

## RESPONSE

# STATE MOTIVES DO NOT CONTROL THE PREEMPTION INQUIRY UNDER THE FEDERAL POWER ACT

In response to Matthew R. Christiansen, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 1 (2016).

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In *FPA Preemption in the 21st Century*, Matthew Christiansen adeptly navigates a topic of central concern in the electric power sector. He persuasively argues that the Federal Power Act (“FPA”) does not field-preempt state laws that seek to shape the impact of the wholesale rate on matters subject to state jurisdiction.<sup>1</sup> The thrust of his analysis is that the preemption inquiry should focus on the narrower question whether the state law targets Federal Energy Regulatory Commission’s (“FERC”) ability to approve a transaction as just and reasonable. The purpose of this response is to shed light on another aspect of preemption analysis—one that is not fully explored in his Comment, but is nevertheless critical to determining how his proposed preemption inquiry would work in practice. That is, whether the State’s purpose in enacting a law is relevant to determining whether that law is preempted by the FPA.

This Response argues that *Oneok v. Learjet*, which examines the “target at which the state law aims,” does not require an evidentiary inquiry into the State’s motive in enacting the law in question.<sup>2</sup> Instead, in evaluating whether a state law is preempted, courts should examine only

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<sup>1</sup> Matthew R. Christiansen, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 1, 13–14 (2016).

<sup>2</sup> 135 S. Ct. 1591, 1599 (2015) (emphasis in original). *Oneok* actually addresses preemption under the similarly structured Natural Gas Act (“NGA”). The FPA and the NGA share the same basic design, and, as a result, the Court has cited “interchangeably decisions interpreting the pertinent sections of the two statutes” as an “established practice.” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

the manner in which the law functions and the effects it has. The State's purpose, as illuminated through a State declaration of intent or through legislative and regulatory history, is relevant to this inquiry only insofar as it sheds light on the question of how the law actually applies. Beyond this, it is irrelevant to the preemption test.

Recognizing this fact is important because *Oneok* is phrased in a confusing manner and contains an ambiguity that groups challenging state laws have sought to exploit.<sup>3</sup> The Supreme Court's emphasis on the state law's "target" could be read to suggest that the preemption inquiry focuses on the State's goal in enacting a particular law. Indeed, Justice Breyer's majority opinion in *Oneok* implies that the test looks at "why the State seeks to regulate."<sup>4</sup> At first blush, this may indicate that the preemption test requires an examination of factual evidence regarding the State's motives. But giving special significance to the State's reasons for enacting a law in this manner would be a mistake.

It would also conflict with how the Court has actually addressed preemption in the power sector. As the Supreme Court recently observed, "the wholesale and retail markets in electricity are inextricably linked."<sup>5</sup> Because States have jurisdiction over retail electricity transactions, and because these transactions affect wholesale prices, it "goes without saying that 'not every state statute that has some indirect effect' on wholesale rates is preempted."<sup>6</sup> It is clear that States can *permissibly* take some actions to affect those prices, so evidence that a state sought to impact wholesale prices is beside the point.<sup>7</sup> All that matters for preemption purposes is the *manner* in which the State sought to have this impact.

Were it otherwise, a broad range of state laws—even state laws that the lower courts have cited with approval—could become the subject of a preemption challenge.<sup>8</sup> For example, state tax incentives or traditional renewable portfolio standards, which can lower wholesale rates only by

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<sup>3</sup> See, e.g., Brief for Respondents at 36–39, *Hughes v. Talen Energy Mktg., LLC*, No. 14-614 (U.S. Jan. 12, 2016) (highlighting evidence that Maryland sought to alter price signals given by FERC-jurisdictional wholesale markets).

<sup>4</sup> *Oneok*, 135 S. Ct. at 1600 (internal quotation marks omitted; emphasis in original).

<sup>5</sup> *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766 (2016).

<sup>6</sup> *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2015) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988)).

<sup>7</sup> Except, of course, insofar as it illuminates ambiguities regarding the meaning of the state law in question.

<sup>8</sup> See *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 253 n.4 (3d Cir. 2014) ("[P]ermissible means [of the state achieving its goals] may include utilization of tax exempt bonding authority, the granting of property tax relief," and direct subsidies to generators "so long as the subsidies do not essentially set wholesale prices." (internal quotation marks omitted)); see also *Nazarian*, 754 F.3d at 478 (recognizing that the court need not address whether direct subsidies and tax rebates are preempted, and acknowledging that states can enact laws that indirectly affect wholesale rates).

effectively subsidizing certain energy sources, could be challenged if the state legislature justified the policies based on this potential to impact wholesale rates. Such an absurd outcome would run counter to the FPA's preservation of state authority over their generation mix.<sup>9</sup> In other words, asking whether the legislative history shows a desire to target matters within FERC's jurisdiction is unhelpful, because States *can* target those matters, at least so long as they use permissible means. It would also cause inconsistent results, where identical laws could suffer different fates based solely on the reasons given for enacting them. New York could enact a policy while New Jersey was prohibited from enacting the *exact same* policy based on different courts' judgment of the different state legislators' intent.

The better interpretation is that *Oneok* considers only the actual way in which the state law functions. This approach is consistent with the broader preemption inquiry, which examines the degree to which the state law either places the State into a role exclusively occupied by FERC or frustrates FERC from carrying out its own regulatory responsibilities.<sup>10</sup> The conclusion that legislative intent carries no special significance in the context of preemption is actually implicit in Christiansen's argument that States can permissibly take action to blunt the effects of wholesale power prices. For example, in discussing *Schneidewind v. ANR Pipeline Co.*—“the leading case” for field preemption—Christiansen focuses only on the effect that the state statute had on FERC's ability to determine whether the wholesale rate was just and reasonable.<sup>11</sup> He makes no mention of the reasons why legislators enacted the law in question.

Despite loose language to the contrary in *Oneok*, this assumption is also evident in the way the Court has decided preemption questions under the Federal Power Act and Natural Gas Act. In evaluating whether the state law at issue was preempted, the Court in *Oneok* looked only at the manner in which the state law functioned.<sup>12</sup> It did not even discuss the history behind the law at issue.

Perhaps then, in understanding *Oneok*, it is more instructive to focus not on the “target,” but on the manner in which the state law “aims” at that

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<sup>9</sup> See *Solomon*, 766 F.3d at 255 (discussing how some state authority over generation mix is clearly preserved by the FPA).

<sup>10</sup> See *Oneok v. Learjet*, 135 S. Ct. 1591, 1594–95 (2015) (explaining that, absent express preemption, the inquiry into whether a state law is voided by the Supremacy Clause examines whether the State occupies a role exclusively reserved by the federal government, or whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (quoting *California v. ARC Am., Corp.*, 490 U.S. 93, 101 (1989))).

<sup>11</sup> Christiansen, *supra* note 1, at 17.

<sup>12</sup> See *Oneok*, 135 S. Ct. at 1601 (noting the broad *applicability* of state blue sky laws). In *Schneidewind*, the Court also focuses on how the state law applies rather than its legislative history or declaration of purpose. See 485 U.S. 293, 306–09 (1988).

target. *Hughes v. Talen Energy Marketing* gives the Court a chance to do just that. The Court would be well-served to use *Hughes* to untangle *Oneok*'s inadvertent (and incorrect) implication that the State's motive controls the preemption inquiry. Meanwhile, lower courts should avoid focusing on the motives behind state laws in assessing whether those laws are preempted. Instead, they should stick to analyzing the manner in which those laws function.