvement in setting prevailing wages and sought state cooperation in facilitating the enforcement of the Act). The "presumption against preemption of state laws dictates that a law must do 'major

damage' to clear and substantial federal interests before the Supremacy Clause will demand that state law surrenders to federal regulation." *Patriotic Veterans, Inc. v. Indiana,* 736 F.3d 1041, 1050 (7th Cir. 2013) (state law precluding automated telephone calls was not preempted, even though it barred placement of interstate calls).

When Congress enacted the FPA, it divided roles and powers between federal and state governments. Section 201 of the Act vests the Federal Energy Regulatory Commission (FERC) with authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." *Allco Finance Ltd v. Klee,* 861 F.3d 82, 87 (2d Cir. 2017). The FPA also maintains the traditional zones of state jurisdiction, including generation of electricity, retail sales of electricity, and intrastate wholesale sales. *FERC v. Electric Power Supply Ass'n,* 136 S.Ct. 760, 767-768 (2016) ("EPSA"); 16 U.S.C. § 824(b)(1).

The U.S. Supreme Court has issued three decisions in the past two years clarifying the contours of this federal-state jurisdiction: *Oneok, Inc. v. Learjet, Inc.,* 135 S.Ct. 1591 (2015); *EPSA,* 136 S.Ct. 760; and *Hughes,* 136 S.Ct. 1288. In all of

these cases, the Court affirmed the cooperative federalism scheme in which the States and the federal government have different but interlocking roles.[2]

As the district court below correctly held, the Illinois ZEC program falls well within the States' jurisdiction under the FPA and is not subject to field preemption. Memorandum Opinion and Order ("Decision"), ECF 107, at 18-35. Further, Plaintiffs do not allege they are unable to comply with federal law and the ZEC program, and the Illinois ZEC program does not conflict with the purposes of the FPA. Accordingly, the district court correctly held that the ZEC program is not barred by conflict preemption. Decision at 33-35; *see also Oneok,* 135 S.Ct. at 1595 (describing standard for conflict preemption).

Simply put, Illinois' establishment of tradable credits for the environmental attributes associated with certain electricity generators neither "directly intervene[s]" in the wholesale electricity market, *Hughes,* 136 S.Ct. at 1297, nor "stand[s] as an obstacle" to the purposes of the FPA, *Oneok*, 135 S.Ct. at 1595. Illinois' ZEC program, therefore, is not preempted.

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[2] *Oneok* involved the Natural Gas Act, but "the relevant provisions of the [Natural Gas Act and FPA] are analogous. This Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S.Ct. at 1298, n.10.

A. The Federal Power Act Embraces the Concept of Cooperative Federalism, Preserving Substantial Authority for the States.

When Congress established "the system of dual state and federal regulation" under the FPA, it did so "with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 510–11 (1989); *Oneok*, 135 S.Ct. at 1599. The Act took "nothing from the State [regulatory] commissions"; they retained all the authority they had prior to the FPA's enactment. *Northwest Central,* 489 U.S. at 511; *see also Oneok,* 135 S.Ct. at 1599. Notably, the power "to allocate and conserve scarce natural resources" remained with the States. *Northwest Central,* 489 U.S. at 511. So, too, did the authority to address the need for "new power facilities, their economic feasibility, and [retail] rates and services." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 205 (1983); *see also* 16 U.S.C. § 824(b)(1) (FERC "shall not have jurisdiction … over facilities used for the generation of electric energy").

The Federal Power Act made "federal and state powers complementary and comprehensive so that there will be no gaps for private interest to subvert the public welfare." *EPSA*, 136 S.Ct. at 780 (internal quotation marks and brackets omitted). Indeed, the "FPA is a paragon of cooperative federalism." *Coalition for Competitive Electricity v. Zibelman,* 2017 WL 3172866, *7 (S.D.N.Y., July 25, 2017). The U.S. Supreme Court's recent decisions in *Oneok, EPSA*, and *Hughes* acknowledge this

interdependency of state and federal roles in the increasingly complex world of electric energy regulation.

For example, in *Oneok*, the Court distinguished between "measures aimed directly at interstate purchasers and wholesales for resale and those aimed at subjects left to the States to regulate," holding, consistent with the FPA's system of dual state and federal regulation, that only the former could be preempted. *Oneok,* 135 S.Ct. at 1599-1600 (emphasis in original; internal citations omitted). The *Oneok* Court expressly rejected the dissenting position that a state regulation is preempted merely because it "affected" FERC's wholesale rates, recognizing that such a rule would nullify the express state authority under the Act. *Id.* at 1600-1601.

In *EPSA*, the Court applied the *Oneok* analysis to the FPA, expanding upon the dual jurisdictional nature of the statutory scheme. The *EPSA* plaintiffs viewed FERC's incorporation of demand response into the wholesale energy markets as impinging upon the authority that the FPA solely reserved to the States. *EPSA,* 136 S. Ct at 767. Emphasizing that the "wholesale and retail markets in electricity are inextricably linked," the *EPSA* Court adopted a "common-sense construction" of the FPA, limiting FERC's "affecting" jurisdiction to "rules or practices that directly affect the wholesale rate." *Id.* at 774 (emphasis in original; internal citations, brackets, and quotes omitted). Because "every aspect" of the challenged federal

regulation occurred "exclusively on the wholesale market," the Court held that the federal regulation was within FERC's authority. *Id.* at 776.

In sum, because the wholesale and retail electricity markets are inextricably linked, effects of FERC rules on retail markets and of state rules on wholesale markets abound and are lawful. The Court has recognized the interdependency of the dual jurisdictions and, accordingly, has limited preemption under the FPA to instances of States directly interfering in a FERC-regulated market. As discussed below, Illinois' statute does not create such interference.

B. The Illinois ZEC Statute is Consistent with Cooperative Federalism.

Citing the dissent in *EPSA*, plaintiffs argue that the ZEC statute "effectively" sets the wholesale rates, and thus the district court misapplied *EPSA*. Brief of Plaintiffs-Appellants Electric Power Supply Association ("AOB") at 50. Plaintiffs seek an interpretation of *Hughes* and the FPA under which the payment of any monies "in exchange for power" triggers preemption. AOB at 50. That overstates the scope of FPA preemption, and, in any event, the Illinois statute neither sets a wholesale rate nor purchases power.

Rather, the Illinois ZEC statute creates a new commodity—a ZEC—that compensates generating facilities for environmental attributes when qualifying energy is produced. 20 ILCS 3855/1-75(d-5); *see also* Decision at 7. Illinois defines a ZEC as a "tradeable credit that represents the environmental attributes of one

megawatt hour of energy produced from a zero emission facility." 20 ILCS 3855/1-10. ZECs are "inventions" of state law whereby "energy attributes are 'unbundled' from the energy itself and sold separately." *Zibelman*, at *12; *see also Allco*, 861 F.3d at 93; *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Public Utility Control*, 531 F.3d 183, 186 (2d Cir. 2008). ZEC programs compensate eligible generators for the environmental attributes of electricity production regardless of how the resulting energy is sold. *See Zibelman*, at *10-*11; Decision at 33.

ZEC payments are not tied to or bundled with the sale of capacity or energy in the federal wholesale markets. Decision at 32-33; *see also Zibelman,* at *11-*12. Illinois ZECs are sold in a separate, state-created market, and the Illinois ZEC price is established by the social cost of carbon and may be reduced by a statutory price adjustment in order to protect retail consumers. 20 ILCS 3855/1-75(d-5)(1)(B). Because Illinois' program does not require generators to participate in the wholesale markets, the generators awarded ZECs may sell the underlying energy at negotiated rates to bilateral purchasers, in the federal wholesale markets, or directly to industrial or governmental end-users for their own consumption. In other words, Illinois ZEC transactions occur untethered from the sale of energy or capacity in the federal wholesale market.

Further, when FERC undertakes its rate-setting responsibilities under the FPA—to ensure wholesale rates are "just and reasonable" and not "unduly

discriminatory and preferential," it does not generally consider environmental attributes. Indeed, FERC has acknowledged that sales of environmental attributes on an "unbundled" basis, separate from the associated energy sales, do not impinge on FERC's jurisdiction. *WSPP Inc.,* 139 FERC ¶61,061, P18 (2012); *see also Grand Council of the Crees (of Quebec) v. FERC,* 198 F.3d 950, 956-957 (D.C. Cir. 2000) (noting other instances where FERC has declined to consider environmental attributes). But being able to recognize and reward environmental benefits of different types of generation—including in the form of tradable instruments that embody environmental attributes—is important for States as they seek to meet environmental, health, and safety objectives. The Illinois ZEC statute regulates unbundled attributes that fall squarely within the state's jurisdiction. It does not regulate the sale of energy in the wholesale market and is not preempted.

C. The Illinois ZEC Statute Is Not the Kind of "Tethered" Regulatory Scheme Found Preempted under Hughes.

The plaintiffs heavily rely upon *Hughes,* contending that the Illinois ZEC statute mirrors the state program that the *Hughes* Court held was preempted. AOB at 41-49. Plaintiffs misapply *Hughes* and ask this court to improperly expand the narrow confines of the *Hughes* holding.

In *Hughes*, the Court held that the FPA preempted Maryland's program to encourage new electric generation plants where the regulatory program required the generators to sell the energy and capacity into the federal wholesale market, and then

ensured the generators would be paid the difference between the wholesale market rate and a contract rate. Recognizing the danger of an overly broad reading of the case, the *Hughes* Court explained that States remain able to encourage specific types of electric generation facilities. Expressly describing its holding as "limited," the Court wrote:

> We reject Maryland's program **only because it disregards an interstate wholesale rate** required by FERC …. **Nothing** in this opinion should be read to foreclose Maryland and other States **from encouraging production of** new or **clean generation** through measures **untethered** to a generator's wholesale market participation. So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Hughes, 136 S.Ct. at 1299 (emphasis added).

The Court held the Maryland program was preempted by the FPA because it replaced a FERC wholesale rate and expressly "tethered" compensation to the generator's wholesale sales into the federal wholesale electricity market. The Court defined "tethered" as "condition[ing] payment of funds on capacity clearing the auction." *Id.*

In its recent *Allco* decision, the Second Circuit relied upon *Hughes* in rejecting a federal preemption challenge to a state energy program that was not tethered to the wholesale energy market. The *Allco* plaintiff challenged Connecticut statutes that authorized the State to solicit proposals for renewable energy generation, to select

winning bids, and then to direct Connecticut utilities to enter into wholesale energy contracts with the winning bidders. *Allco,* 861 F.3d at 86. Connecticut transferred "ownership of electricity from one party to another by contract, independent of the [wholesale] auction." *Allco,* 861 F.3d at 99. The *Allco* court characterized the Hughes holding as a "bright line," prohibiting a form of contracting where bids were directly "tethered to a generator's wholesale market participation," as when payment of funds is conditioned upon clearing the capacity market. *Allco,* 861 F.3d at 102.

Applying the same legal analysis here, the Illinois statute does not cross the line drawn in *Hughes*. It does not require participation in the wholesale market in order to receive ZECs. 20 ILCS 3855/1-75(d-5); Decision at 30; *see also Zibelman,* at *10. The Illinois statute could not "disregard" a FERC wholesale rate because it does not require a FERC wholesale sale at all, let alone as a condition of participation in the ZEC program. *Cf.*, *Hughes,* 136 S.Ct. at 1299. ZECs are, quite simply, the very type of action *Hughes* acknowledged States could engage in—"measures 'untethered to a generator's wholesale market participation'" that "encourage production of new or clean generation." *Hughes,* 136 S.Ct. at 1299. Indeed, plaintiffs describe the ZEC program as a subsidy, and FERC has long noted that States may encourage renewables and other types of generating resources through direct incentives. *Southern California Edison Co.,* 71 FERC ¶61,269 at 62,080 (1995).

Contrary to plaintiffs' arguments, the Illinois statutory "price adjustment" provision does not create a "tether" to the wholesale market simply because ZEC prices may decline if a composite index of wholesale prices rises. Rather, the price adjustment merely provides a check on ZEC prices, ensuring that ratepayers do not pay higher-than-necessary costs. Looking up aggregated prices on an index, as the Illinois statute requires, does not displace the wholesale rate for any transaction, as was the case in *Hughes*. States may regulate "within the domain Congress assigned to them," including retail rates and environmental protection, "even when their laws incidentally affect areas within FERC's domain." *Hughes,* 136 S.Ct. at 1298. Illinois is doing so here, and its program is not preempted by the FPA.

D. A Claim of Incidental Impact on Supply and Demand Does Not Trigger Conflict Preemption.

Citing *Oneok*, plaintiffs contend that the Illinois ZEC statute is subject to conflict preemption. AOB at 54-55.[3] Plaintiffs argue that the statute is preempted because the nuclear generators will not retire if they receive the subsidy, and thus the amount of supply in the wholesale market is "artificially inflated," resulting in lower wholesale prices. AOB at 56-58. Plaintiffs' "indirect impact" preemption theory was expressly rejected in *Oneok* and EPSA.

[3] *Oneok* was decided on field preemption, not conflict preemption. *Oneok*, 135 S.Ct. at 1595.

An incidental impact on prices cannot trigger federal preemption, especially where, as here, the underlying federal statute is structured for dual jurisdiction between the federal and state governments. *See Oneok*, 135 S.Ct. at 1600-1601; *EPSA*, 136 S.Ct. at 774. "The law of supply-and-demand is not the law of preemption." *PPL EnergyPlus, LLC v. Solomon,* 766 F.3d 241, 255 (3d Cir. 2014). The *Allco* court rejected arguments that Connecticut infringed upon FERC's regulatory authority merely because the supply of electricity available to Connecticut utilities was increased, placing a downward pressure on wholesale prices. *Allco,* 861 F.3d at 100. Relying upon *Hughes,* the *Allco* court held that the incidental effect on wholesale prices did not amount to regulation of the interstate wholesale electricity market. *Id.* at 101. Under the same rationale, the district court below correctly rejected plaintiffs' conflict preemption challenge. Decision at 22-24; see also *Zibelman,* at *16-*17. This Court should affirm.

II. THE DISTRICT COURT CORRECTLY FOUND THAT ILLINOIS' ZEC PROGRAM DOES NOT DISCRIMINATE IN VIOLATION OF THE DORMANT COMMERCE CLAUSE.

Plaintiffs' Commerce Clause claims fare no better. Plaintiffs attempt to assert discrimination in two distinct markets, though they conflate these claims in their arguments. Plaintiffs allege that Illinois' distribution of ZECs will be "directly discriminatory" (Compl. at ¶ 90), based on allegations that only "certain in-state

wholesale producers" will receive ZECs to sell in the ZEC market (*id.* at ¶ 13).[4] Plaintiffs also allege that this distribution will have negative impacts on the wholesale energy markets, and that those impacts somehow constitute discrimination. Both claims fail.

Plaintiffs' arguments boil down to a claim that Illinois may not support the continued operation of generators Illinois has determined can provide the State with significant air quality benefits because it may turn out that the qualifying generators who need this support are located in Illinois. Courts have consistently rejected similar, overly-expansive views of the dormant Commerce Clause, and for good reason. This Court should do the same and affirm the district court's dismissal.

A. Plaintiffs' Discrimination Claims Fail Because ZEC Qualifiers and Other Generators Are Not Substantially Similar, and Illinois May Constitutionally Distinguish Between Them.

Discrimination analysis under the dormant Commerce Clause begins with identification of the relevant market and the competitors in that market. This is because "any notion of discrimination assumes a comparison of substantially similar entities," and "substantially similar" generally refers to the competitors "in a single market." *General Motors Corp. v. Tracy,* 519 U.S. 278, 298, 300 (1997).

[4] Citations to "Compl." are to the complaint filed by Electric Power Supply Association, et al., ECF Doc. 1, Case No. 1:17-cv-01164.

Yet, as noted above, plaintiffs do not identify a "single market." Rather, they conflate claims of discrimination in the ZEC market—discrimination regarding who gets ZECs to sell—with claims of discrimination in the wholesale energy markets. Where, as here, there are potentially multiple markets at issue, courts must decide which market should be "accord[ed] controlling significance." *Id.* at 303. Deciding that question requires courts to weigh policy considerations, such as the State's role in protecting its people and any relevant positions adopted by Congress. See *id.*

For example, in *Tracy,* the Supreme Court had to decide whether utilities selling natural gas "bundled with services and protections" designed to ensure reliability and availability for residential consumers were substantially similar to independent marketers selling natural gas "unbundled" from such services and protections. *Id.* at 297. The utilities and independent marketers competed in the unbundled natural gas market, in which gas was sold as a standalone product. *Id.* at 303. They did not compete, however, in the market for natural gas bundled with reliability and availability guarantees. *Id.* In deciding that the bundled gas market was controlling, the Court "proceed[ed] cautiously" to avoid jeopardizing the important protections the bundled product provided to residential consumers—protections Congress had long recognized as desirable. *Id.* at 304.

For similar reasons, the ZEC market is controlling in this case.[5] Just as "Congress [had found] the benefits of … bundled [natural gas]" to be "well within the realm of what the States may reasonably promote and preserve," Congress has also recognized that a State may reasonably promote or preserve certain types of electricity generation to serve its consumers. *See id.* at 305; *see also, supra* at 6 (discussing congressional preservation of traditional state decision-making regarding generation). Illinois' ZEC program does precisely that: it preserves air-pollution-reducing generation in order to protect "the health and welfare of the State's citizens." Ill. P.A. 099-0906, § 2. The ZEC market is controlling in this case, and, in that market, generators that advance Illinois' objectives are not "substantially similar" to those that do not. See *Tracy*, 519 U.S. at 307 (weighing "health and safety considerations" to decide these "threshold question[s]"); *see* also *Allco,* 861 F.3d at 103-108; *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown,* 567 F.3d 521, 527 (9th Cir. 2009).

Indeed, the caution exercised by the Court in *Tracy* is equally appropriate here. *See Tracy*, 519 U.S. at 304; *see also Dep't of Revenue of Ky. v. Davis,* 553 U.S. 328,

[5] Alternatively, this Court could conclude there is no discrimination here because the ZEC market is not a "natural functioning" "interstate market" of the kind the dormant Commerce Clause protects. *See McBurney v. Young*, 569 U.S. 221, 235 (2013). Indeed, ZECs are not goods produced by private parties in response to market demand. These instruments exist solely because the State chose to create them. Particularly where the qualifications for the instruments advance legitimate state interests, the distribution of state-created instruments is not the proper subject of a dormant Commerce Clause claim. *See McBurney*, 569 U.S. at 236 (rejecting discrimination claim involving state-created "product").

342-343 (2008). Many States have programs that rely on tradable compliance instruments that, like ZECs, are issued by the State for the sole purpose of embodying criteria that advance the States' particular objectives. For example, many States issue Renewable Energy Credits or RECs as a means by which utilities may demonstrate compliance with renewable energy quotas or other requirements. *See*, *e.g.*, *Wheelabrator,* 531 F.3d at 186. Each State decides for itself what attributes its particular instruments embody because each State has its own needs and policy objectives. For example, some States recognize landfill gas generation as renewable, and will issue RECs for such generation (assuming other applicable requirements are met), while other States do not and will not. *See* U.S. Energy Information Administration, Annual Energy Outlook 2016 at LR-12.[6] Like the state decisions in *Tracy*, the decisions concerning qualifications for instruments like RECs reflect each sovereign State's policy judgment made by weighing complex sets of potential risks and benefits.

The Supreme Court has "consistently recognized" that the Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens." *Tracy*, 519 U.S. at 306 (internal quotation omitted). The Clause should not, therefore, require Illinois to treat ZEC-

[6] *Available at* https://www.eia.gov/outlooks/archive/aeo16/pdf/0383(2016).pdf, last visited October 20, 2017.

qualifying generators—those that provide the benefits Illinois seeks—as though they are the same as non-qualifying generators that do not provide those benefits. The ZEC qualifications serve precisely the kind of values the Supreme Court has recognized that States may use to distinguish among different classes of businesses—even when those businesses might compete in one or more other markets. Differential treatment of classes that are not substantially similar is simply not discrimination.

B. Plaintiffs Have Not Stated, and Cannot State, a Claim of Discrimination, Even Assuming All Generators Are Substantially Similar.

Plaintiffs' discrimination claims would still fail, even assuming, *arguendo*, that all generators are substantially similar because of their competition in the wholesale energy markets.

1. Plaintiffs Have Not Stated, and Cannot State, a Claim of Facial Discrimination.

Plaintiffs concede that the Illinois statute does not "expressly state that the ZEC subsidies will be awarded only to the in-state Exelon plants." AOB at 65. Yet, Plaintiffs point to no case in which facial discrimination has been found absent such express statements. Plaintiffs' facial discrimination claim fails as a matter of law. *See*, *e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* ME, 520 U.S. 564, 575-76 (1997); *Oregon Waste System, Inc. v. Dept. of Envtl. Quality of Or.*, 511 U.S.

93, 99 (1994); *Wyoming v. Oklahoma,* 502 U.S. 437, 455 (1992); *Nat'l Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1131 (7th Cir. 1995).

2. Plaintiffs Have Not Stated, and Cannot State, a Claim of Purposeful Discrimination.

Plaintiffs also allege no facts that could establish that Illinois had a purpose other than the one stated by the Legislature—"[p]reserving existing zero emission energy generation" in order to achieve the State's "environmental goals and ensur[e] that air quality in Illinois continues to improve." Ill. P.A. 099-0906 § 1.5(4). Indeed, plaintiffs point only to a single statement they allege the Governor made when signing the bill—a statement that the ZEC program would "protect[] taxpayers, ratepayers, and the good paying jobs at the Clinton and Quad Cities plants." Compl. at ¶ 61 (emphasis omitted). This statement, even if proven, is wholly inadequate to support a claim that the ZEC program only "purport[s] to promote environmental purposes" but is, "in reality simple economic protectionism." *See Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471 (1981).

In fact, courts have consistently rejected claims of pretextual discrimination where the evidence of purported protectionism consists of "occasional references" to a law's economic effects, *see Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 38 (1st Cir. 2005), or "a few quotes" pulled "from an expansive record," *Rocky Mountain Farmers Union v. Corey,* 730 F.3d 1070, 1100 n.13 (9th Cir. 2013). *See also Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159 (5th Cir. 2007) (rejecting "stray

protectionist remarks of certain legislators" as sufficient to override other evidence of "legitimate consumer protection concerns"); *Valley Bank of Nev. v. Plus Sys., Inc.,* 914 F.2d 1186, 1196 (9th Cir. 1990) (rejecting claim based on "statements plucked out of the legislative history").

The cases plaintiffs cite in which protectionist purposes were found are wholly inapposite. In *Bacchus*, Hawaii's Legislature had expressly indicated that its sole intent was to "encourage and promote the establishment of a new [domestic] industry." *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270 (1984). It was thus, "undisputed that the purpose of the exemption was to aid [in-state] industry." *Id.* at 271; see also *Alliance for Clean Coal v. Miller,* 44 F.3d 591, 596 (7th Cir. 1995) ("The intended effect of these provisions is to foreclose the use of low-sulfur western coal [from outside Illinois].")

In contrast, the Legislature's stated purpose here is to maintain and improve air quality for the people of Illinois, and Plaintiffs allege no facts that suggest the program does not serve that aim. The single alleged statement by the Governor "is easily understood, in context, as economic defense of [a program] genuinely proposed for environmental reasons." *Clover Leaf*, 449 U.S. at 463 n.7. Plaintiffs' discriminatory purpose claim fails.

3. Plaintiffs Have Not Stated, and Cannot State, a Claim of Discriminatory Effects.

Perhaps recognizing the constitutionality of the ZEC qualifications, plaintiffs primarily complain about the effects they allege the ZEC program will have on wholesale energy markets. See AOB at 63, 65, 67; see also Compl. at ¶¶ 13, 65, 67. However, any such effects flow from non-discriminatory policy judgments about the importance of preserving certain generation for its air quality benefits. Accordingly, these effects are most appropriately analyzed under the *Pike* balancing test applicable to the effects of non-discriminatory laws. *Davis,* 553 U.S. at 338-39; *see also, infra*, Sec. III.

Even analyzed as a discriminatory effects claim, as Plaintiffs posit it, however, this claim fails. The dormant Commerce Clause does not prohibit a State from distinguishing between businesses, and even preferring certain businesses, based on the relative risks and benefits that flow from the operations of those businesses. *See, infra,* Section II.C. Further, courts have rarely found discrimination based solely on a law's effects and have consistently indicated that such claims carry heavy burdens for plaintiffs. *See, e.g.*, *Int'l Franchise Ass'n v. Seattle,* 803 F.3d 389, 405 (9th Cir. 2015); *Cherry Hill Vineyard, LLC v. Baldacci,* 505 F.3d 28, 36 (1st Cir. 2007); *Black Star Farms LLC v. Oliver,* 600 F.3d 1225, 1232 (9th Cir. 2010); *Gwadosky*, 430 F.3d at 39.

Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992) is not to the contrary and does not support plaintiffs' effects claim. In that case, this Court observed that the challenged law's ability to further the State's asserted public health objectives was "questionable at best" and concluded that "the [law's] principal objective" was, actually, "to impede importation" of the product at issue. *Id.* at 1279-80. The Court then also looked to the law's effects, concluding that "the practical impact" would be to reduce that importation "very significantly." *Id.* at 1279 (7th Cir. 1992) (emphasis added). In contrast here, the principal objective of the ZEC program is to maintain and improve air quality for Illinois residents, and plaintiffs allege nothing that suggests the program will not do so. Further, plaintiffs do not allege the program will reduce the import of electricity into Illinois at all, let alone very significantly. Notably, the ZEC program only applies to 16 percent of Illinois' load. 20 ILCS 3855/1-75(d-5)(1).

This case is also wholly distinguishable from *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), upon which this Court relied in *Government Suppliers*. In *Hunt*, the challenged law had "the effect of stripping away from [out-of-state industry] the competitive and economic advantages it ha[d] earned

for itself through its expensive inspection and grading system."[7] *Id.* at 351. Here, in contrast, plaintiffs identify no such earned advantages that could be stripped away.

In fact, if the alleged effects actually come to pass, they will fall on many in-state generators as they do on out-of-state generators. As plaintiffs themselves allege, these alleged effects—depressed market prices and increased barriers to entry—impact all market participants. *See* Compl. at ¶ 35 (alleging all market participants receive the same clearing price), ¶ 46. The two nuclear plants plaintiffs claim will receive ZECs—Quad Cities and Clinton—represent only about 12 percent of Illinois' total generating capacity.[8] Thus, the majority of Illinois' in-state generators—88 percent of the State's generating capacity—will not receive ZECs and will, thus, experience the same adverse market impacts experienced by all non-qualifying generators regardless of their location. *See* Compl. at ¶ 62 ("The ZEC program excludes all other zero-carbon resources in Illinois and elsewhere"); ¶ 13 (alleging that only "certain in-state wholesale producers" will benefit) (emphases added). These facts bear no resemblance to those in *Government Suppliers* or *Hunt* and cannot sustain a claim of discriminatory effects. Indeed, courts have rejected

[7] *Hunt*, like *Government Suppliers*, may be best viewed as a case involving a discriminatory purpose producing discriminatory effects. *See Bacchus*, 468 U.S. at 270 (citing *Hunt* as a discriminatory purpose case); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (same).

[8] *See* U.S. Energy Information Administration, "Nuclear plants account for more than half of electricity generation in Illinois," *available at* https://www.eia.gov/todayinenergy/detail.php?id=31092, last visited October 5, 2017.

such claims where the law could be "viewed as harming one type of in-state entity … while benefitting another type of in-state entity." *Int'l Franchise Ass'n, Inc.,* 803 F.3d at 406.

The district court correctly concluded that plaintiffs have failed to state a claim of discrimination in any form.

C. Plaintiffs' Discrimination Claims Are Premised on an Overbroad Reading of the Dormant Commerce Clause that Contravenes Controlling Precedent.

Plaintiffs' discrimination claims also fail for the simple reason that their foundational premise is faulty. Contrary to Plaintiffs' assumption, regulatory programs adopted to advance legitimate state interests, including public health and environmental protection, do not violate the dormant Commerce Clause just because they might make market participation easier for some and harder for others.

The Supreme Court's decision in *Exxon Corp. v. Maryland,* 437 U.S. 117 (1978), illustrates the point. There, Maryland had decided to protect its consumers from abusive pricing and distribution practices of oil refiners by prohibiting refiners from operating retail gasoline stations. *Id.* at 121. There was no dispute that Maryland's policy preference for independent retailers would affect the retail gasoline market. Exxon itself operated 36 retail stations in Maryland before the prohibition was enacted and could operate none afterwards. *Id.* at 121. It was likewise clear that the burden of Maryland's policy preference would fall exclusively

on out-of-state interests because all refiners happened to be located outside of Maryland. *Id.* at 121, 125. Yet, the Court rejected Exxon's "underlying notion" that such preferences are unconstitutionally discriminatory, holding expressly that the Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market." *Id.* at 127.

Other courts have likewise upheld distinctions States have drawn between businesses based on the relative risks or benefits presented by different types of operations, rejecting an "expansive interpretation of discrimination" that would include "all instances in which a law, in effect, burdens some out-of-state interest while benefitting some in-state interest." *See Ford Motor Co. v. Texas Dep't of Transp.,* 264 F.3d 493, 500 (5th Cir. 2001); *see also Allstate,* 495 F.3d at 161; *Brown v. Hovatter,* 561 F.3d 357, 364 (4th Cir. 2009); *Valley Bank,* 914 F.2d at 1193.

Notably, many, if not all, of the laws upheld in these cases had greater impacts than plaintiffs allege here. Many of these laws expressly prohibited entire classes of businesses from any market participation. The ZEC program, in contrast, prohibits nothing and covers only 16 percent of Illinois' electricity load, meaning the vast majority of Illinois' load will be served by energy that receives no ZEC support. 20 ILCS 3855/1-75(d-5)(1).[9] Given that States may, consistent with the dormant

[9] This fact, among others, distinguishes this case from *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994) on which plaintiffs rely. AOB at 64, 70. The ordinance at issue in

Commerce Clause, adopt broader measures—including prohibitions—that differentiate among businesses based on the risks and benefits of their operations, there is no reason to conclude that the substantially lesser burdens alleged here run afoul of the Constitution.

Further, the authority to distinguish between businesses in ways that protect consumers and residents does not disappear when some portion of the resulting burdens or benefits happens to align with the in-state or out-of-state locations of the businesses. In *Exxon*, "the burden of divestiture requirements" fell "solely" on the refiners who happened to be outside Maryland, but this fact did "not lead, either logically or as a practical matter, to a conclusion that the State [was] discriminating." *Exxon,* 437 U.S. at 125. Similarly, in *Clover Leaf Creamery*, the Supreme Court rejected both discrimination and undue burden challenges to Minnesota's prohibition against nonreturnable plastic milk containers, "[e]ven granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry." *See* 449 U.S. at 472-73.

Likewise, here, even if only in-state generators ultimately qualify for ZECs, that would not transform Illinois' facially neutral ZEC qualifications into

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Carbone created a monopoly for one local business. *Id.* at 391 ("it allows only the favored operator to process waste that is within the limits of the town"). Illinois' ZEC program does nothing of the kind. Plaintiffs do not even allege that the ZEC program "leav[es] no room for investment from outside." *See Carbone*, 511 U.S. at 392.

discrimination.[10] As in *Exxon* and *Clover Leaf*, this is not a case where the line between who benefits and who does not aligns with location. In fact, as discussed above, most in-state generators are in essentially the same position as the allegedly discriminated-against out-of-state generators. *See*, *supra* at p. 24. "The existence of major in-state interests adversely affected" underscores that that the ZEC program is not protectionist. *See Clover Leaf*, 449 U.S. at 473 n.17; *see also Rocky Mountain Farmers Union*, 730 F.3d at 1099; *Davis,* 553 U.S. 337-38 (defining economic protectionism as "regulatory measures designed to benefit in-state economic interests by *burdening out-of-state competitors*") (internal quotation omitted, emphasis added).

Where, as here, the State expresses a preference based on public health and environmental impacts, not on location, there is no prohibited protectionism. *See also Carbone,* 511 U.S. at 390 ("We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.") (emphasis added); *Wyoming,* 502 U.S. at 455 (finding protectionism where differential treatment was "based solely on [product's] origin") (emphasis added); *Fort Gratiot*

[10] The fact that *Exxon* and *Clover Leaf* involved claims of geographically unbalanced *burdens*, as opposed to *benefits*, does not matter. "The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications…." *Bacchus*, 468 U.S. at 273; *see also Allstate Ins. Co.*, 495 F.3d 156 (rejecting discrimination claim where benefits were allegedly designed "to maintain the dominance of local Texas body shops").

Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 361 (1992) (invalidating distinctions based on "no reason, apart from its origin"). Just as "[t]he dormant Commerce Clause is no obstacle" to regulation that seeks "to prevent firms with superior market position … from entering" a particular market "upon the belief that such entry would be harmful to consumers," the Clause likewise is no obstacle to Illinois supporting the continued availability of nuclear power upon the belief that such generation prevents air pollution harmful to Illinois residents. *See Allstate Ins.,* 495 F.3d at 162.

Plaintiffs cannot state a discrimination claim here, and the district court's judgment should be affirmed.

III. PLAINTIFFS ALSO FAIL TO STATE A CLAIM UNDER THE *PIKE* BALANCING TEST.

As noted above, the effects about which plaintiffs complain result from non-discriminatory distinctions based on risks to public health and the environment. Under the "protocol for dormant Commerce Clause analysis," such effects are analyzed under the *Pike* balancing test. *See Davis*, 553 U.S. at 338-339. This *Pike* claim also fails.

State laws usually survive the *Pike* balancing test because courts recognize that state actions designed to protect their citizens can and do permissibly impact markets and commerce. *See id.* at 339. Plaintiffs, thus, must allege an unusual or substantial burden—not just a modest, speculative loss in opportunities or profits—to state a

viable *Pike* claim. *See Clover Leaf,* 449 U.S. at 472 (rejecting *Pike* claim in light of "relatively minor" burden); *Nat'l Ass'n of Optometrists & Opticians v. Harris,* 682 F.3d 1144, 1150 (9th Cir. 2012) (requiring "significant burden"); *Pacific Northwest Venison Producers v. Smitch,* 20 F.3d 1008, 1015 (9th Cir. 1994). Plaintiffs' allegations cannot establish the necessary substantial burdens. *See Clover Leaf,* 449 U.S. at 473 (rejecting a *Pike* challenge despite the fact that challenged law would change the market, possibly in ways that might favor the State's pulpwood industry).

This conclusion is further bolstered by the fact that the putative benefits—maintenance and improvement of Illinois' air quality—are well-recognized as outweighing some burden on interstate commerce. *See*, *e.g.*, *id.* at 473 (recognizing "substantial state interest" in natural resource protection); *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority,* 550 U.S. 330, 347 (2007) (recognizing "health and environmental benefits" as substantial enough to outweigh "arguable burden"). In the absence of adequate allegations, it is appropriate to dismiss *Pike* claims on the pleadings. *See*, *e.g.*, *Park Pet Shop, Inc. v. City of Chicago,* 872 F.3d 495, 501-502 (7th Cir. 2017); *Chinatown Neighborhood Ass'n v. Harris,* 794 F.3d 1136, 1147 (9th Cir. 2015); *Alliance of Auto. Mfrs., Inc. v. Currey,* 610 Fed.Appx. 10, 13 (2d Cir. 2015); *Fednav, Ltd. v. Chester,* 547 F.3d 607, 624 (6th Cir. 2008); *PTI, Inc. v Philip Morris Inc.,* 100 F. Supp. 2d 1179, 1201 (C.D. Ca.

2000); *Goldfarb v. Supreme Court of Virginia,* 766 F.2d 859, 863 (4th Cir. 1985).

The district court properly dismissed this claim.

CONCLUSION

For these reasons, the Amici States respectfully request that the district court's decision be affirmed.

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CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Circuit Rule 32(a)(7)(B) in that this brief contains **6,988** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),as determined by Microsoft Word. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced face in 14-point Times New Roman font (with footnotes in 12-point).

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CERTIFICATION OF SERVICE

I hereby certify that on this 3rd day of November 2017, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all counsel of Record.

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