

The FPA and the Private Right to Preempt

Matthew R. Christiansen*

ABSTRACT

The boundary between state and federal authority over the electricity sector is in flux. A host of new technologies is rapidly changing how electricity is generated and consumed. At the same time, state and federal regulators are adopting novel laws and regulations to cope with these changes and to address other priorities, such as reducing carbon pollution from the electricity sector. Together, these technological and regulatory changes have called into question the basic division between state and federal jurisdiction over the electricity sector that has persisted since Congress passed the Federal Power Act (“FPA”) in 1935. As a result, in cases across the country, courts are wrestling with the question of whether the FPA preempts many of these novel state regulations.

This Essay examines whether those cases were properly brought in federal court in the first place. Last year, the Supreme Court concluded, for the first time, that the Constitution’s Supremacy Clause is not a private right of action. Instead, the Court held, a party may bring a preemption claim directly in federal court only when permitted to do so by the putatively preemptive federal statute. This Essay applies that holding to the FPA. In doing so, it provides the first serious attempt to examine whether a private party may bring an FPA preemption claim in federal court or is instead required to make its case first to the Federal Energy Regulatory Commission, the agency that administers the FPA.

INTRODUCTION

The Supreme Court’s recent decision in *Hughes v. Talen Energy Marketing, LLC*¹ marked the third time in less than a year that the Court addressed the boundary between state and federal authority to regulate the energy sector.² The Court in *Hughes* concluded that the Federal Power Act (“FPA”)³ preempts a Maryland regulation that sought to promote the development of new power plants. It held that, “[b]y adjusting an interstate wholesale rate [for electricity], Maryland’s program invade[d] FERC’s

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¹ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

² The other cases were *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016) and *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

³ Federal Power Act, 16 U.S.C. §§ 791–828c (2012).

regulatory turf” and thus “contraven[ed] the FPA’s division of authority between state and federal regulators.”⁴ Nevertheless, the Court stressed that its decision was “a narrow one,” and the holding appears to have little direct applicability beyond the facts of the case before it.⁵ As a result, *Hughes*’s impact on a host of other preemption challenges remains very much an open question.⁶

This Essay tackles a different side of *Hughes*. It asks whether the case, which was brought under the Supremacy Clause of the U.S. Constitution, should have been in federal court in the first place. Last year, while the *Hughes* litigation was pending, the Supreme Court clarified that the Supremacy Clause does not, on its own, provide a private right of action.⁷ Instead, the Court explained, a private party’s ability to bring a preemption challenge in federal court turns on certain characteristics of the putatively preemptive federal statute.⁸ In particular, a court must determine whether the relevant statute permits the court to entertain a private suit seeking to enforce the Supremacy Clause against state officers.⁹

The FPA exhibits many of the characteristics that the Court has concluded weigh against exercising courts’ equitable jurisdiction. These characteristics include (1) a comprehensive remedial scheme and (2) a high degree of judgment and “complexity associated with enforcing” that scheme.¹⁰ Both characteristics were on display during the oral argument in *Hughes* as the Justices grappled with the finer points of federal electricity regulation. Even Justice Stephen Breyer, the Court’s regulatory expert, expressed his frustration with the complexity of the facts and the lack of

⁴ *Hughes*, 136 S. Ct. at 1297.

⁵ *Id.* at 1299 (“So long as a State does not condition payment of funds on capacity clearing the [wholesale market] auction, the State’s program would not suffer from the fatal defect that renders Maryland’s program unacceptable.”).

⁶ See Emily Hammond, Response, *Hughes v. Talen Energy Marketing, LLC: Energy Law’s Jurisdictional Boundaries – Take Three*, GEO. WASH. L. REV. ON THE DOCKET (Apr. 22, 2016), <http://www.gwlr.org/hughes-v-talen-energy-marketing-llc-energy-laws-jurisdictional-boundaries-take-three> (noting that *Hughes* creates “significant uncertainty for states going forward”); *id.* (“*Hughes* doesn’t really tell us which state initiatives will survive future Supremacy Clause challenges and which will fail.”); see also Press Release, Nat’l Ass’n Regulatory Util. Comm’rs, NARUC Responds to Supreme Court Ruling in Maryland Generation Case (Apr. 19, 2016), <http://www.naruc.org/about-naruc/press-releases/pr-041916/> (“This narrow ruling, however, inevitably will result in further litigation of these issues by leaving many open questions.”).

⁷ See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

⁸ *Id.* at 1385.

⁹ *Id.* at 1384.

¹⁰ *Id.* at 1385.

“simple examples” with which to identify the critical legal questions, as well as the with the absence of an authoritative opinion from the Federal Energy Regulatory Commission (“FERC”)—the agency that administers the FPA.¹¹ At one point, he even appeared to suggest that this preemption question was the type of issue that should have been brought first before FERC rather than in federal court.¹²

Whether FPA preemption claims like those at issue in *Hughes* are privately enforceable is a question that has received scant attention. Notwithstanding Justice Breyer’s questions at oral argument, the majority opinion in *Hughes* expressly declined to address the issue.¹³ Nevertheless, it is a question that merits careful consideration. The electricity sector is evolving rapidly, prompted by both technological change and regulatory requirements, such as the Environmental Protection Agency’s Clean Power Plan and many state-level initiatives to reduce carbon pollution.¹⁴ That evolution and the states’ efforts to keep pace have led to a series of lawsuits in federal court that reflect increasing pressure on the FPA’s division of authority between state and federal electricity regulators.¹⁵ A careful

¹¹ See, e.g., Transcript of Oral Argument at 30, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (No. 14-614) (Justice Breyer: “[T]ruer words were never spoke, than I am not quite on top of how this thing works.”); *id.* at 24 (Justice Breyer: “I don’t understand the procedural posture of this case [W]e don’t have FERC’s opinion. We only have it through the SG. I thought there was a doctrine called primary jurisdiction”); *id.* at 38–39 (Justice Sotomayor: “I’m a little bit like Justice Breyer on this. I’m not quite sure how everything is working”).

¹² *Id.* at 24 (referencing the primary jurisdiction doctrine); see also *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956) (explaining that the primary jurisdiction doctrine “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views”).

¹³ *Hughes*, 136 S. Ct. at 1296 n.6 (“Because neither CPV nor Maryland has challenged whether plaintiffs may seek declaratory relief under the Supremacy Clause, the Court assumes without deciding that they may.”); see also *Nw. Airlines, Inc. v. Cty. of Kent*, 510 U.S. 355, 365 (1994) (noting that “[t]he question whether a federal statute creates a claim for relief” does not implicate a court’s subject-matter jurisdiction).

¹⁴ See generally Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 C.F.R. § 60 (2015), www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf; ENVTL. PROT. AGENCY, THE CLEAN POWER PLAN, KEY CHANGES AND IMPROVEMENTS: FROM PROPOSAL TO FINAL (2015), www2.epa.gov/sites/production/files/2015-08/documents/fs-cpp-key-changes.pdf.

¹⁵ In addition to *Hughes*, see, e.g., *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 95–98 (2d Cir. 2015) (discussing preemption challenge to Connecticut energy procurement program); *Entergy Nuclear Fitzpatrick, LLC v. Zibelman*, No. 5:15-CV-230, 2016 WL 958605, at *8–

consideration of the FPA's private enforceability—i.e., whether those cases can be brought in federal court in the first place—is critical to the efficient resolution of these preemption questions, many of which involve intricate technical, economic, and legal questions.¹⁶

This Essay provides the first serious consideration of that question, examining how the Court's recent Supremacy Clause jurisprudence might be applied to at least certain FPA preemption cases. It proceeds as follows: Part I explains the Court's recent private right of action jurisprudence. Part II explores how that jurisprudence might be applied FPA. It first describes the parallels between the Court's most recent discussion of the question and the type of preemption challenge brought in *Hughes* before turning to examine the implications of other statements the Court has made regarding its equitable jurisdiction. Part III briefly touches on procedural considerations. The Essay concludes by noting that it is high time for courts to consider that question of the FPA's private enforceability.¹⁷

I. ARMSTRONG AND ENFORCEMENT OF THE SUPREMACY CLAUSE

Last year, the Supreme Court held that the Supremacy Clause does not

10 (N.D.N.Y. Mar. 7, 2016) (denying motion to dismiss preemption challenge under the FPA); Complaint, *Riggs v. Curran*, No. 15-343 S, 2016 WL 3688431 (D.R.I. July 7, 2016) (preemption challenge to Rhode Island's effort to promote wind generation off Block Island); *see generally* HARVARD LAW SCH. ENVTL. LAW PROGRAM POLICY INITIATIVE, STATE POWER PROJECT, www.statepowerproject.org/ (last visited Sept. 21, 2016) (providing an excellent survey of recently-filed FPA preemption challenges). There is every reason to expect, especially after *Hughes*, that this number will increase in the coming years as States continue to cope with the wide-ranging changes currently buffeting the electricity sector.

¹⁶ As discussed further below, equitable jurisdiction is not the only doctrine that might result in preemption challenges being brought first before FERC rather than the federal courts. Others include the doctrine of primary jurisdiction and the exhaustion of administrative remedies. *See, e.g., infra* note 60. Courts might also seek out FERC's expertise by issuing more invitations for FERC to participate in preemption cases as *amicus curiae*, as the Court of Appeals for the Third Circuit did in a case involving essentially the same facts as *Hughes*. *See PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014), *cert. denied sub nom.* CPV Power Dev., LP v. Talen Energy Mktg., LLC, 136 S. Ct. 1728 (2016). Such invitations would not necessarily have the same fact-finding and deference benefits as having FERC address the question in the first instance, however. *See infra* notes 95–103 and accompanying text.

¹⁷ Indeed, litigants have begun to press this issue in the wake of *Hughes*. *E.g.*, Letter Brief for Intervenor-Defendant, at 2 n.1, *Zibelman*, 2016 WL 958605 (N.D.N.Y. May 6, 2016), ECF No. 102, <http://statepowerproject.files.wordpress.com/2014/03/ny-dunkirk-letter-brief-on-hughes.pdf> (citing an earlier version of this Essay); *see also* Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 461 (2016) (explaining why it is “important to ensure that the agency, not courts, make the ultimate decision regarding the preemptive effect (if any) of federal regulation”).

create a private right of action. In *Armstrong v. Exceptional Child Center, Inc.*,¹⁸ the Court considered a group of insurers' claim that the reimbursement rates in Idaho's Medicaid plan violated certain provisions of the Medicaid statute.¹⁹ Under federal law, Medicaid requires that a state plan provide for payments to healthcare providers that "are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available," but that nevertheless "safeguard against unnecessary utilization of such care and services."²⁰ The insurers argued that Idaho had set its rates too low and that the rates violated, and were therefore preempted by, the Medicaid statute.²¹ Writing for the majority, Justice Antonin Scalia first held that a private party could not bring suit directly under the Supremacy Clause.²² He explained that the Supremacy Clause is not a source of independent federal rights, but rather "a rule of decision" that provides that courts "must not give effect to state laws that conflict with federal laws."²³ All nine Justices agreed.²⁴

But that was not the end of the matter. *Armstrong* recognized that a line of cases, dating back to *Ex Parte Young*,²⁵ provided that courts may exercise their equitable jurisdiction to enjoin state officials from acting unconstitutionally unless federal law prevents courts from doing so.²⁶ Accordingly, the Court explained, the critical question is whether the relevant federal statute demonstrates Congress's intent to preclude private enforcement of the Supremacy Clause's rule of decision.²⁷ Again, all nine Justices agreed.²⁸

They disagreed, however, about whether the relevant provision of the Medicaid statute evinced such intent. The five-Justice majority interpreted the provision to preclude the exercise of the Court's equitable jurisdiction for two primary reasons. First, invoking the maxim that "the 'express provision of one method of enforcing a substantive rule suggests that

¹⁸ *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015).

¹⁹ 43 U.S.C. § 1396a (2012); *Armstrong*, 135 S. Ct. at 1382.

²⁰ *Armstrong*, 135 S. Ct. at 1382 (quoting 42 U.S.C. § 1396a(a)(30)(A)).

²¹ *Id.*

²² *See id.* at 1383.

²³ *Id.*

²⁴ *Compare id.*, with *id.* at 1391 (Sotomayor, J., dissenting) ("[T]he Court is correct that it is somewhat misleading to speak of 'an implied right of action contained in the Supremacy Clause,' . . .").

²⁵ *Ex parte Young*, 209 U.S. 123 (1908).

²⁶ *Armstrong*, 135 S. Ct. at 1384.

²⁷ *Id.* at 1385.

²⁸ *Compare id.*, with *id.* at 1392 (Sotomayor, J., dissenting).

Congress intended to preclude others,”²⁹ the Court pointed to the Medicaid statute’s provision for the withholding of federal funds from a state that violates the law, reasoning that this means of enforcing the statute’s substantive provisions suggested Congress’s intent to preclude all others, including preemption challenges in federal court.³⁰

Second, the Court held that the “judicially unadministrable text” of the statute confirmed that conclusion.³¹ In particular, the Court pointed to the statute’s “judgment-laden standard,” observing that these substantive judgments are precisely the sort that courts are ill-positioned to make.³² As the Court summarized, “the sheer complexity associated with enforcing [the provision at issue], coupled with the express provision of an administrative remedy . . . shows that the Medicaid Act precludes private enforcement” of the Supremacy Clause.³³

Justice Breyer concurred. Although he fully joined the analysis above, he wrote separately to elaborate on why the factors cited by the majority militated against private enforcement.³⁴ He argued that answering this type of preemption question required significant expertise—expertise that courts lacked, but that the relevant agency, the Centers for Medicare and Medicaid Services (“CMS”), possessed.³⁵ First, he observed that the questions before the Court involved an issue of ratemaking, which he described as a “complex[] and nonjudicial . . . task.”³⁶ Second, like the majority, he emphasized the availability of alternative means of enforcement, although he took a broader view of these alternatives than did the majority.³⁷ In particular, he noted that CMS could review Idaho’s rates—either *sua sponte* or in response to a petition from a regulated entity.³⁸ The courts could then occupy their more natural position of reviewing that agency judgment pursuant to provisions providing for judicial review of agency action under the Administrative Procedure Act (“APA”).³⁹ In short, Justice Breyer appeared to conclude that the relative competencies of the agency and the

²⁹ *Id.* at 1385 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

³⁰ *Id.* (citing 42 U.S.C. § 1396c (2012)).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1388 (Breyer, J., concurring in part and concurring in judgment).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1388–90.

³⁸ *Id.*

³⁹ *Id.* at 1388–89 (Breyer, J., concurring in part and concurring in judgment) (citing 5 U.S.C. §§ 702, 706(2)(A) (2012)).

courts—policymaking and judicial review, respectively—counseled strongly against the courts using the Supremacy Clause to interject themselves into the dispute over Idaho’s Medicaid reimbursement rates.⁴⁰

Four Justices dissented. In an opinion written by Justice Sonia Sotomayor, they argued primarily that the Medicaid statute did not provide the sort of “detailed remedial scheme” that the Court had previously required before concluding that a statute deprives courts of their equitable jurisdiction.⁴¹ In addition, the dissent took issue with the conclusion that the majority drew from the “judicial unadministrability” of the statute.⁴² The dissent argued that the breadth of the statute’s highly subjective standard meant only that it “provide[d] substantial leeway to States” in setting their rates.⁴³ The dissent concluded that, although that leeway would make it difficult for the plaintiffs to prevail on their preemption claims, it did not necessarily deprive the courts of jurisdiction to consider those claims.

II. HUGHES AND PRIVATE ENFORCEMENT OF THE FPA

A. *The FPA and Hughes*

Much of the Court’s reasoning in *Armstrong* could apply equally to preemption challenges brought under the FPA.⁴⁴ Explaining why requires a brief survey of the electricity industry, the FPA, and the facts of *Hughes*.

The electricity sector is generally divided into three components: the generation of electricity, its transmission over long distances, and its ultimate distribution and sale to end-use consumers.⁴⁵ The FPA largely maps onto these distinctions. It vests FERC with exclusive jurisdiction to ensure that the first two components, the wholesale sale and transmission of electricity, are performed in a “just and reasonable” manner.⁴⁶ It also vests FERC with

⁴⁰ See *id.* at 1389.

⁴¹ *Id.* at 1390 (Sotomayor, J., dissenting).

⁴² See *id.* at 1394.

⁴³ *Id.* at 1395.

⁴⁴ See Complaint at ¶¶ 79–103, *PPL EnergyPlus v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013) (No. 12-CV-1286), 2012 WL 12519774, *aff’d*, 753 F.3d 467 (4th Cir. 2014), *aff’d sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). The original *Hughes* complaint also alleged a dormant Commerce Clause violation, which the district court rejected. *Nazarian*, 974 F. Supp. 2d at 841.

⁴⁵ See Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSP. 119, 121 (1997).

⁴⁶ 16 U.S.C. §§ 824d(a), 824e(a); see also *Hughes*, 136 S. Ct. at 1292. The FPA also vests FERC with authority to review rates to determine whether a rate is unduly preferential or discriminatory. 16 U.S.C. § 824d(b). For the sake of simplicity, this section will encompass both standards as part of the just-and-reasonable determination.

authority to ensure that any rate or practice “affecting” those sales is itself just and reasonable.⁴⁷ In short, the FPA empowers FERC to exercise “plenary” jurisdiction to determine the appropriateness of any wholesale rate or practice.⁴⁸ Nevertheless, the Act also preserves a significant role for the states, giving them jurisdiction over the distribution and ultimate sale of electricity as well as the “facilities used for the generation of electric energy.”⁴⁹

Although the FPA’s conceptual division of authority is neat, putting that division into practice can be far more complicated. Because the state and federal spheres of jurisdiction cover separate halves of the same industry, almost anything that happens in one sphere ineluctably affects matters in the other.⁵⁰ State regulation of generation facilities will affect federal regulation of the wholesale rate, which will affect state regulation of the retail rate and so forth. Separating the permissible effects from the impermissible ones often requires a sophisticated assessment of the consequences for the electricity industry as a whole—an assessment for which the FPA itself provides no real guidance.

The challenge posed by the lack of statutory guidance is compounded by the electricity industry’s extreme complexity. The electric grid is often described as “the most complex machine ever made.”⁵¹ And the legal and economic structures that govern the electricity transmitted over that grid are nearly as intricate. Over the last twenty-five years, FERC has transitioned from a system of regulating electricity markets based on the cost of service—a highly technical, but relatively predictable inquiry—to one based on market competition.⁵² As part of this transition, FERC has fostered the development of organized regional markets for the sale and transmission of electricity (known as “regional transmission organizations” or “RTOs”).⁵³

⁴⁷ 16 U.S.C. § 824e(a).

⁴⁸ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

⁴⁹ 16 U.S.C. § 824(b)(1).

⁵⁰ *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776 (2016); *see also* Matthew R. Christiansen, Comment, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 1, 7–9 (2016) (discussing preemption analysis under the FPA).

⁵¹ *E.g.*, PHILLIP F. SCHEWE, *THE GRID: A JOURNEY THROUGH THE HEART OF OUR ELECTRIFIED WORLD* 1 (2007); TURAN GONAN, *ELECTRIC POWER DISTRIBUTION ENGINEERING* 86 (2014) (explaining that the electric grid “has often been referred to as the greatest and most complex machine ever built”).

⁵² *See* Christiansen, *supra* note 50 at 9–13 (detailing evolution of electric regulation through late twentieth and early twenty-first century).

⁵³ OFFICE OF ENF’T, FED. ENERGY REGULATORY COMM’N, *ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS* 35, 39–41 (2015), <http://www.ferc.gov/market-oversight/guide/energy-primer.pdf> (“*Energy Primer*”).

FERC's regulation of these RTOs hinges on an intricate—and, to the non-expert, seemingly byzantine—set of rules for combating unfair competition.

Hughes lies at the intersection of these complex technical, economic, and legal structures. A full discussion of the Maryland regulation and the background market structure is outside the scope of this Essay. Suffice it to say, an important aspect of FERC's transition to a market-based regulatory regime has been the promotion of the sophisticated auction markets for electricity in the RTOs discussed above.⁵⁴ One of the purposes of these markets is to provide price signals that encourage the construction of new power plants and forestall the retirement of old ones.⁵⁵

Prior to issuing the regulation at issue in *Hughes*, Maryland concluded that these price signals were insufficient to incentivize the development of new generation that it believed was needed to maintain reliability within the state.⁵⁶ To remedy that perceived problem, it required utilities within the state to enter a twenty-year contract with a generating company ("CPV Maryland, LLC" or "CPV") in which the utilities agreed to pay CPV a fixed rate for certain sales of electricity in the RTO market regardless of the price for which the electricity was actually sold in that market.⁵⁷ The regulation thereby replaced the price signal generated by the RTO market with one preferred by Maryland.⁵⁸ As noted, the Supreme Court concluded that the FPA preempted this regulation because, by "adjusting an interstate wholesale rate," the State had "invade[d] FERC's regulatory turf"—although it based that conclusion on some relatively uncommon features of the Maryland regulation.⁵⁹

B. *The Private Enforceability of the FPA*

FPA preemption challenges—including, to some extent, *Hughes*—illuminate the parallels between the FPA and the Medicaid statute in *Armstrong*. This section suggests that those parallels—while imperfect—

⁵⁴ See Christiansen, *supra* note 50 at 10–11.

⁵⁵ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1289, 1293 (2016) ("The capacity auction serves to identify need for new generation" and "is designed to accommodate long-term bilateral contracts for capacity."); Christiansen, *supra* note 50, at 11.

⁵⁶ *Hughes*, 136 S. Ct. at 1294.

⁵⁷ The Maryland regulation also addressed the "capacity" market, which is, in essence, a forward market in which utilities are required to purchase options for the delivery of electricity in the future. See *Energy Primer*, *supra* note 53, at 46. It was this capacity market transaction that led to the litigation in *Hughes*. See *Hughes*, 136 S. Ct. at 1295–97.

⁵⁸ See *id.* at 1297 (noting that the Maryland program "guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to" the relevant RTO).

⁵⁹ *Id.*

are enough to raise a serious question about whether the FPA permits courts to exercise jurisdiction over suits seeking to enforce the Supremacy Clause against state laws that give rise to a wholesale rate or practice that FERC can also review pursuant to its authority under the FPA.⁶⁰ It begins by addressing the factors discussed in *Armstrong* before turning to discuss other matters that the Court has considered when evaluating the limits of its equitable jurisdiction. The section concludes by discussing some of the most obvious counterarguments to requiring that preemption claims be brought before FERC.

1. The Statute Provides a “Sole Remedy”

Like the Medicaid provision in *Armstrong*, the FPA provides an exclusive means—what *Armstrong* called a “sole remedy”⁶¹—for enforcing its substantive provisions. As noted, the FPA requires that all wholesale rates and practices must be just and reasonable,⁶² and it makes FERC’s review of wholesale rates and practices the exclusive forum for determining the substance of that requirement and enforcing it.⁶³ Wholesale rates must be filed with FERC, and the Court has explained that, under the FPA, the “right to a reasonable rate is the right to the rate which [FERC] files or fixes, and . . . except for review of [FERC’s] orders, [a] court can assume no right to a different [rate].”⁶⁴ The same goes for practices “affecting” the wholesale

⁶⁰ Whether a statute deprives courts of their equitable jurisdiction is a distinct issue from whether courts should effectively remove themselves from deciding a question by invoking the doctrine of primary jurisdiction—which, as noted, permits courts to refer to administrative agencies questions that are within the agencies’ competence rather than the courts.’ See *Far E. Conference v. United States*, 342 U.S. 570, 574–75 (1952) (listing factors that courts consider in deciding whether to invoke primary jurisdiction). The considerations relevant to both inquiries are remarkably similar, however, and a court could well conclude that it possesses equitable jurisdiction, but that primary jurisdiction nevertheless lies with the relevant agency. Cf. Catherine M. Sharkey, *Preemption as a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1, 4 n.14 (2012) (discussing the doctrine and noting that it was raised repeatedly during argument in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012)). At least one federal court has recently rejected a primary jurisdiction argument in an FPA preemption case. See *Entergy Nuclear Fitzpatrick, LLC v. Zibelman*, No. 5:15-CV-230, 2016 WL 958605, at *9 (N.D.N.Y. Mar. 7, 2016).

⁶¹ *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

⁶² See *supra* note 46 and accompanying text.

⁶³ See *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988).

⁶⁴ *Id.* (omission in original) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963–64 (1986)); see also *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (observing that a party “can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by [FERC]”). This is not to suggest that the filed-rate doctrine applies to cases such as *Hughes*, where no rate or practice had been

rate.⁶⁵ In short, under the FPA, only FERC may determine the propriety of a wholesale rate and, by extension, the only place to challenge the propriety of a wholesale rate is before FERC. The courts' role in this process is to provide judicial review of FERC's actions or to enforce FERC's judgments.⁶⁶ That allocation of authority is, in essence, the same one that underpinned *Armstrong's* conclusion that the FPA is not privately enforceable.

To be sure, FPA section 201—the basis for *Hughes* and other FPA preemption challenges—is not a perfect parallel to the Medicaid provision in *Armstrong*.⁶⁷ In particular, *Armstrong* addressed whether the state law was consistent with the Medicaid statute's *substantive* provisions, while *Hughes* addressed whether the state law was consistent with the FPA's *jurisdictional* provision.⁶⁸ At first blush, that may seem like a significant difference. After all, interpreting a statute's allocation of jurisdiction seems like exactly the type of question that courts routinely resolve, and it would seem not to require the policymaking expertise needed to apply a statute's substantive standard.

But the FPA is not your typical statute. In many cases, the question whether a state has impermissibly regulated a wholesale rate is as much a ratemaking question as it is a jurisdictional one. That is because, as noted, the state and federal spheres of jurisdiction cover separate halves of the same

filed or accepted by FERC at the time of decision. Instead, the point is that the Court has recognized repeatedly that review before FERC is the “sole remedy” for disputing the appropriateness of a particular rate.

⁶⁵ *Nantahala*, 476 U.S. at 966–67 (observing that FERC's exclusive jurisdiction to determine reasonableness applies not only to rates per se, but extends to practices affecting the wholesale rate).

⁶⁶ Congress does not appear to have spent much, if any, time expressly contemplating where FPA preemption challenges could be brought. It is noteworthy, however, that in 1934, one year before the FPA was enacted, Congress passed the Johnson Act, 28 U.S.C. § 1342, which prohibited the federal district courts from enjoining “any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision” where “[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution.” The Johnson Act, 28 U.S.C. § 1342 (2012). The Johnson Act appears to indicate Congress's disapproval of state ratemaking determinations being collaterally challenged in federal court, especially on constitutional grounds. It would seem reasonable that Congress would continue to share that concern a year later when it enacted the FPA, although that is speculation and, in any case, Congress did not enact a similar prohibition in the FPA.

⁶⁷ Compare 16 U.S.C. § 824, with 42 U.S.C. § 1396a.

⁶⁸ See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1289, 1297 (2016).

industry.⁶⁹ As a result, there are many actions that a state can take pursuant to its authority under the FPA that nevertheless have a significant effect on the wholesale rates subject to FERC's authority.⁷⁰ That is why, as the court of appeals explained in the decision on appeal in *Hughes*, "not every state regulation that incidentally affects federal markets is preempted."⁷¹ But not every action that a state takes pursuant to its authority is safe from preemption. Courts have also recognized that even where a state "operates within its own field, it may not intrude 'indirectly' on areas of exclusive federal authority."⁷²

Thus, the critical question in many FPA preemption cases is not whether the state law affects the wholesale rate, as there is bound to be *some* effect. Instead, the critical question is whether that effect is of an impermissible type or to an impermissible extent. Those questions, however, have much more in common with FERC's ordinary ratemaking determinations than the type of jurisdictional inquiries with which courts are familiar.⁷³ In particular, they will often require FERC to implicitly decide whether a wholesale rate or practice is still just and reasonable, notwithstanding the state action in question.⁷⁴ That judgment appears quite similar to the type of judgment that Congress vested in FERC. Although that question may not be identical to whether a rate or practice is just and reasonable in the first instance, it nevertheless requires the same experience and expertise—the primary rationale for vesting the just and reasonable determination with FERC in the first place.

Consider *Hughes*. No party disputed that States could take actions to promote their preferred forms of generation even if those actions affected the

⁶⁹ FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) (noting that the federal and state spheres of jurisdiction "are not hermetically sealed from each other").

⁷⁰ *Id.*; see also *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (observing that in the natural gas industry—which is similarly divided between state and federal jurisdiction—the "Platonic ideal" of distinct federal and state spheres of jurisdiction does not exist).

⁷¹ *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014) (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 515 (1989)), *aff'd sub nom. Hughes*, 136 S. Ct. at 1292; see Rossi *supra* note 17 (arguing that field preemption does not do any of a court's "primary analytical" work in assessing an FPA preemption claim because that claim "always implicitly depends" on assessment of the facts of the case and whether the state law is an obstacle to the federal purpose).

⁷² *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274 n.2 (D.C. Cir. 1990) (citing *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963)); see also *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988).

⁷³ See *supra* notes 69–72 and accompanying text.

⁷⁴ See *id.*

wholesale rate. Instead, much of oral argument was devoted to the Justices' efforts to understand whether and how Maryland had interfered with the federal scheme.⁷⁵ The Justices' questions turned not just on *what* effect the Maryland program had on the wholesale rate, but also on *why* that effect was impermissible.⁷⁶ In particular, they sought to determine whether the Maryland law sufficiently affected the RTO's auction market to alter the price signals the market would otherwise produce.⁷⁷ But, as noted, that question—whether the law affected the price *enough*—is really another way of asking whether the wholesale rate is nevertheless just and reasonable in spite of the state action.⁷⁸ That question requires precisely the same “judgment-laden” determination about the rate in question that the Court in *Armstrong* pointed to in holding that the Medicaid statute deprived courts of their equitable jurisdiction.⁷⁹ Indeed, as explained further below, FERC considered a similar question in the proceedings leading up to the *Hughes* litigation.⁸⁰

In the end, *Hughes* did not need to decide whether the Maryland regulation improperly affected the wholesale market because the Court concluded that the regulation “invade[d]” FERC's exclusive jurisdiction, rendering it preempted regardless of its effect.⁸¹ Nevertheless, as the Court noted, that conclusion was an exceedingly narrow one that turned on Maryland's decision to require the generator to bid its generation into the wholesale market in order to receive the state subsidy.⁸² Future preemption cases will likely require a court to delve more deeply into how the state law affects the wholesale market, again raising the type of quasi-ratemaking questions with which the Court appeared to struggle at oral argument in *Hughes*.⁸³ Accordingly, the coming preemption cases, while nominally about jurisdiction, are likely to turn at least in part on questions very similar to those that Congress intended FERC to resolve.⁸⁴

⁷⁵ See Transcript of Oral Argument, *supra* note 11 at 30–37.

⁷⁶ See *id.* at 37–42, 46–50.

⁷⁷ *Id.* at 41–42.

⁷⁸ See *supra* notes 69–74 and accompanying text.

⁷⁹ See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

⁸⁰ See *infra* notes 99–101 and accompanying text.

⁸¹ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1289, 1297 (2016).

⁸² *Id.* at 1299.

⁸³ See *supra* notes 11–12 and accompanying text.

⁸⁴ This is not to suggest that Congress intended FERC to resolve *these* specific questions. The electricity industry has evolved beyond anything Congress could have imagined in 1935 and many of the most difficult aspects of preemption challenges are largely the result of the fact that Congress did not foresee the modern electricity industry. Rather, the

2. *The Act Establishes a “Judicially Unadministrable” Standard*

The FPA also shares the second characteristic that *Armstrong* held to weigh against private enforceability. Describing the relevant provision of the Medicaid statute, the *Armstrong* majority observed that “[i]t is difficult to imagine a requirement broader and less specific than [the] mandate that state plans provide for payments that are ‘consistent with efficiency, economy, and quality of care,’ all the while ‘safeguard[ing] against unnecessary utilization of . . . care and services.’”⁸⁵ Justice Scalia must not have considered the FPA, which, if anything, is even broader and less specific than the Medicaid Statute. As noted, the FPA requires that wholesale rates be just and reasonable and not unduly discriminatory without providing another guiding principle such as the Medicaid’s statute’s exhortation to avoid unnecessary utilization.⁸⁶ It thus establishes exactly the sort of “judgment-laden” and “judicially unadministrable” standard that *Armstrong* interpreted to suggest an issue is for the agency to resolve, rather than a court.⁸⁷

Here, too, there are important differences between the FPA and the Medicaid statute. Again, the principal difference is that section 201 of the FPA—the basis for FPA preemption challenges—deals with the allocation of statutory authority rather than a particular substantive standard.⁸⁸ Indeed, section 201 does not actually contain the “judicially unadministrable” just and reasonable standard. Nevertheless, as discussed, when it comes to the FPA, a preemption question can be as much a ratemaking inquiry as it is a jurisdictional one, making the determination whether a state has violated the FPA into an inquiry whether the wholesale rate or practice is just and reasonable notwithstanding the State action.⁸⁹

Here, too, *Hughes* helps illustrate the point. During oral argument, the Justices asked repeatedly how they should draw a principled distinction that invalidates the contract before them but preserves the swath of state programs that affect wholesale rates while remaining squarely on the States’

point is that judgments about whether a wholesale rate is appropriate or instead impermissibly distorted are the *type* of complex policy judgments that Congress intended to confer on FERC.

⁸⁵ *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (alteration and omission in original) (quoting 42 U.S.C. § 1396a(a)(30)(A) (2012)).

⁸⁶ See *supra* note 46 and accompanying text.

⁸⁷ *Armstrong*, 135 S. Ct. at 1385. Cf. *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210 (2012) (noting that complex statutes that involving provisions that are “broad and general” present “the kind of legal question[s] [that] ordinarily call[] for APA review” rather than direct enforcement in court).

⁸⁸ See 16 U.S.C. § 824.

⁸⁹ See *supra* notes 69–70 and accompanying text.

side of the FPA's jurisdictional divide.⁹⁰ It certainly appeared that the Justices were not confident when—and under what circumstances—a state law that operated on the States' side of the FPA's jurisdictional boundary could nevertheless interfere with the federal scheme.⁹¹

That confusion might help to explain why the Court resolved *Hughes* on perhaps the narrowest grounds possible—concluding that the Maryland regulation's unusual requirement that the generator bid its output into the RTO market in order to be eligible for financial incentives compelled its invalidation.⁹² In so doing, the Court may have hoped to avoid issuing a rule with consequences for the electricity sector that went well beyond what the Justices could foresee. The narrow decision, however, failed to provide much guidance on the FPA's preemptive effect more generally, leaving states with regulations that lack the Maryland program's "fatal defect" facing considerable uncertainty.⁹³ Resolving disputes regarding many of those regulations will likely require exactly the sort of detailed, quasi-ratemaking jurisdictional inquiry that the Court avoided in *Hughes*. And, as in *Armstrong*, that sort of detailed policy judgment calls out for agency expertise—expertise that could also produce an authoritative agency determination to which a court could defer.⁹⁴

⁹⁰ See Transcript of Oral Argument, *supra* note 11, at 34–35, 37–38, 52.

⁹¹ See *id.* In *Hughes*, that uncertainty was compounded by the parties' debate over FERC's actual position on the Maryland regulation, notwithstanding its participation in the case. *Id.* at 24–28.

⁹² *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1289, 1299 (2016).

⁹³ See Hammond, *supra* note 6 (describing the "significant uncertainty for states" that remains after *Hughes*); Robert Walton, *What the Hughes v. Talen Supreme Court Decision Means for State Power Incentives*, UTILITY DIVE (Apr. 25, 2016), <http://www.utilitydive.com/news/what-the-hughes-v-talen-supreme-court-decision-means-for-state-power-incen/418046/> (explaining how the Court's "narrow ruling means big questions still remain" for state programs to promote particular generators).

⁹⁴ It is true that not every FPA preemption claim will present a complicated ratemaking question, and the Court's narrow decision in *Hughes* appears to be an example of a case that did not require such a determination. But the specter of easy cases was present in *Armstrong* as well. As Justice Breyer observed in his concurrence, the fact that there may be some cases that the courts can handle easily is not necessarily a compelling argument for finding federal court jurisdiction, especially since the expert agency can presumably deal easily with both the difficult cases and the straightforward ones. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1389 (2015) (Breyer, J., concurring in part and concurring in the judgment). As in *Armstrong*, the potential for preemption challenges to implicate complex policy judgments—even if not always realized—may support vesting jurisdiction over these challenges with FERC. See *supra* notes 34–40 and accompanying text.

3. *Other Considerations for Equitable Jurisdiction*

Although not discussed in *Armstrong*, the Court has in other cases identified a number of additional factors that inform whether it should exercise its equitable jurisdiction. Many of those are relevant to the FPA, especially the need to promote judicial economy.⁹⁵ As the Court recently noted in a similar case, permitting parallel judicial and administrative actions that “should reach the same result . . . is *at best* redundant.”⁹⁶ Requiring preemption challenges to be brought before FERC would help to avoid such redundancy by encouraging parties to make all their arguments—both constitutional and statutory—simultaneously rather than in piecemeal proceedings split between FERC and the federal courts.⁹⁷ Absent such a requirement, a party challenging a rate or practice that results from a state law has every incentive to take two bites at the apple by pursuing bifurcated proceedings: filing “just and reasonable” challenges before FERC and preemption challenges in the federal courts.⁹⁸

Something along these lines preceded *Hughes*. Partly in response to the Maryland program,⁹⁹ the relevant RTO, along with a group of generators that

⁹⁵ See, e.g., *Younger v. Harris*, 401 U.S. 37, 43–44 (1971); see also *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) (describing how, in *Younger*, “principles of judicial economy” weighed against the Court’s exercise of its equitable jurisdiction).

⁹⁶ *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1211 (2012) (emphasis added).

⁹⁷ There is some evidence that this is already occurring. FERC recently resolved a complaint prompted by a series of power purchase agreements in Ohio that would have guaranteed income for several generators within the State. See Notice of Complaint at 1, Elec. Power Supply Ass’n v. AEP Generation Resources, Inc., 155 FERC ¶ 61,102 (Apr. 27, 2016). The complaint, filed by competing generators, asked FERC to block the payments under its section 205 authority, but it expressly stated that FERC should not reach the preemption question, which the complaint suggested could be raised in a separate suit in federal court. Complaint at 14 n.45, *AEP*. FERC prevented the agreements from going into effect, presumably precluding the need for a lawsuit on preemption grounds. *AEP*, 155 FERC ¶ 61,102, ¶ 55.

⁹⁸ An agency determination might also provide an authoritative interpretation to which a court could subsequently defer, although the Supreme Court has not clarified the deference standard that applies to an agency’s preemption determination. See *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1602–03 (2015) (“Because there is no determination by FERC that its regulation pre-empts the field into which respondents’ state-law antitrust suits fall, we need not consider what legal effect such a determination might have.”); Sharkey, *supra* note 60, at 9 (“[T]he Supreme Court has sent mixed signals about the level of deference owed to an agency’s determination of the existence of a conflict between federal and state law in preemption suits.”).

⁹⁹ The petition was initially brought in reaction to a similar program in New Jersey, but eventually encompassed the Maryland action as well. See *PJM Interconnection, LLC*, 135 FERC ¶ 61,022, ¶ 2 (Apr. 12, 2011) (noting that the tariff revision was in response to “recent

included *Hughes* plaintiff Talen Energy Marketing, LLC,¹⁰⁰ petitioned FERC seeking to change its policies in order to make it more difficult for CPV to clear the RTO market.¹⁰¹ Although FERC approved changes that made it tougher for generators, including CPV, to successfully sell electricity, it did not go as far as some of the petitioners had requested.¹⁰² The complaint in *Hughes* followed shortly after CPV successfully cleared the RTO market, notwithstanding these changes.¹⁰³ Concentrating these challenges into a single proceeding before FERC would help to reduce the governmental resources needed to resolve these preemption questions while also helping to ensure that the FPA is applied uniformly, perhaps forestalling the need for another trip to the Supreme Court.

4. Counterarguments and Responses

Notwithstanding the parallels between *Armstrong* and FPA preemption challenges, whether the supremacy of the FPA is privately enforceable is, for several reasons, very much an open question. First, *Armstrong* was decided by a 5–4 vote, with Justice Scalia writing for the majority.¹⁰⁴ How the Court will apply the *Armstrong* precedent without him is far from clear. Second, as discussed above, there are important differences between the Medicaid statute and the FPA.¹⁰⁵ How a court will interpret these differences is also unclear. Finally, there are real counterarguments to vesting an agency with exclusive jurisdiction to consider preemption challenges involving its enabling statute. One or more of these arguments could carry the day when it comes to the FPA, causing a court to distinguish *Armstrong*. This section outlines two of the most compelling such counterarguments. It also notes a few reasons why those arguments might not be as forceful as they might at first appear.

Perhaps the most intuitive counterargument is that putting an agency in charge of its own preemption cases is akin to putting the fox in charge of the

initiatives in New Jersey and Maryland to support new generation.”). A certiorari petition in a preemption challenge based on the New Jersey program was denied following the *Hughes* decision. See *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014), *cert. denied sub nom.* *CPV Power Dev., LP v. Talen Energy Mktg., LLC*, 136 S. Ct. 1728 (2016).

¹⁰⁰ Talen was then known as PPL EnergyPlus, LLC.

¹⁰¹ See *PJM*, 135 FERC ¶ 104; see also Richard B. Miller, Neil H. Butterklee, & Margaret Comes, “Buyer-Side” Mitigation in Organized Capacity Markets: Time for a Change?, 33 ENERGY L.J. 449, 465–68 (2012) (discussing *PJM*’s changes).

¹⁰² See Miller et al., *supra* note 101 at 465–68.

¹⁰³ See Complaint, *supra* note 44.

¹⁰⁴ See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015).

¹⁰⁵ See *supra* note 67 and accompanying text.

hen house. After all, the argument might go: Why would the agency have any incentive other than to find state law preempted, thereby protecting or expanding its regulatory autonomy? That incentive could lead the agency to act in a manner that would upset the federal-state balance of authority that lies at the heart of cooperative federalist statutes like the FPA. A court, by contrast, might provide a more “neutral” arbiter of the jurisdictional dispute.

When it comes to the FPA, however, those concerns are less compelling than they might be for other statutes. That is because the breadth of FERC’s mandate under the FPA—ensuring that wholesale rates are just and reasonable—gives FERC tremendous discretion to determine when a rate or practice improperly distorts the wholesale markets.¹⁰⁶ As a result, there will be few, if any, cases in which FERC could find a rate or practice preempted where it could not also block or invalidate that rate or practice by determining that it is not just and reasonable. Thus, requiring these challenges to be brought first before FERC is unlikely to enhance FERC’s capacity to invalidate state laws of which it disapproves beyond existing limits.¹⁰⁷

In addition, even putting aside FERC’s just-and-reasonable authority, it is far from clear that requiring preemption challenges to be brought before FERC would make a preemption outcome more likely. FERC’s conclusions could still be challenged on judicial review, and the reviewing court would generally apply the same legal standard that it would apply to FERC’s legal arguments in a case brought directly in federal court.¹⁰⁸ Indeed, the Court has recently suggested that there is no basis for according an agency’s legal conclusions more or less deference based on the forum in which the case was brought.¹⁰⁹

Furthermore, under the APA, FERC would need to respond to arguments contending that the rate or practice was not preempted.¹¹⁰ There

¹⁰⁶ See *supra* notes 46–47 and accompanying text.

¹⁰⁷ FERC’s recent rejection of the Ohio Power Purchase Agreements, see *supra* note 97, provides an illustration of this phenomenon. Although these agreements were widely viewed as the next major preemption issue following *Hughes*, see, e.g., Walton, *supra* note 93 (describing the Ohio contracts as the “next front” in FPA preemption jurisprudence), FERC’s decision not to approve the contracts under substantive FPA authority has effectively mooted the preemption questions.

¹⁰⁸ *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210–11 (2012) (suggesting that the standards of deference should not differ based on whether a preemption challenge is filed first in federal court or arises under judicial review under the APA).

¹⁰⁹ See *id.*

¹¹⁰ See, e.g., *Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994, 999 (D.C. Cir. 2013) (“[FERC’s] complete failure to consider the evidence proffered renders its orders arbitrary

is no similar formal opportunity for comment or input in the process by which FERC formulates litigating position if it is asked to participate as *amicus curiae*. As a result, opponents of preemption would have an opportunity to persuade the Commission of the merits of their position—an opportunity that they do not have when a case is brought directly in federal court.¹¹¹ And, in response, FERC would need to articulate the factual and policy rationale underlying a finding of preemption. Similarly, although FERC’s evidentiary considerations would require only substantial evidence in the record to survive judicial review, there is little reason to believe that the typical court is likely to engage in a probing review of FERC’s assessment of the complex fact patterns that often underlie electricity-sector preemption cases.

Requiring preemption challenges to be brought before FERC may even *decrease* the likelihood that a particular law will be found preempted. If a regulated party files a complaint before FERC alleging that a rate or practice is preempted and unjust and unreasonable, FERC has the option of concluding that the challenged rate or practice is not preempted but nevertheless blocking it or requiring changes before it is deemed just and reasonable.¹¹² A court, by contrast, faces the binary choice of holding a law preempted or not preempted; it cannot require that the law be modified to mitigate its adverse effect on wholesale markets.¹¹³ Perhaps that difference helps explain why, during oral argument in *Hughes*, the defendants expressed their strong desire to be in front of FERC rather than in federal court.¹¹⁴

and capricious.”).

¹¹¹ Cf. Rossi *supra* note 17 (arguing that a preemption finding by FERC “is best made through an open and transparent . . . decisionmaking process, such as notice and comment rulemaking, rather than as implicit regulatory choice or as a mere afterthought, as articulated in a brief”).

¹¹² See, e.g., R.E. Ginna Nuclear Power Plant, LLC, 154 FERC ¶ 61,157, ¶¶ 2, 29–31 (Mar. 1, 2016) (finding that certain aspects of an agreement filed with FERC pursuant to section 205 of the FPA raised preemption concerns and requiring the parties to submit a compliance filing that addressed those concerns rather than simply rejecting the agreement outright); see also *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984) (holding that the Commission can require a utility to make certain changes before a rate filed under section 205 goes into effect, but that the Commission cannot compel the utility to do so under that provision).

¹¹³ See *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988) (“[W]e will not rewrite a state law to conform it to constitutional requirements.”).

¹¹⁴ Transcript of Oral Argument, *supra* note 11, at 24. Other States have made similar arguments in other preemption cases. See, e.g., *Entergy Nuclear Fitzpatrick, LLC v. Zibelman*, No. 5:15-CV-230, 2016 WL 958605, at *8–9 (N.D.N.Y. Mar. 7, 2016) (rejecting New York’s invocation of the primary jurisdiction doctrine to have a preemption challenge

Another concern with requiring preemption challenges to be brought before an agency is that the agency might respond slowly.¹¹⁵ Lawsuits brought directly in federal court enable the court to enjoin the putatively preempted state action until the agency reaches a decision.¹¹⁶ Although that concern may be very real in contexts where the agency proceedings can often take several years, such as under the Medicaid statute,¹¹⁷ it is less compelling when it comes to FERC, which generally considers cases filed by regulated entities quickly—much faster than the year and half that it took the district court to reach a decision in *Hughes*.¹¹⁸

III. PROCEDURE

The mechanics of a requirement that FPA preemption challenges be brought first to FERC could take many forms—a full discussion of which falls beyond the scope of this Essay. A preemption claim could be brought either as a petition for a declaratory judgment from FERC or as a part of a complaint contending that the rate or practice resulting from the state law is not just and reasonable.¹¹⁹ Alternatively, a court might conclude that the plaintiff must first pursue its rights under sections 205 and 206 of the FPA—i.e., the right to a just-and-reasonable rate—before bringing a section 201 preemption claim in federal court. This option, which is similar to the administrative exhaustion doctrine, might be especially attractive where a plaintiff alleges that a state law interferes with FERC’s regulatory scheme.¹²⁰

litigated before FERC rather than the federal courts).

¹¹⁵ Sharkey, *supra* note 60, at 4.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 4–5 (discussing the significant delays sometimes associated with CMS’s review of plans under the Medicaid provision at issue in *Douglas* and *Armstrong*).

¹¹⁸ Compare *Complaint Resolution Paths and Target Time Frames*, FERC (June 28, 2010), <http://www.ferc.gov/legal/complaints/form-comp/comp-resolution.asp> (demonstrating that the Commission expects to issue decisions on the merits within sixty to ninety days after an answer is filed, that administrative law judges would render initial decisions within sixty days of the hearing, and that post-ADR, the Commission would issue any subsequent orders within forty-five days after the ADR resolution), with *Complaint*, *supra* note 44 (filed Apr. 27, 2012), and *PPL EnergyPlus v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013) (decided Sept. 30, 2013). As noted below, however, some preemption challenges might be brought before FERC as petitions for a declaratory judgment, which are not covered by the complaint resolution time frames discussed in the first citation in this footnote. And even complaints brought under section 206 of the FPA can, and do, sometimes take much longer to resolve.

¹¹⁹ See, e.g., *City of Orangeburg*, 151 FERC ¶ 61,241 (June 18, 2015) (considering a petition for a declaratory judgment that a state law does not apply to the rates and practices of certain generators because it is preempted by the FPA).

¹²⁰ Cf. *Allco Fin Ltd. v. Klee*, 805 F.3d 89, 97–98 (2d Cir. 2015) (dismissing claims on

Nevertheless, it is not clear that all relevant state actions will give rise to a rate or practice over which FERC has jurisdiction. Where there is no rate or practice that FERC may review, it seems plain that the FPA does not impose an exclusive remedial scheme as contemplated in *Armstrong*, and a plaintiff remains free to invoke the federal courts' equity jurisdiction to enforce the Supremacy Clause and enjoin the state action. For example, one of the Court's leading preemption cases, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*,¹²¹ addressed whether a *retail* rate was preempted by the FPA.¹²² A retail rate—a matter within the States' exclusive jurisdiction—is plainly not a FERC-jurisdictional rate, and the claim could thus likely have been brought in federal court even if *Armstrong* were applied to the FPA.¹²³ But the fact that isolated instances of this type could arise does not necessarily suggest that in the mine run of cases in which the state action *does* implicate a FERC-jurisdictional rate or practice—as some parties suggested was the case in *Hughes*¹²⁴—a plaintiff should be able to bring suit in federal court.¹²⁵

CONCLUSION

The federal courts' equitable jurisdiction to entertain cases such as *Hughes* is, in light of *Armstrong*, far from clear. This Essay has identified a number of parallels between *Armstrong* and *Hughes*. It has also noted a number of important differences, chief among these being that preemption

the grounds that the plaintiff failed to exhaust its administrative remedies before FERC). FERC currently takes the position that, although it has discretion to decide preemption questions, "the Commission may also exercise its discretion not to do so," in part because an "entity that believes it is harmed by a state's action that conflicts with the Federal Power Act may pursue its claim in state or federal court" Brief for the Respondent at 36, *City of Orangeburg v. FERC*, No. 15-1274 (D.C. Cir. June 21, 2016). Although that position may make sense so long as there is a private right of action under the FPA, it assumes the answer to the question that this Essay raises: whether a private party *can* in fact vindicate such a grievance in federal or state court.

¹²¹ *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 356 (1988).

¹²² *Id.* at 487.

¹²³ See also, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988) (declaratory judgment action challenging as preempted a state public utility's commission's assertion of jurisdiction over a natural gas pipeline's issuance of securities).

¹²⁴ See Transcript of Oral Argument, *supra* note 11, at 24, 28.

¹²⁵ This wrinkle could be accommodated rather easily. Where there is no FERC-jurisdictional practice, a plaintiff could bring suit directly in federal court. And where the presence of a FERC-jurisdictional practice is disputed—as it was in *Hughes*—the claims could be brought originally before FERC and proceed to federal court if and when FERC determines that there is no practice over which it has jurisdiction. See *id.* Of course, a case could also proceed to federal court on judicial review of a FERC determination that it possesses jurisdiction to review a rate or practice affected by a state regulation.

challenges like *Hughes* are technically jurisdictional claims, even if many require exactly the sort of ratemaking judgment at issue in *Armstrong*. It is high time for the courts to weigh in and determine whether the parallels or the differences predominate.