No. 19-42

IN THE

Supreme Court of the United States

NORTH CAROLINA UTILITIES COMMISSION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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STATEMENT PURSUANT TO RULE 29.6

There are no amendments to Petitioner's corporate disclosure statement as set forth in the Petition for a Writ of Certiorari.

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ARGUMENT

Petitioner North Carolina Utilities Commission (NCUC) adamantly disagrees with the D.C. Circuit's holding below that the NCUC failed to show injury-in-fact under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). It is undisputed that (i) some of the proposed facilities will be constructed and operated in North Carolina (*see, e.g.*, Pet. App. at 140a (discussing "odor masking/deodarization equipment . . . in North Carolina")), and (ii) the facilities were designed "to meet growing demand for natural gas in the Mid-Atlantic and southeastern markets," including North Carolina (Pet. App. at 153a). Yet, because gas marketers producers, which serve as "middlemen" between interstate pipelines and end-use customers, subscribed the majority of capacity on the Atlantic Sunrise Project, the D.C. Circuit dismissed the NCUC's appeal on the grounds that the NCUC did not "show[] that any end-users in [North Carolina] will pay higher rates as a result of the project." *See* Pet. App. at 3a (citing *Kan. Corp. Comm'n v. FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018) ("We are 'usual[ly] reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors.'")). That holding, though erroneous, is *not* the basis for NCUC's Petition. Rather, NCUC's Petition raises the different question of whether the "special solicitude" doctrine articulated in *Massachusetts v. EPA*, 549 U.S. 497 (2007), serves as an alternative means for the NCUC to establish standing.

Respondent Federal Energy Regulatory Commission (FERC) and Intervenor Transcontinental Gas Pipe Line Company, LLC (Transco) make three fatal errors in answering that question in the negative. First, they ignore *Massachusetts'* plain language and deny that

Massachusetts has any effect on the traditional standing inquiry under *Lujan*. Second, they erroneously claim that circuit courts uniformly interpret *Massachusetts*. Third, they misstate or ignore NCUC's quasi-sovereign interests in interstate pipeline facilities that will be constructed and operated within North Carolina and marketed to North Carolina ratepayers. Because of these flaws, FERC's and Transco's conclusions that the Court should deny the NCUC its rightful seat at the table with respect to federal actions that implicate NCUC's quasi-sovereign and *parens patriae* interests in interstate pipeline facilities that were marketed to serve North Carolina ratepayers and that will be constructed and operated within North Carolina's borders are erroneous. The Court should grant the Petition to afford NCUC the special solicitude to which it is entitled and settle important questions surrounding the scope and durability of *Massachusetts*' special solicitude doctrine.

A. The Crux of the Arguments in Opposition is that *Massachusetts* Does Not Mean What It Says.

Below, the NCUC argued that it met the traditional test for establishing standing under *Lujan*. Petitioner Initial Brief at 27-32; Petitioner Reply Brief at 5-19. However, to ensure that it would not be denied a seat at the table with respect to FERC orders that authorized construction of interstate pipeline facilities that were marketed to serve North Carolina ratepayers and that will be constructed and operated within North Carolina's borders, the NCUC also relied on *Massachusetts* as an independent means of establishing standing. *See* Petitioner Reply Brief at 21 ("Should the [D.C. Circuit] find that NCUC failed to establish standing under the traditional test (a finding

that would be unsupportable), the Court should afford NCUC the special solicitude it is owed and reach the merits."). FERC and Transco advance three arguments to support their claim that the NCUC is not entitled to special solicitude, none of which has merit.

First, FERC and Transco simply deny that *Massachusetts* established a revised paradigm governing State standing. *See* Brief in Opposition of Respondent at 9 ("[C]ontrary to [P]etitioner's contention (Pet. 8-12), *Massachusetts*' 'special solicitude' for a State in that case, 549 U.S. at 520, did not supplant the traditional Article III standing inquiry."); Brief in Opposition of Intervenor at 8 ("[N]othing in *Massachusetts* changes these bedrock principles of Article III standing."). Those denials are facially contrary to *Massachusetts*' plain language. As the Chief Justice made this clear in his dissenting opinion, *Massachusetts* did not apply the "familiar test" for determining Article III standing, but rather "change[d] the rules," "[r]elax[ed] Article III standing requirements because asserted injuries are pressed by a State," and "adopt[ed] a new theory of Article III standing for States." *Massachusetts*, 597 U.S. at 536, 540-41 (Roberts, C.J., dissenting). The Chief Justice's criticism also explained that States satisfy this new test by demonstrating a quasi-sovereign interest in the federal action at issue. *See id.*, 538 (Roberts, C.J., dissenting) (*Massachusetts* "takes what has always been regarded as a *necessary* condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a *sufficient* showing for purposes of Article III.") (emphasis in original). NCUC expressly relied on *Massachusetts*' revised paradigm as an alternate means of establishing standing below. Nonetheless, the D.C. Circuit failed to address, much less acknowledge, the NCUC's arguments.

Second, FERC and Transco assume that *Massachusetts* requires all State-petitioners to demonstrate injury-in-fact because the State-petitioner in *Massachusetts* demonstrated injury-in-fact. Brief in Opposition of Respondent at 9; Brief in Opposition of Intervenor at 9. To support that assumption, FERC and Transco cite circuit court opinions that require State-petitioners to establish injury-in-fact. *See* Brief in Opposition of Respondent at 9-10 ("It is well-established . . . that a State still must show a concrete and particularized injury to its interests."); *see also* Brief in Opposition of Intervenor at 12 ("The courts of appeals have uniformly required state litigants to demonstrate injury in fact, and none have indicated that solicitude under *Massachusetts* is a free pass to avoid the Article III standing criteria set forth in *Lujan*."). Similar to their first argument, these assumptions are flawed because neither FERC nor Transco reconciles their claims with Chief Justice Roberts' explanation that *Massachusetts* "change[d] the rules," "[r]elax[ed] Article III standing requirements because asserted injuries are pressed by a State," and "adopt[ed] a new theory of Article III standing for States." *Massachusetts*, 597 U.S. at 536, 540-41 (Roberts, C.J., dissenting). Rather than demonstrate that NCUC's Petition should be denied, FERC and Transco demonstrate, at most, that the Court should grant the Petition and settle important questions regarding *Massachusetts'* relationship with the traditional test for establishing standing. *Id*., 540 ("It is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis.").

Third, Transco alleges that the Court need not address whether *Massachusetts* established a new paradigm governing State standing because the NCUC failed to raise that argument below. *See* Brief of Intervenor in Opposition at 14 ("NCUC did not argue

before the D.C. Circuit that, under *Massachusetts*, a State has standing even if it fails to demonstrate injury."); *id*. (alleging that "NCUC did not argue below that . . . the D.C. Circuit should rule that NCUC has standing notwithstanding the absence of injury") (emphasis omitted). But the NCUC did expressly argue that, "[s]hould the [D.C. Circuit] find that NCUC failed to establish standing under the traditional test (a finding that would be unsupportable), the Court should afford NCUC the special solicitude it is owed and reach the merits." Petitioner Reply Brief at 21. Consequently, Transco's allegation misstates the record below and therefore does not support denying the Petition.

B. The Briefs in Opposition Ignore the Relevant Split Among the Circuits Concerning States' Quasi-Sovereign Versus Proprietary Interests.

FERC and Transco deny there is any split among the circuits. *See* Brief in Opposition of Respondent at 9-10; *see also* Brief in Opposition of Intervenor at 12. But their conclusions are based solely on circuit court opinions that required State-petitioners to establish injury-in-fact. Again, those decisions fail to recognize that *Massachusetts* "change[d] the rules," "[r]elax[ed] Article III standing requirements because asserted injuries are pressed by a State," and "adopt[ed] a new theory of Article III standing for States" (*Massachusetts*, 597 U.S. at 536, 540-41 (Roberts, C.J., dissenting). They do not settle the important questions raised in the Petition concerning the scope of *Massachusetts* or its relationship with the traditional standing inquiry.

FERC and Transco also ignore the relevant split, which pertains to the distinction between States' quasi-sovereign interests and their proprietary interests. It is well-settled that "[q]uasi-sovereign interests stand

apart from . . . proprietary interests." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). *Massachusetts* held that State-petitioners have standing based on their quasi-sovereign interests. *Massachusetts*, 597 U.S. at 520 n.17. The Fifth Circuit followed this finding and afforded Texas special solicitude to challenge federal action that implicated its quasi-sovereign interests. *Texas v. United States*, 809 F.3d 134, 151-54 (5th Cir. 2015), *juris. aff'd by equally divided Court*, 136 S. Ct. 2271 (2016). Transco undoes its own claim that there is no circuit split by explaining that the D.C., Fourth, and Second Circuits have held that "the solicitude afforded by *Massachusetts* is limited to state litigants that sue to protect their *proprietary* interests." Brief in Opposition of Intervenor at 13-14 (emphasis added). Consequently, the Court should grant the Petition, address the circuit split, and conclusively determine that a quasi-sovereign interest is sufficient to establish Article III standing under *Massachusetts*.

C. The Circuit Split is Particularly Relevant Here Because NCUC Asserted Its Rights Within the Federalist System to Protect Its Quasi-Sovereign Interests in Interstate Natural Gas Pipeline Facilities that will be Constructed and Operated in North Carolina.

Focusing solely on the D.C. Circuit's affirmative finding of lack of injury-in-fact under *Lujan*, FERC's opposition brief only addresses NCUC's *parens patriae* interest in the level of rates that North Carolina utilities pay for service on interstate natural gas pipelines. Brief in Opposition of Respondent at 13. Similarly, Transco accuses the NCUC of "attempt[ing] to obscure the lack of injury to any North Carolina gas customer

or ratepayer by repeatedly pointing out that some of Transco's expansion facilities are located in North Carolina." Brief in Opposition of Intervenor at 11. Admittedly, a key component of NCUC's demonstration of standing below was its interest in rates for service over natural gas pipeline facilities that would be marketed to North Carolina ratepayers. Petitioner Initial Brief at 27. After all, the NCUC's core functions include "appear[ing] before federal . . . courts and agencies as in its opinion may be necessary to secure for the users of public utility service in [North Carolina] just and reasonable rates and service." N.C. Gen. Stat. § 62-48(a) (Pet. App. 360a). However, NCUC also explained: "*Of particular relevance here is North Carolina's interest in Expansion Facilities constructed and operated in North Carolina*, as well as services provided over those facilities." *Id*. at P 33 (emphasis added). Like the D.C. Circuit, FERC and Transco ignore NCUC's *parens patriae* and quasi-sovereign interests in facilities that will be constructed and operated in North Carolina. As a result, there is no basis for their claims that NCUC failed to demonstrate injury to its legally cognizable interests.

NCUC's interests in facilities that will be constructed and operated in North Carolina is qualitatively different than NCUC's interest in the level of rates paid for interstate service. It stems from a State's traditional police power to regulate the operation of utilities within its borders. *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). By joining the Union, North Carolina "'did not renounce the possibility of making reasonable demands on the ground of [its] still remaining quasi-sovereign interests.'" *Snapp*, 458 U.S. at 604 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Given the implications of interstate commerce on the

regulation of natural gas pipelines, NCUC now protects its quasi-sovereign interest in the construction and operation of interstate natural gas pipeline facilities that are constructed and operated within North Carolina by participating in federal proceedings. Pet. at 3-4. NCUC did just that below. In addition to challenging the negotiated rate contracts on the grounds that they imposed excessive charges on North Carolina end-users, NCUC also argued that, by relying on the negotiated rate contracts in question to find "need" for the proposed facilities, FERC failed to "ensur[e] that certificates for facilities constructed and operated in North Carolina will only be issued for facilities and services that meet the public interest standard." Petitioner Initial Brief at 30-31. Granting the Petition is necessary to ensure NCUC is not denied its rights within the federal system to challenge FERC's failure to fulfil its obligation of ensuring that facilities constructed and operated within North Carolina are consistent with the public interest. *Massachusetts*, 549 U.S. at 520 n. 17; *Snapp*, 458 U.S. at 607-08.

CONCLUSION

Based on the foregoing, and the arguments in NCUC's July 2, 2019 Petition for Writ of Certiorari, the Court should grant review, settle important questions concerning *Massachusetts'* scope and durability, and ensure that NCUC is not denied its rightful seat at the table with respect to FERC orders that authorize construction of interstate natural gas pipeline facilities that were marketed to serve North Carolina ratepayers and that will be constructed and operated within North Carolina's borders.

Respectfully submitted,

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