NO. 17-2445 (Consolidated with 17-2433)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs–Appellants,

v.

ANTHONY M. STAR, *et al.*,

Defendants–Respondents.

On Appeal from a Final Judgment of the United States District Court for the Northern District of Illinois, No. 17 CV 1164

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INTRODUCTION

The energy company plaintiffs file this supplemental brief to address the first two issues identified in the Court's January 3, 2018 Order: (1) primary jurisdiction; and (2) *Ex Parte Young*. We do not address the third topic – *Illinois Brick* – because it does not concern the energy company plaintiffs.

ARGUMENT

I. A PRIMARY JURISDICTION REFERRAL IS NOT APPROPRIATE IN THIS CASE

Defendants have waived the issue of primary jurisdiction by failing to raise it either below or in this Court. In any event, this is not an appropriate case for a primary jurisdiction referral because FERC has no special expertise in resolving the constitutional issue of preemption, a subject the courts have addressed for decades without directing that the matter first be resolved in FERC proceedings. Moreover, a referral to FERC would cause a lengthy and prejudicial delay in judicial resolution of plaintiffs' preemption claims. An invitation to FERC to express its views in an *amicus* brief would be a far more fair and expeditious way to address the Court's understandable interest in FERC's views.

A. Defendants Have Waived the Issue of Primary Jurisdiction

The issue of primary jurisdiction "can be waived or forfeited by the parties" because it does not "concern a court's power to hear a case in the first instance." *Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir. 1995). It is waived by a defendant's failure to "urge[] the district court to refer the matter to the [agency]" or to "raise this issue on appeal." *Id.*; *accord, e.g.*, *Baltimore & Ohio Chicago Terminal R. Co. v. Wis. Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998) ("the doctrine of primary jurisdiction is not, despite its name, jurisdictional" and "is therefore waivable"); *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 242 (7th Cir. 1989) (same).

Defendants never raised the primary jurisdiction issue at any time prior to oral argument of this appeal. This constitutes a double waiver: first, for failure to raise the matter in trial court, and second, for failure to raise it in their answering brief.

B. Primary Jurisdiction Is Inapplicable to Plaintiffs' Preemption Claim

1. The Preemption Claim Is Within The Court's Competence To Resolve

A court may exercise its discretion to defer to an agency on primary jurisdiction grounds only when "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." *United States v. W. Pac. Ry.*, 352 U.S. 59, 63-64 (1956).

For example, courts have invoked the primary jurisdiction doctrine to refer to FERC technical issues such as the "scope, effect, and validity" of a gas pipeline company's tariff and curtailment plans, *Texasgulf Inc. v. United Gas Pipe Line Co.*, 471 F. Supp. 594, 596 (D.D.C. 1979), and whether the ejection of a gas pipeline company's facility from plaintiff's property would violate FERC regulations, *Tampa Interstate 75 Ltd. P'ship v. Fla. Gas Transmission Co.*, 294 F. Supp. 2d 1277, 1279 (M.D. Fla. 2003).

Legal questions, however, typically involve "neither the agency's particular expertise nor its fact finding prowess." *Occidental Chem. Corp. v. La. Pub. Serv. Comm'n*, 810 F.3d 299, 309 (5th Cir. 2016). Specifically, the "question of whether a local law is preempted by

federal law is within the expertise of courts, not agencies." *Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1340 (D.N.M. 2007). Accordingly, the Courts of Appeals have long recognized that "the doctrine of primary jurisdiction would not bar a judicial determination that a state regulation is preempted by federal law," *Nat'l Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 823 (1st Cir. 1979), and that therefore "the primary jurisdiction doctrine is rarely, if ever, appropriate when federal law preempts state law," *Boyes v. Shell Oil Prod. Co.*, 199 F.3d 1260, 1266 (11th Cir. 2000). "Federal courts *uniformly* have concluded that primary jurisdiction abstention does not apply to cases involving federal preemption." *Norfolk S. Ry. Co. v. Pa. Pub. Util. Comm'n*, 2010 WL 1253551, at *2 (W.D. Pa. Mar. 24, 2010) (emphasis added) (collecting cases).

Plaintiffs' claim that the FPA preempts the Illinois ZEC program is particularly well suited to judicial resolution. Plaintiffs ask the Court to interpret two legal texts: the FPA, and the Supreme Court's decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016). The interpretation of such legal texts is a core function of the judiciary. The construction of the FPA's language presents an issue familiar to courts

considering a statute's allocation of federal and state power: whether state action impinges on FERC's exclusive regulatory authority over wholesale rates and charges "received in connection with" wholesale electricity rates and "rules and regulations pertaining to or affecting such rates and charges." 16 U.S.C. § 824d(a); *see also id.* § 824e(a). That is the same issue the Supreme Court addressed in *Hughes*, and its resolution of the preemption issue in that case without a primary jurisdiction referral establishes that this Court can do the same.

The phrase "in connection with" in the FPA is no different from language in other federal statutes that the courts regularly construe in determining whether state action intrudes into a field occupied exclusively by the federal government, including the Interstate Commerce Commission Termination Act, *see, e.g., Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998) (construing provisions giving the Surface Transportation Board exclusive authority over railroad operations and defining "railroad" to include facilities "used by or in connection with a railroad") (quoting 49 U.S.C. § 10102(6)(A), (C)); the Securities Litigation Uniform Standards Act, *see, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547

U.S. 71, 74 (2006) (construing provision preempting state-law claims alleging, *inter alia*, fraud "in connection with the purchase or sale of a covered security") (quoting 15 U.S.C. § 78bb(f)(1)); and the Homeowners' Protection Act, *see, e.g., Augustson v. Bank of America, N.A.*, 864 F. Supp. 2d 422, 432 (E.D.N.C. 2012) (construing provision preempting state laws "relating to requirements for obtaining or maintaining private mortgage insurance in connection with residential mortgage transactions") (quoting 12 U.S.C. § 4908(a)(1)).

The Supreme Court and other federal courts have addressed the FPA's preemptive scope for decades without invoking the primary jurisdiction doctrine. *See* AOB 28 n. 2. Indeed, in a recent case also involving a preemption challenge to a state attempt to subsidize a nuclear power plant, the court specifically rejected a primary jurisdiction argument. *See Entergy Nuclear Fitzpatrick, LLC v. Zibelman*, 2016 WL 958605, at *8-9 (N.D.N.Y. Mar. 7, 2016).

Nor would it make sense to refer Plaintiff's conflict preemption claims to FERC. As with field preemption cases, courts routinely decide conflict preemption issues related to FERC's jurisdiction, including, specifically, whether a state law "stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress" as implemented by FERC. *See, e.g.*, *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478-79 (4th Cir. 2014) (finding that state-imposed contracts for differences "interfere with the method by which the federal statute was designed to reach its goals") (citation and internal quotations omitted), *aff'd on other grounds sub. nom.*, *Hughes*, 136 S. Ct. 1288. The existence of such a conflict is a matter squarely within the courts' competence and not one requiring FERC's subject-matter expertise.

Even assuming FERC may have special insight into its *policies*, that insight can be presented in an amicus brief. It is the courts that can, and should, determine whether the challenged law conflicts with those policies. Otherwise, a *de facto* administrative exhaustion requirement would exist for any assertion of conflict preemption. But in actual practice, even where (unlike here) a defendant asserts primary jurisdiction rather than waiving it, courts routinely resolve *both* primary jurisdiction *and* conflict preemption without referring the case to the agency. *See, e.g.*, *Lohr v. Nissan N. Am., Inc.*, 2017 WL 1037555,

at *5 (W.D. Wash. March 17, 2017); *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1212 (N.D. Cal. 2002).

Moreover, it is hard to see how Defendants would be able simultaneously to argue that FERC's expertise is needed to evaluate Illinois's ZEC law *and* that that law has nothing to do with the areas Congress has placed within FERC's jurisdiction. This Court has held that where the "defendant does not allege any conflict between the federal and state regulations … the primary jurisdiction doctrine is inapplicable." *O'Brien v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 593 F.2d 54, 65 (7th Cir. 1979). Here, Defendants would have to argue that despite their waiver of primary jurisdiction, and despite their claim that the ZEC law has nothing to with areas left to FERC's jurisdiction, this Court nevertheless should refer the case to FERC. The Court should not entertain such an argument.[1]

[1] There is no inconsistency, by contrast, in recognizing that the ZEC law's rate-setting falls within the area of FERC's expertise (rate-setting), but that the application of preemption rules does not. *Cf. PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014) ("[W]hether the Standard Offer Capacity Agreements pick 'just and reasonable' capacity prices is beside the point. What matters is that the Agreements have set capacity prices in the first place.").

2. The Added Expense and Delay Further Cuts Against Referring this Case to FERC

In evaluating whether to stay a case under the primary jurisdiction doctrine, the courts balance the benefits of obtaining the agency's expert guidance against the prejudice that would result from delaying resolution of the case. Because "efficiency" is the "deciding factor" in whether to defer to an agency's primary jurisdiction, courts must consider "whether invoking primary jurisdiction would needlessly delay the resolution of claims." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (citations omitted); *see also, e.g., Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (primary jurisdiction "should be invoked sparingly, as it often results in 'added expense and delay'" (citation omitted)).

A stay of this case while the matter is referred to FERC would result in significant and prejudicial delay. There is no pending proceeding in which FERC is directly addressing the preemption issues now before this Court. In 2016, a complaint was filed at FERC to request the imposition of a rule that would require ZEC-subsidized

generators in PJM to offer capacity at a minimum price.[2] A comparable complaint about protecting New York's capacity market has been pending at the Agency since 2014.[3] These proceedings do not ask FERC to decide whether the ZEC subsidy is preempted. While they seek relief that would mitigate the distortive effect of the ZEC subsidy on *capacity* markets, they do not address the impact of ZECs on *energy* markets. FERC has not ruled on these requests, and there is no indication of when it will do so. The FPA does not include any time limit that applies in this setting.[4]

Nor is there any certainty that FERC would consider those proceedings as an appropriate occasion to address the preemption issues arising in this case. And any new proceeding to address

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[2] *See Calpine Corp. v. PJM Interconnection, L.L.C.,* Complaint Requesting Fast Track Processing, Docket No. EL16-49-000 (filed Mar. 21, 2016); *see also* Motion to Amend, and Amendment to Complaint, and Request for Expedited Action on Amended Complaint, filed by the Electric Power Supply Association, et. al., FERC Docket No. ER16-49-000 (filed Jan. 9, 2017) (concerning Illinois ZEC program).

[3] *See Independent Power Producers of New York v. New York Independent System Operator, Inc.*, Complaint Requesting Fast Track Processing, Docket No. EL13-62-000, filed May 10, 2013.

[4] While the FPA has a non-binding 180-day target for deciding a proceeding once it is initiated, there is no requirement for when a proceeding on a complaint must be initiated, and the 180-day target can be extended in FERC's discretion. *See* 16 U.S.C. § 824e(b).

preemption could similarly languish at FERC indefinitely. In the meantime, plaintiffs suffer ongoing, severe competitive injury as a result of the ZEC subsidies. A.5 (Compl. ¶ 10), A.31 (Compl. ¶¶ 66-67), A.75-77 (DeRamus Decl. ¶¶ 81-89). This factor weighs heavily against invoking the primary jurisdiction doctrine.

These concerns are especially compelling because it should be beyond dispute that FERC cannot have primary jurisdiction over this entire case. At a minimum, the Dormant Commerce Clause issue is wholly unrelated to FERC's expertise, and the same has repeatedly been held with respect to field preemption. *See supra* at 4-6. Even if Defendants were to argue that conflict preemption should be referred to FERC—and it should not for the reasons set forth above—that is only a small slice of this appeal. The rest would be left for this Court. Efficiency and the need to avoid delay thus carry particular force here.

3. FERC's Views Can Be Solicited By Requesting an Amicus Brief

In this case, as in others, "requesting an amicus brief from that agency may represent a 'more efficient and expeditious alternative'" to referring the case to FERC. *Allco Renewable Energy Ltd v. Mass. Elec. Co.*, 875 F.3d 64, 74 (1st Cir. 2017) (citation omitted). The courts have

frequently invited FERC to present its views by way of an amicus brief in FPA preemption cases.[5]

Plaintiffs respectfully submit that this Court should follow that approach and request FERC to submit an amicus brief, now that FERC has a quorum (which it lacked when FERC declined the district court's invitation to submit an amicus brief).

II. *EX PARTE YOUNG* IS AVAILABLE AS THE BASIS FOR EQUITABLE RELIEF IN THIS CASE

Plaintiffs may bring this equitable action seeking prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). To

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[5] *See*, *e.g.*, Br. for the United States as Amicus Curiae, *Hughes v. Talen Energy Marketing*, Nos. 14-614, 14-623 (U.S.), 2016 WL 344494, at 1-2 (2016) (where "this case directly implicates FERC's regulatory responsibilities, the United States has a substantial interest in the Court's resolution of the preemption issue," and at "the Court's invitation, the United States filed an amicus brief"); Br. for the United States as Amicus Curiae, *Oneok, Inc. v. Learjet, Inc.*, No. 13-271 (U.S.), 2014 WL 4826636, at 1 (2014) (same); Br. for the United States and FERC as Amici Curiae, *Miss. Power & Light Co. v. Mississippi*, No. 86-1970 (U.S.), 1987 WL 880466, at 2 (1987) (same); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 249 (3d Cir. 2014) ("At the Court's invitation, the United States and FERC, acting amicus curiae, also briefed the preemption questions."); *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390, 392 n.1 (D. Mass. 2016) ("This Court relies extensively on the Brief of Amicus Curiae Federal Energy Regulatory Commission."), *aff'd*, 875 F.3d 64; *Diamond Shamrock Expl. Co. v. Hodel*, 853 F.2d 1159, 1161 n.1 (5th Cir. 1988) ("This court asked for and received amicus briefs from" FERC.).

determine whether *Young* applies, "a court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002); *accord Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). Where, as here, a plaintiff has established Article III standing, "there is no warrant in [the Supreme Court's] cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff." *Va. Office of Prot. & Advocacy v. Stewart*, 563 U.S. 247, 256 (2011) ("*VOPA*").

As discussed below, a long and unbroken line of cases establishes the availability of equitable relief to enjoin unlawful governmental action even where the plaintiff will not be the subject of state enforcement proceedings. These cases find their origin in the basic principle, deeply rooted in the English and American commitment to the rule of law, that "relief may be given in a court of equity … to prevent an injurious act by a public officer, for which the law might give no adequate redress." *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845). The Supreme Court's recent decision in *Armstrong v.*

Exceptional Child Center, 135 S. Ct. 1378 (2015), reaffirms that rule, with Justice Scalia's opinion for the Court emphasizing that "equitable relief … is traditionally available to enforce federal law" in this situation, unless "Congress … displace[s]" it. *Id.* at 1385-86.

A. The Supreme Court's Opinion in *Armstrong* Resolves This Issue

Armstrong establishes the availability of an *Ex Parte Young* action here. The plaintiffs in *Armstrong* were healthcare providers who asserted that the Medicaid reimbursement rates set by the State of Idaho were preempted by federal law because they were too low. 135 S. Ct. at 1382. The Medicaid statute did not provide for a "private cause of action" or the sort of federal "right" necessary to maintain an action under 42 U.S.C. § 1983. *Armstrong*, 135 S. Ct. at 1386 n.*.

The Court in *Armstrong* first rejected the providers' argument that the Supremacy Clause, U.S. Const. Art. VI, cl. 2, provided a cause of action for their federal preemption claim. 135 S. Ct. at 1384. The Court then turned to "respondents' contention that, quite apart from any cause of action conferred by the Supremacy Clause, this suit can proceed against Idaho in equity." *Id.* at 1385. The Court noted that "we have long held that federal courts may in some circumstances grant

injunctive relief" against state and federal officials "who are violating, or planning to violate, federal law." *Id.* at 1384 (citing *Young*, 209 U.S. at 150-51).

Idaho specifically argued that an equitable cause of action under *Young* was unavailable because the case did not "involve the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." Reply Br. for Pet'rs, *Armstrong*, No. 14-15 (U.S.), 2015 WL 163994, at *13 (quoting *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting)). That is the same position Defendants have urged here, even quoting the same dissenting opinion as did the Idaho brief. Illinois Answering Br. (IAB) 20, Exelon Answering Br. (EAB) 16.

Although this argument would have furnished a complete and efficient ground for resolving Idaho's claims, the *Armstrong* Court did not accept it. Instead, the Court recognized that "equitable relief … is traditionally available to enforce federal law," but found that Congress had "displace[d]" this otherwise available traditional relief, based on "[t]wo aspects" of the particular Medicaid statutory provision at issue that "establish[ed] Congress's 'intent to foreclose' equitable relief." 135

S. Ct. at 1385-86. The Court's entire discussion of Congress's intent to foreclose equitable relief would have been unnecessary if, as Idaho argued and Defendants reprise here, an equitable cause of action under *Young* were unavailable in the first instance. Indeed, the majority explained that its "only" disagreement with the dissent—which would have found an equitable cause of action—was whether Congress had displaced that equitable cause of action in the Medicaid statute. *Id.* at 1386.

As the *Armstrong* Court recognized, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 135 S. Ct. at 1384. This is true not only with respect to actions by state officials, "but also with respect to violations of federal law by federal officials"—a realm where the Supremacy Clause has no role to play, making clear that the existence of such claims cannot be explained by a mistaken assumption that the Supremacy Clause provided a cause of action. *Id.* This form of equitable relief "is a judge-made remedy," *id.*, and while Congress may *displace* that remedy by statute (as the Court determined it did in the

Medicaid statute), Congress need not affirmatively *provide* a private right of action to allow a plaintiff to bring such a claim.

Numerous courts and commentators have recognized this aspect of *Armstrong*. For instance, the Fifth Circuit applied *Armstrong* to allow an air-ambulance company to sue the State of Texas under *Young* on the ground that the Federal Airline Deregulation Act preempted the State's workers'-compensation system as applied to air ambulances. *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 515 (5th Cir. 2017). The court noted that *Armstrong* "reaffirmed" a plaintiff's ability to bring an equitable *Young* action notwithstanding that the federal statute did not "provide a 'private right of action.'" *Id.* at 512, 515; *see also Bellsouth Telecomm'cns LLC v. Louisville/Jefferson County Metro. Gov't.*, 2016 WL 4030975, at *3 (W.D. Ky. July 26, 2016) ("A party may invoke a federal court's equitable jurisdiction even when no private cause of action exists" (citing and discussing *Armstrong*)).

Armstrong is "the latest in [a] line of decisions" establishing that, despite the Supreme Court's "hostility to implied rights of action," a plaintiff may nonetheless bring an equitable action based on the "longstanding tradition of suits against officers seeking equitable or

declaratory relief" for violations of federal law, even where, as in *Armstrong*, the cause of action lacks a "firm statutory basis." H. Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 Notre Dame L. Rev. 1807, 1821 (2016). "*[E]very* Member of the Court apparently assumed that a federal court 'sitting in equity' possessed a freestanding authority to enjoin enforcement of the state conduct on preemption grounds." *Id.* at 1822; *see Armstrong*, 135 S. Ct. at 1391 (Sotomayor, J., dissenting on other grounds) (agreeing with majority on this point and citing numerous cases in which plaintiffs sought "prospective equitable protection from an injurious and preempted state law without regard to whether the federal statute at issue itself provided a right to bring an action").

Justice Sotomayor also explained *why* the Court has not imported its private-right-of-action case law into "equitable preemption actions." *Armstrong*, 135 S. Ct. at 1392 (dissenting opinion). While Justice Sotomayor disagreed with the majority on the question whether Congress had foreclosed such actions in the relevant provision of the Medicaid statute, *id.* at 1393–95, she agreed with and elaborated upon the majority's rationale regarding the reach of *Young* as a general

matter. Whereas "[s]uits for 'redress designed to halt or prevent the constitutional violation rather than the award of money damages' seek 'traditional forms of relief,' … a plaintiff invoking § 1983 or an implied statutory cause of action may seek a variety of remedies—including damages—from a potentially broad range of parties." *Id.* at 1392 (quoting *United States v. Stanley*, 483 U.S. 669, 683 (1987)). Because of the breadth of such a cause of action, the Court has held that "a plaintiff must demonstrate specific congressional intent to *create* a statutory right to these remedies," but these "principles … are not transferable to the *Ex parte Young* context," where the range of both remedies and potential defendants is far narrower. *Id.*

B. Federal Courts Have Long Entertained Equitable Actions to Enjoin Enforcement of State Law in Circumstances Like Those Present Here

The Court's reasoning in *Armstrong* finds ample support in precedent stretching back more than a century—indeed, since before *Young* itself. Federal courts have long entertained suits in equity seeking to enjoin unlawful governmental conduct, even when the plaintiff is not a potential target of state enforcement and has no statutory cause of action. For instance, in *American School of Magnetic*

Healing v. McAnnulty, 187 U.S. 94 (1902), the Postmaster General refused to deliver mail to an alternative-medicine business believed to be engaged in fraud. *Id.* at 98-99. The business sued for injunctive relief, arguing that the Postmaster General's action violated federal law governing mail delivery, and the Supreme Court agreed and ordered delivery of the business's mail. *Id.* at 110-11.

Importantly, the availability of such relief rests unmistakably on the federal courts' equitable powers, not on the Supremacy Clause, as evidenced by the fact that *McAnnulty* involved a suit seeking injunctive relief against a *federal* official to restrain a violation of federal law. *Armstrong*, 135 S. Ct. 1384. In the years before the Administrative Procedure Act provided an avenue for challenges to federal agency action, *see* 5 U.S.C. § 702, such suits in equity against federal officials were common. *See, e.g.*, *McAnnulty*, 187 U.S. at 110; *Santa Fe Pac. R.R. Co. v. Lane*, 244 U.S. 492, 493, 497-98 (1917) (action to "enjoin the Secretary of the Interior" from demanding certain fees from railroads to cover land surveying costs; "if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it"); *Lane v. Watts*,

234 U.S. 525, 538, 540 (1914) (action to "enjoin" the Secretary of the Interior from "treating [certain] land as being public land"; Court held that such action would have violated federal statute, and injunction was proper because "[t]he suit is one to restrain the appellants from an illegal act under color of their office").

Nor have courts conditioned such equitable relief on the existence of a private right of action or potential state enforcement. For instance, in *Foster v. Love*, 522 U.S. 67 (1997), the plaintiffs were Louisiana voters who argued that the federal statute setting the first Tuesday after the first Monday in November as the date for federal congressional elections, 2 U.S.C. §§ 1, 7, preempted the State's law providing that a candidate for federal office who received a majority of the vote in the state's "top two" open primary (held earlier in the year) was elected. 522 U.S. at 69-70. Of course, the voters could not have been the targets of a state enforcement action, and the federal statute at issue did not create a cause of action or private right of any kind. Yet federal courts nonetheless entertained the lawsuit and enjoined Louisiana's law on preemption grounds. *Id.* at 70.

More specifically, federal courts have routinely entertained suits in equity brought by business entities seeking to enjoin state law on preemption grounds, even where the business entity was not a potential target of a state enforcement action and the federal law at issue plainly did not create a private right of action. *E.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367, 371-72 (2000) (suit by business to enjoin, as preempted by federal law governing relations with Burma, Massachusetts law that prohibited state from contracting with companies doing business in that country); *see also* ARB 9-10 (collecting similar cases); *Verizon Md.*, 535 U.S. at 642, 645 (entertaining preemption claim under *Young* even where federal statute at issue did "not create a private cause of action").

Even Defendants' authorities confirm that equitable jurisdiction under *Young* is broader than they allow. Illinois and Exelon both cite Justice Kennedy's concurring opinion in *VOPA*, 563 U.S. at 262. IAB 20; EAB 16. Yet that opinion noted that while *Young itself* involved "the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law, … [t]he Court has expanded the *Young* exception far beyond its original

office in order to 'vindicate the federal interest in assuring the supremacy of federal law.'" *VOPA*, 563 U.S. at 262 (Kennedy, J., concurring).[6] And that was not meant as a criticism of the doctrine: Justice Kennedy joined the majority opinion in *VOPA*, which allowed a *Young* action brought by a state agency to go forward, even though the agency obviously was not the potential subject of a state enforcement action. 563 U.S. at 255. Justice Kennedy also joined Justice Sotomayor's dissenting opinion in *Armstrong*, which forcefully argued (in agreement with the majority on this point) that *Young* applies "without regard to whether the federal statute at issue itself provide[s] a right to bring an action." 135 S. Ct. at 1391 (dissenting on other grounds).

This Court's opinion in *Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Department of Health*, 699 F.3d 962 (7th Cir. 2012), does not dictate a contrary result. First, that opinion predated *Armstrong*, which clarified that equity, not the Supremacy

[6] While it is true that *Young* itself arose in the preemptive-defense posture, the suggestion that federal courts at that time entertained equitable actions to enjoin unlawful government conduct *only* in that posture is wrong. Even then, the doctrine was not so narrowly circumscribed. *See, e.g.*, *McAnnulty*, 187 U.S. at 110-11.

Clause, provides the basis for lawsuits in federal court seeking to enjoin state action on preemption grounds. *Cf. Planned Parenthood*, 699 F.3d at 983 ("If Planned Parenthood's preemption claim is to proceed, we would have to agree with its position that the Supremacy Clause supplies a right of action of its own force."). The *Planned Parenthood* court's discussion of *Young* relied upon Justice Kennedy's concurrence in *VOPA* and the Chief Justice's dissent in *Douglas*. *See id.* But *Armstrong* makes clear that those opinions cannot support the inference that equitable injunctive relief under *Young* is available *only* in the preemptive-defense context—a rule which, as discussed, is inconsistent with well-established Supreme Court precedent. *Supra* at 19-22; *see VOPA*, 563 U.S. at 262 (Kennedy, J., concurring). Second, the *Planned Parenthood* court's discussion of the matter was dicta: it ultimately "assume[d] without deciding the right-of-action question" and resolved the case on the merits. 699 F.3d at 983.[7] Third, *Planned Parenthood* is

[7] In a separate holding involving a different statutory provision, the *Planned Parenthood* court determined that an administrative enforcement scheme similar to that under the FPA did *not* evince a congressional intent to foreclose a § 1983 claim. 699 F.3d at 974-75 ("private enforcement … in no way interferes with the Secretary's prerogative to enforce compliance using her administrative authority"). That holding and reasoning provide additional support for the

distinguishable because of the differences between the federal healthcare funding statute examined in that case and the FPA. Unlike the statute at issue in *Planned Parenthood*, *see* 699 F.3d at 968 (citing 42 U.S.C. § 247c(c)), the FPA expressly confers jurisdiction over "all suits in equity … to enjoin any violation" of the law—which precisely describes an *Ex parte Young* action. 16 U.S.C. § 825p; *see* ARB 13-14.

In short, Plaintiffs' suit here fits comfortably within the rule of *Ex parte Young* as it has been applied for generations. Denying Plaintiffs' claim would be at odds with both the text of the FPA, *see* 16 U.S.C. § 825p, and a long history of private equitable actions under the statute, *see* AOB 28 n.2. For these reasons, and because the two aspects of the Medicaid statute that led the Court to conclude in *Armstrong* that Congress intended to foreclose that equitable relief are not present here, *see* AOB 28-39; ARB 16-24, Plaintiffs' suit should proceed to the merits.

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conclusion that Congress did not intend to foreclose equitable relief under *Young* by providing for administrative enforcement of the FPA. *See* ARB 18-20.

CONCLUSION

This Court should reverse the district court's decision granting Defendants' motion to dismiss and remand the case with instructions to consider Plaintiffs' motion for preliminary injunction.

Dated: January 26, 2018

Respectfully submitted,

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1. This brief complies with the word limit applicable to reply briefs under Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,206 words, as determined by Microsoft Word 2010.

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I HEREBY CERTIFY that on January 26, 2018, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

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