No. 17-2433 (Consolidated with 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, *et al.*,
Defendant-Appellee,
and
EXELON GENERATION COMPANY, LLC,
Intervenor-Appellee.

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,
Intervenor-Appellee.

On Appeals from the United States District Court for the Northern District of Illinois, Nos. 1:17-cv-01163 & 1:17-cv-01164, Hon. Manish S. Shah, District Judge

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SUPPLEMENTAL BRIEF OF INTERVENOR-APPELLEE EXELON GENERATION COMPANY, LLC

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Exelon respectfully responds to the Court's questions in a different order than posed. First, Plaintiffs lack a cause of action under *Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs argue they can sue under *Ex parte Young* because they claim an injury-in-fact resulting from allegedly unlawful state action. But mere Article III standing does not provide an equitable cause of action. Only plaintiffs asserting preemptive defenses to state enforcement may sue in equity. Here, Plaintiffs could not be the subjects of state enforcement. They are not even regulated by the State. Nor do they seek to vindicate any personal right conferred by federal statute. Accordingly, even a dramatic expansion of *Ex parte Young* would not authorize this suit. (Question 2; Section I below.)

Second, primary jurisdiction does not apply. That doctrine presumes a claim that may be resolved in federal court. But here, even if equity permitted this suit, Congress intended to foreclose it and require Plaintiffs to avail themselves of the administrative remedies provided by the Federal Energy Regulatory Commission ("FERC"). Congress established an exclusive and comprehensive administrative scheme for wholesale sellers to enforce the Federal Power Act, and FERC has many tools to ensure just and reasonable rates—which is all Plaintiffs are entitled to claim. As in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), Congress did not license Plaintiffs to bypass the agency. To be sure, a comprehensive administrative scheme and expert agency can sometimes point toward primary jurisdiction, but only when the claim is properly before the Court. Here, it is not, so dismissal with prejudice is warranted.

If the Court nevertheless finds that Plaintiffs do have a roving cause of action to enforce the division of federal and state authority—an antecedent issue the Court must

decide at the threshold—then invoking primary jurisdiction would be an appropriate exercise of the Court's discretion. FERC is in the midst of proceedings addressing the interaction between the ZEC Program and FERC's wholesale markets, and it has numerous tools to do so that would resolve this controversy. For example, FERC could find that wholesale rates are just and reasonable. Or it could change its market rules to ensure just and reasonable rates, without disturbing the ZEC Program's operation. PJM, the wholesale market operator for one of the two regional grids at issue in this case, is expected to propose changes that it will contend do exactly that. Either way, Plaintiffs will receive just and reasonable rates, which is all they are entitled to. Alternatively, FERC could moot the case by granting Plaintiffs the relief they already have requested from FERC, which Plaintiffs told FERC would remedy their alleged injury. So, if the Court concludes that Plaintiffs have a cause of action, it would be within the Court's discretion to invoke primary jurisdiction and either dismiss this case or stay it until resolution of the proceedings at FERC and any petition for judicial review. (Question 1; Section II below.)

Finally, the Retail Plaintiffs have no cause of action under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). (Question 3; Section III below.)

ARGUMENT

I. *Ex parte Young* Is Not Available as the Basis for Equitable Relief Here.

As Plaintiffs concede, their suit requires stretching *Ex parte Young* to provide an equitable cause of action to any preemption plaintiff with Article III standing. EPSA Reply 7. This theory finds no support in history or case law, and was analyzed and

rejected by the Tenth Circuit in *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (2017). *Ex parte Young* does not provide a cause of action.

A. *Ex parte Young* Authorizes Only the Pre-emptive Assertion In Equity of a Defense That Otherwise Would Have Been Available in State Enforcement Proceedings.

Ex parte Young is limited to preemptive assertions in equity of defenses that otherwise would have been available at law in state enforcement proceedings. In claiming that *Ex parte Young*'s equitable cause of action instead requires *only* standing and an alleged violation of federal law, Plaintiffs confuse *Ex parte Young*'s two separate holdings. In that case, railroad shareholders sued Minnesota's Attorney General, alleging that their state-set rates were unconstitutional. 209 U.S. at 144-45. A federal court agreed and enjoined enforcement. *Id.* at 149. The Supreme Court held that the trial court had the power to entertain the suit and issue the injunction, rejecting two potential barriers.

First, the Court held that the Eleventh Amendment did not bar the suit because the Attorney General, having acted unlawfully, was not immune. *Id.* at 159. Second, the Court rejected the argument that the court lacked equitable authority to issue the injunction. The Attorney General had objected that "there is a plain and adequate remedy at law open to the complainants"—violating the state order and invoking its unconstitutionality as a defense. *Id.* at 163. But the Court disagreed, outlining the difficulties of defending against such enforcement, including that this approach "would place the company in peril of large loss and its agents in great risk of fines and imprisonment if … the act was valid." *Id.* at 165. The Court found that these "objections

to a remedy at law as being plainly inadequate are obviated by a suit in equity." *Id.*

Here, Plaintiffs claim that "any plaintiff with Article III standing may seek an injunction against enforcement of a preempted state law." EPSA Reply 7. But Plaintiffs' only support is the Court's modern articulation of *Young*'s *first* holding regarding the Eleventh Amendment: That "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) ("*VOPA*") (quotation marks omitted) (brackets in original); *see* EPSA Reply 7. Plaintiffs fail to acknowledge that the Court uses that test to "determin[e] whether the doctrine of *Ex parte Young avoids an Eleventh Amendment bar to suit*." *VOPA*, 563 U.S. at 255 (emphasis added).

It is not enough for Plaintiffs to "avoid[] an Eleventh Amendment bar." *Id.* As in *Ex parte Young*, they must *also* show that equity gives them a cause of action. *See Ind. Prot. & Advocacy Servs. v. Ind. Fam. Soc. Servs. Admin.*, 603 F.3d 365, 370-74, 374-82 (7th Cir. 2010) (en banc) ("*IPAS*") (analyzing the two questions separately); *id.* at 392 (Easterbrook, J., dissenting) ("to say that a claim against a state officer sidesteps sovereign immunity is not enough; plaintiffs still need a right of action").

Here, equity does not give Plaintiffs a cause of action. The question is not whether a suit would be "equitable" in the colloquial sense of "fair and equitable." The question is historical: whether the relief requested "was traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A.v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). If not, that remedy falls outside of the federal courts' equitable powers. *Id.* at 318-19.

The Supreme Court has adopted a "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Id.* at 329.

Ex parte Young fell within equity's historic jurisdiction. The plaintiff "pre-emptive[ly] assert[ed] in equity … a defense that would otherwise have been available in the State's enforcement proceedings at law." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 983 (7th Cir. 2012) (quotation marks omitted). That is, the plaintiff sought an anti-suit injunction, a type of action recognized by equity courts for centuries. *See* 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, § 1360, at 2699-2700 (3d ed. 1905) ("The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction…."); 2 Joseph Story, *Commentaries on Equity Jurisprudence* 190 (13th ed. 1886) (discussing anti-suit injunctions); John Harrison, Ex parte Young, 60 Stan. L. Rev. 989, 997-1001 (2008) (same).

That is not the type of suit Plaintiffs have brought. There is no enforcement action impending against them, nor could there be. Rather, Plaintiffs say that "equity" gives them roving authority to enforce the line separating federal and state authority, so long as they have standing. *See* EPSA Reply 7 (Plaintiffs seek to "prevent[] Illinois' incursion into FERC's exclusive regulatory authority in a manner that harms Plaintiffs").

"Equity" does not stretch so broadly. Plaintiffs' suit in no way resembles the relief "traditionally accorded by courts of equity." *Grupo Mexicano*, 527 U.S. at 319. Nothing like it is mentioned in Pomeroy, Story, or any other historical treatise describing the power of equitable courts. It is for Congress to undertake the "substantial expansion"

Plaintiffs invite. *Id.* at 329. Here, Plaintiffs do not, and cannot, claim that Congress has created a statutory right of action. *See Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 73 (1st Cir. 2017) ("[T]he FPA resoundingly does not confer a private right [of action] …").[1] That should end this case.

B. Plaintiffs' Suit Falls Far Outside the Furthest Potential Limits of *Ex parte Young*.

Plaintiffs cite various Supreme Court cases entertaining arguments that state laws were preempted, even absent state enforcement action. EPSA Reply 8-13. For two reasons, these cases do not help Plaintiffs: They did not address the issue, and regardless, none considered claims by bystanders like Plaintiffs.

First, in none of Plaintiffs' cited cases did the Court actually address whether equity permitted the action. The Court has cautioned against reading its cases as resolving "[q]uestions which merely lurk in the record, neither brought to the attention of the [C]ourt nor ruled upon." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quotation marks omitted). Indeed, the Court has frequently emphasized that it was *not* deciding the question here. In *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), it stressed that "[b]ecause neither [defendant] challenged whether plaintiffs may seek declaratory relief under the Supremacy Clause, the Court assumes without deciding that they may." *Id.* at 1296 n.6 (citing amicus brief doubting plaintiffs' right to sue). Likewise, in two other cases cited by Plaintiffs, Justices expressed skepticism that the

[1] Plaintiffs cite 16 U.S.C. § 825p, a jurisdictional provision. Exelon has explained why Plaintiffs' reliance on Section 825p is misplaced, *see* Exelon Br. 23-24, but even Plaintiffs do not contend that Section 825p *creates* a private right of action. Rather, they claim it preserves whatever equitable right of action *Ex parte Young* recognizes.

plaintiffs had a cause of action. *See VOPA*, 563 U.S. at 262-63 (Kennedy, J., concurring) (noting that *Young*'s "negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law" but that "[i]n the posture of the case as it comes before the Court, it must be assumed that VOPA has a federal right to the records it seeks"); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) ("*PhrMA*") (Thomas, J., concurring) (arguing that because plaintiff had no cause of action under 42 U.S.C. § 1983, it "arguably is not entitled to bring a pre-emption lawsuit," but noting that defendants "have not advanced this argument in this case").[2]

In another case Plaintiffs cite, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the plaintiffs proceeded under 42 U.S.C. § 1983. *See Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998). Similarly off point is *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017), where there was a statutory private right of action, *see id.* at 90, 93, 94 n.9. And virtually all Plaintiffs' cases were decided before *Armstrong*, 135 S. Ct. 1378, when many courts assumed that the Supremacy Clause implied a private right of action.

Second, even if these cases did silently expand *Ex parte Young*, this suit falls beyond their furthest limits. Every case cited by Plaintiffs falls into two categories: Either the plaintiff was the direct subject of state regulation (and thus potentially exposed to

[2] *See also Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015) (holding that sovereign immunity did not bar suit, but affirmatively expressing no view on existence of cause of action, *id.* at 144) (cited by EPSA Reply 8-9).

coercive state action), or the plaintiff was suing to enforce personal rights conferred upon the plaintiff by statute. Neither situation is present here.

The first category includes *Crosby*.[3] There, a business association challenged a state law that "penalize[d the] private action" of its members—"ban[ning]" them from doing business with Burma, by placing any company that did so on a "restricted purchase list" that precluded them from selling goods or services to state entities. 530 U.S. at 367, 376; *id.* at 378 (state law "penaliz[ed] individuals and conduct," including by the plaintiff's members). The plaintiff thus was directly subject to the challenged state action. *PhrMA* was similar: The State imposed regulations on drug manufacturers, enforced by banning them from participating in Medicaid. 538 U.S. at 649-50. Plaintiffs, by contrast, are not regulated by Illinois. EPSA Plaintiffs are bystanders to a subsidy that allegedly causes them competitive harm, while Retail Plaintiffs complain about regulations imposed on utilities, not themselves.

Equity does not permit challenges by bystanders, as this Court has recognized. In *Planned Parenthood*, the plaintiff brought suit alleging the State had improperly refused to fund it. The Court found, in persuasive dicta, that the circumstances were not "covered by … *Ex parte Young*." 699 F.3d at 983. It emphasized that "Indiana is not threatening

[3] *See also N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650-51 (1995) (challenge brought by commercial insurers against state law directly obligating them to pay more money to hospitals); *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507 (5th Cir. 2017) (challenge brought by air ambulance providers challenging their own rates) (cited by EPSA Reply 8-9). This Court's decision in *Restoration Risk Retention Group, Inc. v. Gutierrez*, No. 17-1016, 2018 WL 388070 (7th Cir. Jan. 12, 2018), likewise involved a party directly regulated by the State; the plaintiff challenged its obligation "to comply with the insurance regulations of Wisconsin." *Id.* at *4.

Planned Parenthood with *an enforcement action or otherwise trying to regulate its behavior through an action at law*; the State has simply turned off the funding spigot." *Id.* (emphasis added). Likewise here, Illinois is neither threatening Plaintiffs with enforcement (as in *Ex parte Young*) nor is otherwise regulating its behavior (as in *Crosby* and *PhrMA*). Indeed, the link between Plaintiffs' injury and the State's actions is even more attenuated than in *Planned Parenthood*; rather than "turn[ing] off the funding spigot" to the plaintiff, *id.*, the State is turning *on* a source of funding to a third party.

In the second category of cases, the plaintiff sued to enforce personal rights conferred upon it by federal law. *Cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (imposing that requirement for suits brought under 42 U.S.C. § 1983). In *VOPA*, the plaintiff (a state agency) was asserting its own right to receive records from the defendants (state actors). The Supreme Court did not decide whether the plaintiff had a cause of action, *see supra* 6-7, but this Court, addressing the same statute, held a similar plaintiff could sue because it asserted personal rights conferred by federal law. *See IPAS*, 603 F.3d at 375 (Congress "create[d] a legally enforceable right of access to patient records vested in" the plaintiff). Likewise, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), a pre-*Young* case cited at oral argument, the Court found that a federal statute conferred a personal right on the plaintiff that could be vindicated in equity. *Id.* at 110 ("In our view of these statutes the complainants had the legal right, under the general acts of Congress …, to have their letters delivered….").

Even if *Ex parte Young* stretched so far, Plaintiffs do not claim to be vindicating personal rights. The only personal right even arguably conferred by the Federal Power

Act on wholesale sellers is to receive just and reasonable rates in connection with wholesale sales. 16 U.S.C. § 824d(a); *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 250 (1951) (assuming the Federal Power Act granted such a right, but holding FERC had "exclusive powers" to address it). But throughout this litigation, Plaintiffs have confirmed they are *not* suing to vindicate any statutory right to just and reasonable rates. They seek a roving license to enforce the line between federal and state authority, regardless of whether the resulting wholesale rates are just and reasonable. Their opening brief proclaimed that "[t]he issue … is not what rates should be set, but who should set them." EPSA Open. Br. 38. And at argument, EPSA's counsel argued that even if FERC determined that rates are just and reasonable notwithstanding the ZEC Program, Plaintiffs would (in his view) still have a cause of action, because their claim does not seek to vindicate any personal right conferred by the Federal Power Act, but to police the boundaries of state and federal authority. Oral Arg. at 13:50, 14:44.

Safe Streets rejects Plaintiffs' theory of a roving cause of action to enforce federal law. There, plaintiffs alleged they were injured by Colorado's legalization of marijuana, and brought an equitable action to enjoin Colorado's laws under the Controlled Substance Act. Like Plaintiffs here, they did not allege that Colorado was regulating them, or that their own rights under the statute were violated. They "hypothesize[d] that a private plaintiff may enforce any provision of any federal statute 'in equity' whenever: (a) a State … violates that statute; and (b) that private citizen suffers any alleged injury as a result." 859 F.3d at 895. This "remarkable vision of federal equitable relief in the absence of federal substantive rights [was], apparently, premised on the notion that free-floating

causes of action in equity exist unless Congress has restricted the courts' preexisting equitable authority to enjoin violations of federal law." *Id.* (internal quotation marks omitted). The Tenth Circuit comprehensively rejected that theory. It concluded that the plaintiffs could not sue unless they "allege[d] that they are vindicating a federal substantive right to be able to maintain a cause of action in equity." *Id.* at 903-04. This holding applies with full force here. *See also Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144-46 (2d Cir. 2016) (allowing suit by plaintiffs claiming preemption as an anticipatory defense to "escalating fines and other sanctions," but suggesting bystander plaintiffs seeking "to enforce federal law themselves" lack a cause of action).

Plaintiffs argue that *Armstrong* must have impliedly recognized an *Ex parte Young* cause of action in a bystander-type case, or *Armstrong* would not have analyzed whether the Medicaid Act eliminated courts' equitable power. Not so. *Armstrong* simply chose to reject the suit on the narrower ground that the Medicaid Act foreclosed whatever equitable relief otherwise existed. Indeed, as the Tenth Circuit explains, the *Armstrong* plaintiffs claimed to be "vindicat[ing] their averred *federal property rights* to [Medicaid] funds, rights allegedly bestowed on them by [the Medicaid Act]." *Safe Streets*, 859 F.3d at 899; *see Armstrong*, 135 S. Ct. at 1382. Thus, "*Armstrong* itself relied on an initial determination that the providers claimed to be vindicating the[se] substantive rights by enforcing the very federal statute that allegedly created those rights." *Safe Streets*, 859 F.3d at 901. Accepting *arguendo* the plaintiffs' premise, the majority analyzed whether Congress extinguished the *Ex parte Young* claim. But as *Safe Streets* notes, the

plurality—four Justices of the five-Justice majority—doubted that premise, questioning whether "'providers are intended beneficiaries … of the Medicaid agreement,' which *also* would have foreclosed their claimed 'private right of action under federal law.'" *Id.* at 903 (quoting *Armstrong*, 135 S. Ct. at 1387 (plurality op.)) (alteration in original)).

Plaintiffs' suit thus lies beyond even the broadest expansion of *Ex parte Young*.

C. Plaintiffs' Position Contradicts Decades of Precedent.

Plaintiffs' theory also cannot be squared with the Supreme Court's precedent on when private plaintiffs may sue to enforce federal law, including the case law on statutory private causes of action and 42 U.S.C. § 1983.

As to statutory causes of action, modern cases hold that if Congress does not expressly provide a right of action, none exists. *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). And even when Congress provides an express right of action, it does not apply against States unless Congress makes its intention "unmistakably clear." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541 (2002). Plaintiffs' theory turns this precedent on its head. In a preemption case, only State actors are defendants. Yet by invoking an independent action in equity, Plaintiffs would let any litigant with standing circumvent the limits that apply to private rights of action. Plaintiffs' position thus perversely makes it *easier* to establish an implied right of action against a State.

As to § 1983, the Supreme Court has held that it authorizes suits for violations of federal statutes only when Congress "speaks with a clear voice, and manifests an unambiguous intent to confer individual rights." *Gonzaga*, 536 U.S. at 280 (quotation marks and alteration omitted). As noted, Plaintiffs are not seeking to vindicate any

personal right. And their expansive approach to *Ex parte Young* would allow plaintiffs to bypass § 1983's rigorous standard for pursuing statutory claims—even though preemption claims merely assert federal statutory rights. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989); *cf. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 619 (2012) (Roberts, C.J., dissenting) ("This body of law would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect").

Plaintiffs' rule also harms state sovereignty. The Supreme Court has acknowledged that *Ex parte Young* rests on a "fiction" that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *VOPA*, 563 U.S. at 255 (quotation marks omitted). In the context of a looming enforcement action, that "fiction" does not substantially injure state sovereignty. The State will be litigating, one way or another, and *Ex parte Young* merely changes forum and timing. Here, however, the fiction turns into a fabrication: Plaintiffs are haling state officials into court, against their consent, and forcing them to defend the legality of a state program in light of a federal statute, even though Congress never allowed them to do so.

D. If Plaintiffs Change Their Theory and Contend They Are Asserting Personal Rights, Such a Claim Would Not Be Cognizable.

As explained, Plaintiffs do not claim that their own right to just and reasonable rates was violated. *See supra* 9-10. If Plaintiffs reverse themselves and assert that they are vindicating a personal right to just and reasonable rates, their claim still cannot be

brought in federal court, for reasons independent of *Ex parte Young*. That is because a plaintiff "cannot litigate in a judicial forum its general right to a reasonable rate." *Mont.-Dakota Utils.*, 341 U.S. at 251. This right is "qualif[ied]" by the caveat "that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion." *Id.* Hence, "the reasonableness of rates," including whether rates remain just and reasonable, is within "FERC's exclusive jurisdiction." *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 887 (7th Cir. 2013). "[T]he prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." *Mont.-Dakota Utils.*, 341 U.S. at 251. Thus, if Plaintiffs claim they are vindicating their own right to just and reasonable rates, they put themselves out of court.

Plaintiffs have identified no other personal right they could be vindicating. None exists. Indeed, Plaintiffs conceded that if FERC deemed rates to be just and reasonable, no right would be violated. *See* Oral Arg. 13:50 (JUDGE EASTERBROOK: "Assume that FERC has said, we've looked at this, they're fine by us. What statute would that violate?" MR. VERRILLI: "It wouldn't because they would be exercising their authority in that circumstance to say that rates are just and reasonable, which is their job."); *id.* at 14:44 (JUDGE EASTERBROOK: "But if the FERC says this is fine, it sounds that you don't have a claim." MR. VERRILLI: "But that's because they will have exercised their jurisdiction.").

In short: Either Plaintiffs are attempting to vindicate the right to just and reasonable rates (which is a question for FERC), or they are not trying to vindicate any personal

right (so cannot use *Ex parte Young)*. Either way, this suit cannot proceed.

II. Primary Jurisdiction Does Not Apply Because Plaintiffs Lack a Cause of Action—But if Plaintiffs Had a Cause of Action, the Doctrine Would Be an Appropriate Exercise of the Court's Discretion.

"[A] prerequisite to merely suspending" a suit under primary jurisdiction "is that the plaintiff's claim have been originally cognizable in the courts." *Pennington v. Zionsolutions LLC*, 742 F.3d 715, 720 (7th Cir. 2014) (quotation marks omitted). That prerequisite is not present when plaintiffs "have failed to present a judicially cognizable claim"; in that circumstance, dismissal with prejudice for failure to state a claim is required. *Id.* That describes this case. Even assuming *Ex parte Young* grants a roving license to plaintiffs to enforce federal law, Congress foreclosed that cause of action in the Federal Power Act (Part A). But if the Court disagrees and finds a cause of action, then the Court's invocation of primary jurisdiction, either to dismiss this action or stay it until related proceedings at FERC (including those brought by Plaintiffs) are resolved, would be an appropriate exercise of discretion (Part B).

Primary jurisdiction has two forms. Under the strong form (the "central and original form"), the doctrine applies when the plaintiff's suit is "not brought under the regulatory statute," *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001), but contains an embedded legal issue requiring resolution by the agency. Put otherwise, "the court has jurisdiction of the *case*, but the agency of the *issue*." *Id.* at 564. For example, in *United States v. Western Pacific Railroad Co.*, the plaintiff sought to recover damages against the United States, but the claim depended on tariff interpretation issues reserved for the agency. 352 U.S. 59, 63-64 (1956). In such circumstances, the court pauses the case and refers the

issue to the agency. "If the agency's resolution of the issue does not dispose of the entire case, the case can resume subject to judicial review … along whatever path governs review of the agency's decisions, whether back to the court in which the original case is pending or" as provided in "the statute governing review of the agency's decisions." *Arsberry*, 244 F.3d at 563.

The doctrine's weak form "allows a court to refer an issue to an agency that knows more about the issue." *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004). It applies when the "court and agency have concurrent jurisdiction to decide an issue, or only the court has the power to decide it, and seeks merely the agency's advice." *Arsberry*, 244 F.3d at 564. The rationale is "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions," and "the expert and specialized knowledge of the agency[]." *W. Pac. R.R. Co.*, 352 U.S. at 64.

A. Primary Jurisdiction Does Not Apply Because Plaintiffs Lack a Cause of Action.

Both forms of primary jurisdiction assume that the action is properly before the court. Where the suit is *not* "originally cognizable in the courts" because the plaintiff lacks a cause of action, *Pennington*, 742 F.3d at 720, the case must be dismissed on the merits, with prejudice, *id.*; *see Mont.-Dakota Utils.*, 341 U.S. at 253-54 (primary jurisdiction under Federal Power Act applies only when plaintiffs "state[] a federally cognizable cause of action," which plaintiffs there had not). Here, even assuming *Ex parte Young* allows a roving cause of action to enforce federal law, Congress foreclosed that cause of action when it passed the Federal Power Act. Congress did not intend private litigants to bypass the Act's detailed and complex administrative remedial scheme. Therefore,

Plaintiffs lack a cause of action, and primary jurisdiction does not apply.

As discussed in Exelon's brief (at 16-23), Congress created a comprehensive administrative scheme for wholesale sellers to litigate entitlement to just and reasonable rates, and an expert agency with an extensive remedial toolkit and decades of experience regulating harmoniously with states, *e.g.*, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 517 (1989), and articulating the bounds of its own jurisdiction, *e.g.*, *WSPP, Inc.*, 139 FERC ¶61,061 (2012); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *New York v. FERC*, 535 U.S. 1 (2002). "Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have … refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996).

Here, Congress not only created a detailed administrative scheme to apply a "judgment-laden standard," *Armstrong*, 135 S. Ct. at 1385, but also declined to provide an unqualified private right of action to sue in federal court—even while recognizing a governmental right of action in district court, 16 U.S.C. § 825m, and a private right to sue following the conclusion of agency proceedings, *id.* § 825*l*(b). The "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Armstrong*, 135 S. Ct. at 1385 (quoting *Sandoval*, 532 U.S. at 290).

In short, Congress did not intend to allow this suit in federal court *at all*—and so primary jurisdiction does not apply.

B. If Plaintiffs Had A Cause of Action, Primary Jurisdiction Would Be an Appropriate Exercise of Discretion.

Nonetheless, essentially the same considerations indicate that FERC has the

expertise and means to adequately address Plaintiffs' core concern regarding the ZEC Program's interaction with wholesale markets. Thus, if the Court *does* conclude that Plaintiffs have a cause of action, it would be an appropriate exercise of the Court's discretion to invoke the weak form of primary jurisdiction[4] and either dismiss this action or stay it pending resolution of related proceedings at FERC.[5] That would give FERC the chance to consider all its options, many of which would address Plaintiffs' alleged injury. *See Marseilles Hydro Power, LLC, v. Marseilles Land & Water Co.*, 299 F.3d 643, 651-52 (7th Cir. 2002) (recommending primary jurisdiction because pending FERC proceeding may "either render the lawsuit moot" or require changes to the equitable relief the court would order); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306 (1973) (primary jurisdiction referral when agency's determination could "dissolve" importance of legal issue); *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 913 (8th Cir. 2015) (primary jurisdiction referral, and dismissal without prejudice, when agency's "resolution of the referred issue will likely dispose of the entire case"); *cf. Schering-Plough*

[4] The strong form of primary jurisdiction would not apply. If Plaintiffs can bring their preemption claim as bystanders, *see supra* Parts I.A-C, and can proceed in court without regard to FERC's judgment as to whether rates are just and reasonable, *see supra* Part I.D, there would be no other embedded legal issue within the "exclusive original jurisdiction" of the agency. *Arsberry*, 244 F.3d at 563.

[5] Exelon did not argue primary jurisdiction, because its position is that Plaintiffs lack a cause of action altogether. But to the extent the Court disagrees, it can invoke primary jurisdiction *sua sponte*. *See W. Pac. R.R. Co.*, 352 U.S. at 63 (raising issue *sua sponte* "because we regard the maintenance of a proper relationship between the courts and the Commission … to be of continuing public concern"); *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 n.2 (9th Cir. 2002); *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996).

Healthcare Prod., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 508-09, 513 (7th Cir. 2009) (affirming dismissal without prejudice of Lanham Act claim because ongoing parallel agency proceedings "may cast the issue … in a different light").

Several related FERC proceedings are ongoing or imminent. First, Plaintiffs filed a complaint with FERC arguing that, due to the ZEC Program, market rules no longer yield just and reasonable rates. Mot. to Amend, and Amendment to, Compl., *Calpine Corp. v. PJM Interconnection, LLC*, Docket EL16-49-000, at 18 (FERC Jan. 9, 2017) ("EPSA FERC Compl.").[6] Plaintiffs urge changes to PJM's tariff that they assert "provide a workable, just and reasonable fix to the immediate problem," *id.* at 18, and will be "broad enough to address the threat … posed by the ZEC Legislation," *id.* at 16. Because they argued that FERC had the authority to fix the problem—assuming it exists—with changes to its market rules, the Plaintiffs strenuously urged that "the Commission need not and should not decide … whether federal law (the Federal Power Act[)] preempts State action (the ZECs Legislation)…." Mot. for Leave to Answer and Answer, *Calpine Corp.*, at 4 (FERC Feb. 14, 2017) ("EPSA FERC Answer"). The matter is pending.

Second, FERC convened a technical conference to consider "the increasing interest by states to support particular … resource attributes," in light of FERC's desire to "respect state policies." Notice of Technical Conference 2, Docket No. AD17-11-000 (FERC Mar. 3, 2017). FERC identified five paths that it could take regarding such

[6] The FERC filings cited in this supplemental brief can be located by docket number here: https://elibrary.ferc.gov/idmws/ docket_search.asp.

policies, which include maintaining the status quo and changing market rules to ensure just and reasonable wholesale rates while leaving the ZEC Program and other state programs undisturbed. *Id.*

Third, PJM has indicated its intent to file, next month, proposed revisions to its market rules intended to "ensure that state policy actions are accommodated in the market … while ensuring that out-of-market subsidies do not affect the overall effectiveness of the capacity market and the efficient entry and exit of resources."[7] FERC will review that proposal and determine whether it is just and reasonable under 16 U.S.C. § 824d.

FERC could take many actions in these proceedings that would address Plaintiffs' claimed injury. First, FERC could decide that current rates are just and reasonable. Second, FERC could determine that PJM's proposal is just and reasonable and approve it, leaving the ZEC Program undisturbed. Third, FERC could *require* changes (such as those urged by Plaintiffs) after finding they are necessary to ensure just and reasonable rates, again without disturbing the ZEC Program. Fourth, FERC could issue a policy statement following its technical conference that is supportive of designing federal markets to complement state environmental subsidy programs, including the ZEC Program. In all these scenarios, the ZEC Program would continue to operate, and Plaintiffs would receive rates that FERC has deemed just and reasonable—fully protecting their statutory rights, and leaving them no further claim. Plaintiffs

[7] PJM Interconnection L.L.C., *PJM's Capacity Market Repricing Proposal* 1 (Jan. 16, 2018), http://www.pjm.com/-/media/library/reports-notices/special-reports/2018/20180116-capacity-market-repricing-proposal-updated.ashx?la=en.

acknowledged as much both at argument, *see* Oral Arg. at 13:50, 14:44 (quoted *supra* 14), and in their filings at FERC, *see* Mot. to Lodge and Request for Expedited Action on Am. Compl., *Calpine Corp.*, at 4 (FERC Aug. 30, 2017) (FERC is "free … to ensure that the wholesale rates are just and reasonable notwithstanding [Illinois's] actions.").[8]

Finally, FERC could directly address preemption if it wished to do so.[9] Indeed, FERC addressed a question just like this in *WSPP*, 139 FERC ¶61,061 (2012), concluding that environmental attribute credits—which are just like ZECs in all respects relevant to FERC's holding—are within States' authority.

FERC thus has wide-ranging policy discretion to decide whether any remedial action is needed, and if so, what action is appropriate. And FERC's decision could then be reviewed under the APA by a court of appeals.

If this Court does invoke primary jurisdiction, it should dismiss this case. *See Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (court has discretion to dismiss without prejudice); *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 782 (9th Cir. 2002) (dismissal without prejudice appropriate). Alternatively, the Court could stay this case until FERC's proceedings reach resolution. Although primary jurisdiction cases speak

[8] FERC-approved market rules changes would also dramatically affect the factual allegations on which Plaintiffs base their preemption claims. EPSA Compl. 29-44 (describing markets in detail).

[9] FERC has addressed preemption. *See, e.g., Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, PP 1-2 (2010) (finding that "CPUC's decision is not preempted by the FPA"); *Conn. Light & Power Co.*, 70 FERC ¶ 61,012 (1995) (state statute that directly set prices for wholesale transactions held preempted); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067, 61,248 (1997) (same, but noting that "encouraging renewable or other types of resources through [a State's] tax structure, or by giving direct subsidies," was not preempted).

of "referring" an issue to an agency, the Court does not request a particular determination from FERC. Like nearly all statutes, the Federal Power Act "contains no mechanism whereby a court can on its own authority demand or request a determination from the agency." *Reiter*, 507 U.S. at 269 n.3. Accordingly, a primary jurisdiction "[r]eferral" is "left to the adversary system, the court merely staying [or dismissing] its proceedings while the [plaintiff] files an administrative complaint" at the agency. *Id.* FERC will thus be able to manage its own docket and resolve issues surrounding the ZEC Program however it wishes, using its full range of tools and remedies.

III. The Principle of *Illinois Brick* Requires Dismissal of Retail Plaintiffs' Claims.

The principle of *Illinois Brick* forecloses claims by anyone other than a participant in the wholesale market and provides additional grounds for dismissing Retail Plaintiffs' claims.

Illinois Brick held that indirect purchasers cannot pursue antitrust claims: "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property.'" 431 U.S. at 729 (citing 15 U.S.C. § 15). In *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), the Court applied *Illinois Brick* and held that when "suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers," "only the utility has the cause of action because it alone has suffered injury within the meaning of [§ 15]." *Id.* at 204.

This Court has explained that *Illinois Brick* and *UtiliCorp* embody a more general principle: only entities directly affected by illegal actions may sue. In *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), this Court explained that the *Illinois Brick* principle

"prevails throughout the law." *Id.* at 1175. Quoting Justice Holmes' famous aphorism that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step,'" *id.* (quoting *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 533 (1918)), the Court held that the principle "that the indirectly injured party may not sue" is "well established." *Id.* For instance, "[i]f a wrong committed against a firm causes it to become bankrupt and discharge its employees or discontinue its purchases, the injured employees and suppliers may not sue. … The investors in the firm suffer when the firm incurs a loss, yet only the firm may vindicate the rights at issue." *Id.* This "principle applies even in constitutional law. Only the directly affected party, not those who feel the repercussions, gets a hearing under the Due Process Clause." *Id.* (citing *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980)).

That principle—that downstream retail customers cannot enforce a statute about just and reasonable wholesale rates—requires dismissal of Retail Plaintiffs' suit.[10]

Exelon acknowledges that, in the antitrust context, other circuits have permitted indirect purchasers to seek injunctions, although this Court has not addressed the question. Those circuits reason that *Illinois Brick* focuses on the difficulty of allocating damages between direct and indirect purchasers, which is absent when the plaintiff seeks an injunction. *See, e.g.*, *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998).

[10] The District Court applied this principle to dismiss the Retail Plaintiffs' claims, *see* Op. 14-15, and Exelon urged affirmance of that holding in its brief. *See* Exelon Br. 25.

Although Exelon believes those decisions are incorrect,[11] it is unnecessary to reach that question. Congress created an express cause of action to obtain an antitrust injunction, 15 U.S.C. § 26, and courts may have hesitated to interpret it more narrowly than its express terms required when *Illinois Brick*'s practical concerns were absent. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates") (internal citation omitted)). But here, Retail Plaintiffs pursue an implied equitable cause of action. Just as the Court should leave intact the law's traditional constraints on equitable causes of action generally, *see supra* Part I, it should also leave intact the principle that indirectly affected plaintiffs cannot sue.

CONCLUSION

The judgments should be affirmed.

[11] The statutory holding of *UtiliCorp* and *Illinois Brick* is that indirect purchasers have not suffered an "injury" within 15 U.S.C. § 15, which authorizes a private cause of action for damages. *See supra* 22. If indirect purchasers are deemed *uninjured*, then they also do not suffer "loss or damage" under 15 U.S.C. § 26, which authorizes injunctions.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 12 point Century Expanded font for the main text and footnotes.

Dated: January 26, 2018

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I, Matthew E. Price, an attorney, hereby certify that on January 26, 2018, I caused the foregoing Supplemental Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Supplemental Brief** to be transmitted to the Court via hand delivery within 7 days of that notice date.

/s/ Matthew E. Price
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