Nos. 14-840 & 14-841

IN THE

Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Respondents.

ENERNOC, INC., *et al.*,

Petitioners,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

Brief for Delaware Division of the Public Advocate, Office of the People's Counsel for the District of Columbia, Maryland Office of the People's Counsel, New Jersey Rate Counsel, Pennsylvania Office of Consumer Advocate, West Virginia Consumer Advocate Division, Conservation Law Foundation, Environmental Defense Fund, The Environmental Law and Policy Center of the Midwest, Natural Resources Defense Council, The Sierra Club, and Citizens Utility Board as *Amici Curiae* in Support of Petitioners

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Statement of Interest*

As described more fully in the Appendix, *amici* are state consumer advocates' offices, national and regional public health and environmental organizations, and a nonprofit organization representing the interests of individual and small-business electricity rate-payers.

Amici, notwithstanding their diverse perspectives and organizational missions, recognize the large benefits of demand response participation in wholesale energy markets; the critically important role such resources can play in ensuring that the Nation's electric power system is affordable, reliable, and sustainable; and the importance of removing the formidable market and institutional barriers that Order 745 was designed to address. Accordingly, *amici* are deeply concerned by the destabilizing decision of the D.C. Circuit, its many serious adverse consequences, and its potential to subvert the rational development of law and policy in this area.

Reasons for Granting the Petitions

Under a proper interpretation of the Federal Power Act, FERC Order 745 poses no "jurisdictional quandary." Pet. App. 11a.[1] Its "[subject] matter," see 16 U.S.C. § 824(a)—compensation that system

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* Pursuant to Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* or counsel made a monetary contribution to its preparation or submission. Counsel for all parties received timely notice, pursuant to Rule 37.2(a), of *amici*'s intent to file this brief and have consented to its filing.

[1] Citations to "Pet. App." refer to the appendix to the petition in No. 14-840.

operators, FERC-regulated "public utilities," owe demand response resources that participate (with state regulators' permission) in the FERC-regulated day-ahead and real-time markets that determine wholesale energy prices—is well within the agency's congressionally conferred authority to police "practices" that "affect" wholesale rates. *Id.* § 824d. That, under governing precedent, should be "the end of the matter." See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875 (2013) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

The decision of the divided D.C. Circuit below took a remarkably different course. It set aside Order 745 as "ultra vires," reasoning that "demand response," as an undifferentiated subject, "simply" *belongs* to "the retail market," Pet. App. 11a, 17a and therefore is a "matter[]" the FPA reserves exclusively for state, not FERC, regulation. *Id.* 8a (quoting 16 U.S.C. § 824(a)).

That decision warrants review. Its legal ruling is irreconcilable with this Court's precedents; it disrupts widely-settled understandings of the allocation of regulatory authority over the Nation's electric power system; and it defies Congress's recent and specific directive that demand response resources' participation in the wholesale energy markets to which Order 745 applies should be encouraged.

FERC's understanding of state and federal regulatory authority, with the former generally deciding *whether* demand response resources participate in wholesale energy markets and FERC addressing *how* system operators treat those participants, is an eminently sensible one, endorsed

uniformly by the *state regulators* who were parties below. (In contrast, the court's theory of exclusive state regulation was advanced only by the generator interests challenging the Order).

The adverse practical consequences of the court's ruling are far-reaching. The D.C. Circuit's decision appears to deny FERC's authority to pursue measures it has long recognized as "essential to the success of competitive wholesale markets," *New England Power Pool and ISO New England, Inc.*, 101 FERC ¶ 61,344, at P 46 (2002), and jeopardizes a wide array of benefits—for the Nation's consumers, and the health of its citizens and the environment—that derive, as Congress recognized, from demand response participation in *wholesale* markets. To the extent the court below assumed (in disagreement with the expert agency) that such benefits would withstand its decision ostensibly "returning" demand response to the "retail market," it is seriously mistaken.

These harms are magnified, as is the need for the Court's intervention, by the character of the decision below and the context in which it operates. Although the court was emphatic that FERC lacks authority under the statute to specify compensation for demand resources in wholesale energy markets, its opinion did not articulate even the basic contours of the regime *the court* understood the FPA to require. This failure to go beyond the "simpl[e]" proposition that "demand response is … part of the retail market," Pet. App. 11a, has *already* introduced unwarranted, destabilizing uncertainty in markets far beyond those governed by Order 745.

Accordingly, *amici* agree that it is "imperative," FERC Pet. 36, that the decision not be permitted to stand.

I. The D.C. Circuit's Decision Jeopardizes, For No Statutory Reason, Important Benefits of Demand Response Participation in Wholesale Markets

The decision below approached the issue as if it were an exercise in formal logic, but the Order it set aside bristles with real-world significance. Order 745 addresses fundamental problems in the wholesale energy markets FERC oversees, with significant implications for the efficiency and reliability of the Nation's electric power system, as well as large cost savings for consumers and vitally necessary public health and environmental benefits. To the extent the opinion assumes these benefits would not be jeopardized by evicting demand response from wholesale energy markets, it is incorrect.

A. Demand Response Now Plays a Central Role in the Electric Power System and Secures Important Benefits to the Public

Order 745 and its predecessors represent an important part of FERC's broader effort to "break down regulatory and economic barriers that hinder a free market in wholesale electricity," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008), one consonant with FERC's enabling authority and with Congress's injunction, in the Energy Policy Act of 2005 ("EPAct"), that "unnecessary barriers to demand response participation in energy, capacity and ancillary service

markets shall be eliminated." Pub. L. No. 109-58, § 1252(f), 16 U.S.C. § 2642 note.

Order 745 addresses basic characteristics of the electric grid that prevent day-ahead and real-time wholesale *energy* markets from achieving economically efficient outcomes:[2] (1) the current challenges in achieving large-scale electricity storage require that generation generally be contemporaneous with use; and (2) the fact that electricity demand is variable, characterized by peaks, *e.g.*, "a summer afternoon in Washington, D.C. when countless air conditioners toil against the humidity and heat." Pet. App. 23a. Thus, "generating plants, transmission, and distribution lines … must be sized to meet the maximum amount [of electricity] needed by consumers at any time, in all locations." FERC, Energy Primer at 2.

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[2] The "ancillary services" markets that Congress referred to in the EPAct enable system operators to obtain certain services critical to the real-time stability of the grid, including frequency regulation and system balancing. "Capacity markets" are also distinct from the energy markets Order 745 regulates. Their role is to generate investment-inducing price signals in areas facing potential future shortfalls. Participants do not buy *energy*, but rather fulfill ISO-imposed future capacity quotas, essentially by purchasing options entitling them to obtain energy (or demand reductions) should the future need arise. See generally *Connecticut Dep't of Pub. Util. Control v. FERC,* 569 F.3d 477 (D.C. Cir. 2009).

Demand response resources participate actively in these other markets as well, generating important system reliability, economic, and public health benefits distinct from those achieved through energy market participation. As is explained below, although capacity markets are not governed by Order 745, they *are* suffering adverse effects from the instability the decision has generated. See pp. 22-24, *infra*.

When competitive wholesale energy markets were first established, system operators relied solely on increasing generation supply to balance the market. See Doug Hurley, *et al.*, Demand Response as a Power System Resource 13 (2013) ("Hurley"). As demand rose, increasingly costly and inefficient sources would clear the market, including "peaking" units, whose output is deployed for only a few high-demand hours a year.

A prominent defect of that supply-side approach is that when demand is extremely high (and/or when resources fail unexpectedly or powerful market participants engage in strategic or abusive behavior), the wholesale price can skyrocket. In one extreme example, wholesale prices in California, which had been in the range of $27 per megawatt hour in May 2000, spiked to $450 per megawatt hour eight months later. See Electric Energy Market Competition Task Force, Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy 28 (2007).

Demand response participation in these markets can help ameliorate this market failure and advance FERC's statutory responsibility for ensuring nondiscriminatory, just, and reasonable wholesale rates. When demand response resources—large users or aggregators—participate in wholesale energy markets, bidding specific, binding use reductions into day-ahead or real-time auctions, they "flatten … the load profile" and "reduce the need to construct and use

more costly resources during periods of high demand." Order 719-A, 128 FERC ¶ 61,059, at P 47 (2009).[3]

Even small reductions in demand result in significant price effects, both because the supply curve slopes upward steeply, *i.e.*, energy from peak generators is *so much* more inefficient and expensive, and also because reductions in demand can ease costly transmission congestion. Evidence established that "a modest three percent load reduction in the 100 highest peak hours corresponds to a [wholesale] price decline of six to 12 percent." Pet. App. 60a n.15. As FERC recognized, even when demand resources do not bid successfully, their *presence* in energy markets has a salutary effect, by raising the risk to suppliers of pursuing high-price bidding strategies. *Id.* 190a. The cost savings to consumers from demand response participation in these markets are large, running into the hundreds of millions, likely billions, of dollars. See, *e.g.,* Brattle Group, Quantifying Demand Response Benefits in PJM 32 (2007) (finding that 3% load reduction in that one system's 100 "super-peak" hours translated to up to $202 million in annual cost savings).

Demand response participation in wholesale energy markets further benefits consumers by increasing the operational efficiency, stability, and reliability of the grid. Demand-side resource participation, by reducing the *amount* of power that

[3] As FERC explains, see Pet. 9-10, Order 745 is the most recent in a series of Orders addressing demand response participation in wholesale energy markets. It seeks to remedy unpredictable and discriminatory compensation practices that prevent those markets from realizing the rate reduction benefits demand resource participation can bring.

must be transmitted, helps operators better manage the grid and diminish the risk of forced power plant outages and full-scale blackouts. And in transmission-constrained areas, where it can be literally impossible to add additional energy at peak times, demand response is uniquely able to prevent interruptions. See U.S. Dep't of Energy, National Transmission Grid Study 41 (May 2002).

These economic efficiency and system reliability benefits were the impetus for Order 745 and its predecessors. But demand resource participation provides much broader social benefits. Demand response that clears wholesale energy markets frequently results in reduced electricity consumption overall (users who make dispatchable commitments through aggregators, to turn down air conditioning or water heaters during peak periods, rarely run those more at non-peak times), which itself reduces power plants' emissions of air pollutants and attendant public health harms. See Fabio Caiazzo, *et al.*, *Air Pollution and Early Deaths in the U.S.*, 79 Atmospheric Env't 198, 202 (2013). Reductions during summer peaks are especially important, because concentrations of harmful pollutants such as smog (or ground level ozone) are particularly high then. See American Lung Ass'n, State of the Air 30 (2014).

But even when demand response consists of time-shifting, *e.g.*, industrial users' rescheduling production to night-time hours, the public health benefits are large. Generation sources that provide marginal supply are not only *economically* inefficient; they are often among the oldest and most polluting in the fleet. Avoiding resort to the 10% most-polluting

natural gas-fired power plants avoids millions of metric tons of annual greenhouse gas emissions, plus large quantities of nitrogen oxides and sulfur dioxide. See National Research Council, *et al.*, Hidden Costs of Energy 8, 119-23 (2010).[4] Indeed, because peaking plants are frequently built near major population centers, the air pollutants they discharge do disproportionate harm to human health. *Id.* at 121.

Demand response participation in wholesale energy markets also will facilitate greater integration of renewable *generating* sources. Such sources are clean and produce inexpensive power, but their output is variable. Demand-side resources enable system operators to reduce load at times when those sources are not generating—and can also ensure their output is absorbed at times, such as with wind power generators overnight, when system *over*supply is a concern. See Hurley at 13-14.

B. These Critically Important Benefits Are Distinct to Demand Response Participation in FERC-Regulated *Wholesale* Energy Markets and Are Jeopardized By the Ruling Below

Although emphatic in holding that *FERC* may not regulate the terms of wholesale energy market demand response compensation, the decision below is

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[4] As is true with respect to operating efficiency, "not all power plants are created equal" in their health and environmental impacts. Pet. App. 22a (Edwards, J., dissenting). For example, the National Academy of Sciences determined that the most polluting 5% of natural gas-fired power plants emit approximately *550 times* as much harmful pollution *per kilowatt hour of electricity generated* as the cleanest 5%. Hidden Costs at 122-23.

critically ambiguous about the basics of the regime it understood the FPA to require. At points, the court suggested that the "importan[t]" benefits of demand resource participation could continue, either subject to *state* regulatory jurisdiction or no regulation at all, see Pet. App. 14a (but see *infra*, pp. 18-19). Elsewhere, however, the majority opinion appeared to take the view that demand response *belongs* exclusively in "the retail market," calling FERC's distinction between retail- and wholesale-market demand response "a fiction" and suggesting that Order 745 improperly "lure[d]" demand resources from their rightful place. Pet. App. 6a, 8a, 11a.

The skepticism the opinion evinces about Order 745 (and seemingly about demand response itself) is unwarranted—and misunderstands basic market realities. Demand response is not, as the court assumed, a single undifferentiated product, whose value would be unaffected by (ostensibly) "returning" it to the single place ("the retail market") where, in the court's view, it belongs. Rather, as Order 745 recognizes, and Congress affirmed, the just-described economic and broader societal benefits of demand response derive significantly from participation, subject to FERC-regulation, in *wholesale* energy markets. Those benefits will be lost were the decision to stand.

There is nothing "fiction[al]," Pet App. 6a, about what demand response resources offer, nor is it correct that they "'participate' *only* by declining to act," *id.* (emphasis added). Demand response providers are technologically advanced businesses, subject to most of the same ISO requirements as other auction participants. They participate by submitting

legally binding, verifiable, and specific use reductions, which can lower market-clearing prices.

The aspersions cast on FERC's regulation are similarly unwarranted. FERC was early to grasp the important role demand resources could play in its emerging, competitive-market-focused regulatory framework, but the notion that FERC "lure[d]" demand response resources "into the wholesale market … to create jurisdiction," Pet. App. 8a, is insupportable. Wholesale demand response programs pre-dated Order 745 by nearly a decade. See *id.* 61a-63a. System operators continue to have their own reasons—including curbing opportunistic bidding and improving reliability—for encouraging demand response participation. And under Order 745 (as with its precursors), demand response participation in wholesale energy auctions depends on state regulators' permission. See 18 C.F.R. § 35.28(g)(3)(iii).

To be sure FERC, through Order 745, sought to *increase* demand resources' participation in wholesale energy markets, to improve their efficiency. But the suggestion of agency aggrandizement, *i.e.*, that FERC acted in order "to create jurisdiction" over demand response, blinks reality. The Order does not regulate demand response resources; it regulates *the treatment of* those entities (whether longstanding participants in energy markets or new arrivals) by system operators and other market participants indisputably subject to FERC jurisdiction.

Nor was the opinion correct that FERC's recognition of a distinction between retail- and wholesale-market demand response was the agency's "own construction." Pet. App. 6a. On the contrary,

scholars and everyday market participants understand that "demand response is not a homogenous resource; it is provided by a highly diverse set of actors in numerous different ways, and with varying capabilities." Hurley at 14**.** Compare also *id.* (warning against "any simple characterization of demand response types") with Pet. App. 11a ("Demand response—simply put—is part of the retail market.").

In particular, the price-responsive demand response programs that predominate in retail markets are "generally not considered 'firm' resources," because they are not known to grid operators or "dispatchable," Hurley at 15, meaning that system-wide decisions cannot be made, as they are in energy markets, based on legally-binding specific reductions. And FERC's Order reflects another "key distinction" between retail-level and "fully-integrated [wholesale] demand response": the latter has a "much larger price impact," because it can "set the market clearing price." *Id.* at 16. Participation in the broader, multistate energy markets administered by ISOs also enables resources to be "compensated for the full system value of their demand reduction," *id.* at 19, and "wholesale markets[] creat[e] … opportunities for entrepreneurs to find innovative means to supply demand response," thereby widening "the pool of potential participants." *Id.* at 21.

These realities contradict the highly stylized account in the opinion below, where FERC wrongly "lure[s]" "demand response" from its proper place. There is, in practice, no such zero-sum jurisdictional competition. Precisely because technological and

business innovations developed through wholesale market participation are deployed in other settings, *state public utilities commissioners* explained to FERC that eliminating "demand response['s ability] to participate in the *wholesale* energy market would … adversely affect the viability of *retail* price-responsive demand programs." Letter of New England Conf. Pub. Utilities Comm'rs, FERC Docket No. RM10-17, 2-3 (July 1, 2014) (emphasis added).

II. This Court's Review Is Needed to Correct The D.C. Circuit's Important, Erroneous, and Practically Untenable Understanding of the Statute's Allocation of Regulatory Authority

Although ostensibly applying "unambiguous[]" statutory provisions to "simpl[e]" realities, Pet. App. 11a, 14a, the court below advanced a novel and idiosyncratic understanding of federal and state regulatory authority under the FPA, one that is disputed by federal and state regulators alike, unsupported by the statute, irreconcilable with this Court's decisions addressing the subject, and, with regard to the "precise" subject matter of demand response participation in wholesale energy markets, contrary to Congress's expressed intent. See *Chevron*, 467 U.S. at 842.

A. The Federal Power Act Does Not Permit, Let Alone Require, The D.C. Circuit's Interpretation

Although the decision below repeatedly appealed to the "statutory scheme as a whole," Pet. App. 9a n.1, the court did not dispute that the matters Order 745 addresses fall within the plain terms of Congress's

grant to FERC of authority over practices that "affect[]" wholesale rates. 16 U.S.C. § 824d(a). Nor did the court conclude that the transactions Order 745 regulates are "*sales* of electric energy" governed by the bright-line assignment of regulatory authority in Section 201(b). See Pet. App. 9a n.1; *id.* 6a (recognizing that it "is not a wholesale *sale* of electricity; in fact it is not a sale at all").[5]

Instead, the majority opinion anchored its ruling on the conclusion that "demand response," as a category, is "part of the retail market," Pet. App. 11a—and on that basis is "unambiguously" covered by the declaration in Section 201(a) of the FPA, that FERC's authority does not extend to "matters subject to regulation by the States." 16 U.S.C. § 824(a).

It is not plausible that Congress, by using those words, spoke "directly … to the precise question" of FERC's jurisdiction over compensation of demand response resources that clear wholesale energy

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[5] In the court below, respondents argued that Order 745, by increasing the "opportunity cost" of purchasing electricity, is indistinguishable from a FERC-imposed retail rate. Pet. Reh. Opp. 5-6. But this only shows why such concepts cannot control legal and regulatory questions: It would be uncommon to describe a property developer's offer to purchase a parcel of land on which a power plant sits as having "increased the cost" of generating electricity, and not even an economist would describe that as "direct regulation"—any more than a reduction in the price of Hershey bars would be said to "regulate" the price of M&Ms.

That respondents' position (and the majority opinion) depend so heavily on such loose analogies (and equally gossamer distinctions between "direct[] incentiv[es]" and indirect ones, Pet. App. 10a n.2), is at the very least a sign of having crossed the border into areas in which agency deference is required.

market auctions, expressing an "unambiguous intent" to deny FERC such authority. *Arlington*, 133 S. Ct. at 1868 (quoting *Chevron*). Even if Section 201(a) does more than "mere[ly]" "prefa[ce]" the other Act provisions that allocate regulatory authority, *New York v. FERC,* 535 U.S. 1, 22 (2002), the "matter" regulated under Order 745—compensation owed demand response participants in ISO-administered energy auctions—is, like the "unbundled interstate transmissions" held subject to FERC jurisdiction in *New York*, "a recent development," one that has "never been 'subject to regulation by the States.'" *Id.* at 21 (quoting Section 201(a)); see *id.* ("[I]n 1935, there was neither state nor federal regulation of what did not exist").

Indeed, *FERC* has regulated demand response resources' participation in organized wholesale markets essentially from the beginning. See Pet. App. 61a-63a & n.27. Moreover, while this Court in *New York* identified the "matter" for Section 201(a) purposes with specificity, the D.C. Circuit here applied that term at the highest possible level of generality, concluding that "demand response" is "part of the retail market," and that "market," as a whole, is beyond federal reach. Cf. *New York,* 535 U.S. at 16-17 (recognizing that "the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was 'neatly divided into spheres of retail versus wholesale sales'" (quoting appeals court decision) and rejecting contention that "the jurisdictional line between the States and FERC falls between the wholesale and retail markets").

As petitioners explain, this Court's numerous decisions interpreting the jurisdictional provisions of the FPA (and their Natural Gas Act analogues) foreclose the sort of broad and categorical bar to federal action—essentially a rule of reverse field preemption—that the decision below located in Section 201(a). In *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988), for example, the Court held the State could not take regulatory actions in "exercise [of] its undoubted jurisdiction over retail sales" when doing so would interfere with FERC's power to regulate practices "affecting [wholesale] rates." *Id.* at 372. See generally EnerNOC Pet. 26-27 (discussing other cases).

Order 745, in contrast, not only leaves intact States' authority to regulate retail-sector demand response, it does not supplant the only authority state regulators reasonably *could* exercise with respect to demand response involvement in the wholesale market: the power to preclude entities under their jurisdiction from participating. Section 201(a) assuredly does not "speak to the precise question," *Arlington*, 133 S. Ct. at 1879, of regulatory authority over demand response participation in wholesale markets, let alone resolve that issue in favor of *state* jurisdiction. But even if it did, Order 745 *would still* be within statutory bounds. It addresses *how* FERC-regulated ISOs treat demand response participants in wholesale markets, but leaves to the States the "matter" of *whether* resources may participate in the first place. See 18 C.F.R. § 35.28(g)(3)(iii). Everything about Order 745 is consistent with an agency's lawfully exercising its authority to address practices with a "direct and substantial effect" on rates under its jurisdiction, Pet. App. 198a—which it

does by imposing obligations on regulated parties, to treat non-jurisdictional participants in a nondiscriminatory manner. And *nothing* about the Order's operation is consistent with an agency's seeking to encroach on state legal or policy prerogatives.[6]

Indeed, the D.C. Circuit's decision, while couched in the vocabulary of federalism and of permitting "the States … to do their own thing," *Arlington*, 133 S. Ct. at 1873, actually *deprives* States of both policy discretion and concrete benefits that enable them to pursue their preferred energy programs. See *supra*, p. 13. Under Order 745, a State's decision to permit entities within its jurisdiction to participate *or not* in organized wholesale energy markets is respected; the D.C. Circuit's ruling makes that decision for the State, imposing the option that few States would choose for themselves.

The conclusion that Congress "unambiguously," Pet. App. 14a, assigned demand response to the "retail market" is especially remarkable in view of Congress's enactment of the EPAct, a statute that was a significant impetus for FERC's Order, which

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[6] Judge Edwards (Pet. App. 35a) accurately restated the Order's operative effect:

> All *Order 745* says is that *if* a State's laws permit demand response to be bid into electricity markets, and *if* a demand response resource affirmatively decides to participate in an ISO's or RTO's wholesale electricity market, and *if* that demand response resource would in a particular circumstance allow the ISO or RTO to balance wholesale supply and demand, and *if* paying that demand resource would be a net benefit to the system, *then* the ISO or RTO must pay that resource the LMP.

does speak to the specific question the court below decided, announcing elimination of "unnecessary barriers to demand response *participation in* [wholesale] *energy, capacity and ancillary service markets*" to be the Nation's "policy." 16 U.S.C. § 2642 note (emphasis added). Neither reading this statutory language "in tandem," see Pet. App. 13a, with adjacent provisions nor doing so in light of its title, *id.*, changes its plain import: that demand response participation in wholesale markets regulated by FERC is not only "importan[t]," *id.* 14a, but lawful.

B. The Decision Does Not Adopt a Legally Permissible or Even Coherent Resolution of the Regulatory Jurisdiction Issue

In fact, the labors of the court below to reconcile that EPAct provision with the rest of its opinion only makes clear why Order 745 reflects the best and likely the only permissible understanding of FERC's authority under the FPA. The majority posited that "Congress understood the importance of demand response resources" in wholesale markets, but then "left regulation … up to the states, rather than to the federal government." Pet. App. 14a. But it would be illogical for Congress to "encourage" "participation," in price-setting markets administered by FERC-regulated "public utilities" pursuant to FERC-approved tariffs, but then require exclusive *state* regulation of those transactions. And, absent a drastic revision of the FPA, that odd scheme would surely be unlawful. There can be no serious claim that, under the statute, *States* have authority to regulate any of the matters Order 745 actually addresses, *e.g.*, to ensure that ISOs compensate

participants in wholesale energy auctions adequately or that purchasers in those markets cover those costs.

Thus, if the EPAct's express policy choice—expanded wholesale-market demand response participation—is respected, along with the basic mandate of the FPA (no state regulation of wholesale markets), the D.C. Circuit's understanding could be sustained only if Congress meant to assign regulatory authority over these critically important matters, to *no one*. But precedent, as well as common sense, "impel[s]" rejection of that conclusion:

> Although federal jurisdiction was not to be exclusive, [federal] regulation was to be broadly complementary to that reserved to the States, so that there would be no "gaps" for private interests to subvert the public welfare. This congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a "no man's land" will be created. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.

Fed. Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 631 (1972) (quotation and citations omitted).[7]

III. This Court's Review Is Needed to Prevent the D.C. Circuit's Erroneous Decision From Destabilizing Important Markets Outside Order 745's Domain

On its own terms, the seriously mistaken and highly significant decision of the D.C. Circuit plainly warrants this Court's review.

Indeed, review would be warranted even if the opinion's "general expressions … [are] taken in light of the particular facts giving rise to them, see *Zenith Radio Corp. v. United States*, 437 U.S. 443, 62 (1978) (quoting *Cohens v. Virginia*, 19 U.S. 264 (1821)), and the decision is read as *affirming* demand response participation in wholesale energy markets and holding "only" that the FPA forbids FERC from regulating compensation in those markets (or setting compensation rules with the aim of "luring" participants from the "retail market," but see p. 11, *supra*). The court's ruling would *still* deny FERC authority "essential to … fulfilling its statutory responsibility to ensure that jurisdictional rates are just and reasonable," Pet. App. 188a, and open a

[7] Having reached this logical dead end, the majority opinion added assertions that FERC's understanding is "unreasonable for the same reasons," it was (held) impermissible, Pet. App. 14a, and "alternatively," that Order 745 should be set aside based on the claimed insufficiency of FERC's response to Commissioner Moeller's dissent on the compensation issue, *id.* 15a-17a. These offhand assertions are also erroneous and do not in any way limit the significance of the court's broad rule of decision or mitigate its practical effects.

strange void, where demand response resources, alone among participants in interstate wholesale energy auctions, must deal with ISOs or purchasers without federal regulatory oversight and protection. See *supra*, pp. 19-20.

The direct practical effects of permitting *that* statutorily unwarranted rule to stand would be severe. Wholesale energy markets will not "'function[] effectively': Competition will be constrained; prices will be higher;" EnerNOC Pet. 29, and the important public health benefits from reducing reliance on dirty and inefficient generators will be lost. (Indeed, that will occur whether the decision is understood as directly requiring that demand response resources exit wholesale energy markets or as permitting them somehow to remain, in a regulatory "no man's land.").

And because demand response participation in FERC-regulated wholesale energy markets has important positive "spillover" effects, a clearly-stated rule barring such participation would have further adverse effects. As state utility regulators have explained, ousting demand response from *wholesale* energy markets would jeopardize "the viability of *retail* price-responsive demand programs," New England. Comm'rs Ltr., *supra*, at 2-3 (emphasis added), the very programs the decision ostensibly undertook to protect against federal incursion.

But the opinion below made no effort to articulate the metes and bounds of its rule. As a result, the decision is having serious, destabilizing effects on markets and programs that were outside the scope of Order 745 and not before the court below.

In particular, the day the decision issued, generator interests launched an aggressive campaign to eliminate demand response participation from system operators' legally and economically distinct *capacity* markets. Brandishing the court's statements that "[d]emand response … is part of the retail market," Pet. App. 11a, and that the FPA "restricts FERC from regulating the retail market," *id.* 14a, power plant owners filed "emergency" complaints with FERC, demanding that ISOs jettison previously approved rules governing upcoming auctions, re-bid previously conducted ones, void contracts, and award damages. See Complaint, *FirstEnergy Serv. Co. v. PJM Interconnection, LLC*, FERC Docket No. EL14-55-0000 (filed May 23, 2014); Complaint, *New England Power Generators Ass'n v. ISO New England, Inc.*, FERC Docket No. EL15-21-00 (filed Nov. 14, 2014).

These will fail on their merits. The opinion below, as opaque as it is, does not bear the reading these complaints seek to impose. (It is doubtful that the court lawfully *could have* announced such a sweeping rule).[8] But neither that nor the fact (in respondents'

[8] It would be extraordinary to read the broadest language in the opinion below as deciding the lawfulness of behavior or FERC regulatory authority in markets not before the court, especially given the opinion's express acknowledgment of the "importance" of demand response in these markets. And binding D.C. Circuit precedent, including a decision that post-dated the one below, has sustained FERC regulation of capacity markets, affirmatively highlighting the central role demand response resources play in those markets. See *New England Power Generators Ass'n. v. FERC*, 757 F.3d 283, 290–91 (D.C. Cir. 2014); *Connecticut Dep't Pub. Util. Control,* 569 F.3d at 482. Finally, although the ruling below is seriously mistaken in its interpretation of Section 201(a), the features of Order 745's

careful formulation) that the "precedential effects of the Court's decision as it may relate to capacity markets … will have to be resolved in future cases," C.A. Stay Opp. 7, means that these efforts to export the decision's destabilizing power will not bear fruit. On the contrary, these markets—a complex and densely interconnected sector of the economy, dependent on large capital investments, where system reliability and resource adequacy are of paramount importance—are uniquely susceptible to this sort of disruption. Their participants have understandably little tolerance for legal uncertainty or threats of protracted litigation demanding far-ranging retroactive "relief." See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956) ("[T]he stability of supply arrangements … is essential to the health of the [energy] industry."); *NRG Power Marketing, LLC v. Maine Pub. Util. Comm'n*, 558 U.S. 165, 174 (2010) ("Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty...."') (quoting FERC Order).

Thus, the same week petitions for certiorari were filed here, PJM submitted to FERC a 954-page proposed "stopgap" tariff revision, *PJM Interconnection, LLC*, ER15-852-000 (Jan. 14, 2015), to take effect in the event certiorari is not granted. That submission, referencing the need to "mitigate the uncertainty raised by *EPSA*," *id.* at 39, proposed to roll back demand response participation in PJM's

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energy market regulation that appeared to most trouble the majority below have no direct application to capacity markets or FERC's regulation of them.

capacity markets, highlighting a long list of effects attributed to the D.C. Circuit's decision, including: "considerable uncertainty hanging over …commitments" for an impending auction; the risk that demand response participation in future auctions would be "significantly chill[ed]"; and the possibility of "re-running" auctions and of "ripple effects on … pricing and valuation of hedges and derivatives." *Id.* at 4, 8, 11, 40. The submission made clear that only the need to avoid these disruptions had led PJM to consider altering highly successful programs that "PJM and its stakeholders have devoted over eight years to developing." *Id.* at 40.

PJM's independent market monitor has estimated, using sophisticated modeling techniques, that removing demand response resources from one recent PJM capacity auction would have led to some nine *billion* dollars in higher rates for a single year. See FERC Pet. 32.

That harms of this magnitude are resulting, not from the *ruling* below, but rather from its failure to articulate a "limiting principle" to its already significant legal error, is further reason why this Court's review is needed.

CONCLUSION

The petitions for writs of certiorari should be granted.

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APPENDIX

DECRIPTION OF *AMICI CURIAE*

Citizens Utility Board (CUB) is a statutorily created non-profit organization whose mission is to represent the interests of residential and small commercial utility customers in state and federal regulatory and judicial proceedings. CUB is a membership-funded organization with approximately 100,000 members across Illinois. CUB does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in CUB. CUB does not issue stock.

Conservation Law Foundation (CLF) is a New England non-profit, public-interest environmental advocacy organization with offices and members in the states of Maine, New Hampshire, Vermont, Rhode Island and Massachusetts. A substantial component of CLF's work is directed at influencing energy policy in order to ensure that the region achieves its collective goals of reducing greenhouse gas emissions and avoiding or limiting the impacts of climate change. The role of demand-side resources, including demand response, as an energy resource is a central component of this work. CLF is a voting NEPOOL governance participant. In that role, CLF participates actively in the market-design initiatives of ISO-NE, including advocacy for the inclusion of demand response resources in the wholesale energy markets. CLF was directly involved in the NEPOOL stakeholder process associated with FERC's Order 745 and was an intervenor and commenter in the FERC review of ISO-NE's Order 745 compliance filing.

The Delaware Division of the Public Advocate ("DE DPA") represents residential and

small commercial customers of regulated utilities in the State of Delaware, which is within the PJM Interconnection, LLC footprint. The Delaware Public Service Commission has authorized its load serving entities to implement demand response programs and to offer that DR into the PJM wholesale energy auctions. LSEs whose bids are selected in the auctions use the proceeds that they receive from PJM to pay participants in DR programs for reducing their energy usage. The DE DPA represents the interests of Delaware customers whose rates are directly affected by the LSEs' ability to bid DR into the PJM auctions.

The Office of the People's Counsel of the District of Columbia (DC OPC) is an independent agency of the District of Columbia government. DC OPC is the statutory representative of District of Columbia consumers in energy and public utility proceedings before the District of Columbia Public Service Commission, federal regulatory agencies, and state and federal courts. D.C. Code § 34-804 (d) (2010). DC OPC is authorized to investigate and intervene in proceedings regarding the operation and valuation of utility companies and energy service providers on both the distribution and transmission levels. DC OPC's statutory mandate is to advocate for the provision of quality utility service and equitable treatment of all District consumers at rates that are reasonable and just with full consideration of conservation of natural resources and the preservation of environmental quality.

Environmental Defense Fund ("EDF") is a national non-profit, non-governmental, non-partisan organization, representing more than 300,000

members and supporters. Since 1967, EDF has worked to preserve the natural systems on which all life depends. Guided by science and economics, we find practical and lasting solutions to the most serious environmental problems. EDF advocates policies that protect human health and the environment and that support a strong economy by ensuring that cost-effective clean energy resources have open access to our nation's electricity markets. EDF participated as amicus in support of FERC Order 745 in the case below and participated in the underlying FERC rulemaking.

The Environmental Law and Policy Center of the Midwest ("ELPC") is a not-for-profit public interest environmental legal advocacy organization that conducts strategic advocacy campaigns to improve environmental quality and protect our natural resources through the advancement of clean air, clean transportation and clean energy policies at the regional and national levels. ELPC promotes the deployment of clean energy resources including demand response.

The New Jersey Division of Rate Counsel ("NJ Rate Counsel") is the administrative agent charged under New Jersey law with the general protection of the interests of utility ratepayers. N.J.S.A. 52:27E-50 *et seq*. The courts have recognized that it is the ratepayers who ultimately shoulder the cost of electricity. *See Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, 569 F.3d 477, 479 (D.C. Cir. 2009). Cost is a significant concern to ratepayers, as is reliability, both of which are at stake here. Electricity is an essential need, and without reliable service at just and reasonable rates,

ratepayers will be irreparably harmed. For this reason, NJ Rate Counsel has a heightened interest in the outcome of this matter.

The Maryland Office of People's Counsel ("Md OPC") represents the residential customer interest in matters involving regulated utility service in the State of Maryland, which is within the PJM Interconnection, LLC ("PJM") footprint. The Maryland Public Service Commission has authorized load serving entities ("LSEs") in Maryland to implement demand response ("DR") programs and to offer that DR into the PJM wholesale energy auctions. Md OPC represents the interests of Maryland customers whose rates are directly affected by the LSEs' ability to bid DR into the PJM auctions.

Natural Resources Defense Council (NRDC) is a national nonprofit organization with approximately 397,000 members. NRDC is committed to the preservation and protection of the environment, public health, and natural resources. Addressing the climate change crisis is one of NRDC's top institutional priorities. As part of its work in this arena and to curb air pollution, NRDC has been actively involved in advocacy related to demand response, energy efficiency, and renewable energy.

The Pennsylvania Office of Consumer Advocate is the state office statutorily authorized to represent the interests of consumers of public utility services in matters before the Pennsylvania Public Utility Commission, equivalent federal regulatory agencies, and state and federal courts.

The Sierra Club is a national organization founded in 1892 with more than 60 chapters and over

a million members and supporters. The Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. Sierra Club works to address the environmental and public health problems associated with energy generation, and actively advocates for demand-side management and renewable energy resources.

The West Virginia Consumer Advocate Division is the West Virginia statutory representative of residential utility customers in state and federal regulatory and judicial proceedings.