No. 24-1304

IN THE

Supreme Court of the United States

FIRSTENERGY SERVICE COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION;
OFFICE OF THE OHIO CONSUMERS' COUNSEL, ET AL.,

Respondents.

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

REPLY BRIEF

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Respondents do not persuasively explain why this Court should leave unreviewed a decision that (1) implicates two circuit splits, (2) threatens the widespread use of settlements at federal agencies, and (3) "creates an uneven playing field in the competition for investment capital," Pet. App. 207a n.4 (Chatterjee, Comm'r, dissenting), to address the national emergency of an "increasingly unreliable grid," Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

I. RESPONDENTS DO NOT REFUTE THE CIRCUIT SPLIT ON WHETHER A POST-SETTLEMENT DEVELOPMENT REQUIRES UNWINDING THE SETTLEMENT

As FirstEnergy (Pet. 11-12) and Judge Moore (Pet. App. 57a (dissent)) explained, the Sixth Circuit's holding requiring FERC to unwind FirstEnergy's settlement conflicts with the holding in *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005), that FERC acted reasonably in rejecting an attempt to unwind a settlement. In the civil context, several circuits and a state supreme court have held, like the D.C. Circuit, that "changes in the law after settlement do not affect the validity of the agreement and do not provide a legitimate basis for rescinding the settlement." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010); *see also Dunlap v. Chicago Osteopathic Hosp.*, 48 F.3d 1221 (Table), 1995 WL 94876, at *1 (7th Cir. 1995); *Krantz v. Univ. of Kansas*, 21 P.3d 561, 563 (Kan. 2001).

a. The government "disagrees with that aspect of the [Sixth Circuit's] decision" (BIO 28), but nonetheless unpersuasively asserts (*id.*) that it does not warrant this Court's review.

First, the government disregards the circuit conflict, even though Judge Moore acknowledged it.

Second, the government offers nothing to support its conclusory assertion that the question "is highly case-specific and does not implicate any broader question of national importance." *Id.* In fact, it will arise in every case where one component of a rate settlement is affected by a post-settlement event. Rates always involve multiple components,[1] and data shows that at FERC, just as at other agencies, settlements are the "lifeblood of the administrative process," *N.L.R.B. v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 132 (1987) (cleaned up). *See*, *e.g.*, Br. of *Amicus Curiae* Edison Electric Institute Supporting Petitioner at 3 ("EEI Br.") ("Instead of undertaking costly and arduous ratemaking proceedings, utilities often … reach regulatory settlements regarding the rates they will charge."); Stephen Littlechild, *The Process of Negotiating Settlements at FERC*, 50 Energy Policy 174, 174 (2012) ("Interstate gas pipelines and their customers presently settle about 90% of the rate cases set for hearing before [FERC]."). Accordingly, this case and *Brooklyn* present a generic scenario that will recur for many rate settlements.

Regarding the issue's importance to the nationwide transmission industry, the government does not explain why, if this Court relied on *amicus* EEI's

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[1] *See, e.g.*, *Cost-of-Service Rates Manual*, FERC, June 1999, at 7, ("A cost-of-service [rate] includes the product of the [utility's] Rate Base … and the Overall Rate of Return, plus [other items]."); *id.* at 14 ("The Overall Rate of Return is computed as a function of the following three components: the capitalization ratio of the [utility], the cost of debt, and the allowed rate of return on the [utility's] preferred and common equity."). The component here, the RTO Adder, is one component of return on equity.

position on behalf of its "members own[ing] approximately 70% of the transmission facilities in the country" in *New York v. FERC*, 535 U.S. 1, 24 (2002), the government can ignore EEI's explanation here that "[t]he Sixth Circuit's decision … dramatically dilutes the benefits secured by the settlement process" well beyond this case (EEI Br. 9).

Judge Moore elaborated on the negative and broad consequences of the Sixth Circuit's decision for the use of settlements at FERC:

> If FERC had accepted OCC's invitation to change unilaterally a single aspect of such a comprehensive settlement, the Commission could have signaled to parties that their settlements could become *unsettled* as a result of later legal developments in which the parties had little say. This in turn would rob the settlement process of the certainty and predictability that incentivize settlements and thereby enhance administrative efficiency in support of the public good.

Pet. App. 58a (dissent) (cleaned up) (emphasis in original).

b. OCC seeks to distinguish *Brooklyn* as not involving a formal "challeng[e] [to] the existing settlement rate as unjust and unreasonable under FPA section 206." BIO 13. But the challengers to that settlement could easily have invoked Section 206 because their claim was that a "merger [of two pipelines] would lead to *higher shipping rates*," and "existing rates" should therefore be "maintained" until 2005 notwithstanding that the existing settlement required revising the rate before 2005. 409 F.3d at 405 (emphasis added). They did not need to invoke Section 206 because their challenge took the form of proposing a new settlement

in the context of a merger proceeding, rather than simply attacking the old settlement.

OCC also fails to persuade in distinguishing the Third (*Ehrheart*) and Seventh (*Dunlap*) Circuit decisions as not involving the "unique rights [granted by the FPA] to utilities and their consumers to change existing rates, however set." BIO 14. Neither this case nor *Brooklyn* involved a challenger's demonstration that *the overall settlement rate* was unjust and unreasonable, or denied a challenger's ability to try to make that showing. Instead, they involved a challenge only to *a single component* of a settlement rate based on a post-settlement event. FERC noted that OCC *would* be allowed to argue that the overall rate had become unjust and unreasonable, but that OCC had not presented evidence to support such a finding:

> [W]e do not find it would be appropriate to change unilaterally a single aspect of such a comprehensive settlement, *at least absent evidence that the overall ROE [return on equity] has become unjust and unreasonable, which OCC has not adduced in this proceeding*.

Pet. App. 99a (emphasis added). Thus, where, as here, the challenger does not show the overall rate is unjust and unreasonable, the scenario in the federal-agency context is identical to that in the civil context addressed by the Third and Seventh Circuits: Does a post-settlement event warrant undoing the settlement?

II. RESPONDENTS DO NOT REFUTE THE CIRCUIT SPLIT ON WHETHER TRANSMISSION FACILITIES CONNECTED TO THE *INTER*STATE GRID CAN BE DEEMED *INTRA*STATE TRANSMISSION

The Sixth Circuit, in holding that Ohio acted within its preserved authority over "intrastate" transmission, broke with numerous circuits that recognize the *inter*state nature of the transmission grid outside Alaska, Hawaii, and parts of Texas. *See, e.g., Transource Pa., LLC v. DeFrank*, --- F.4th ---, 2025 WL 2554133, at *3 (3d Cir. 2025) ("[A]ny electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.") (cleaned up); *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49-50 (D.C. Cir. 2014) (similar); *North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016) (similar). The Ninth Circuit's recent decision, *Pacific Gas & Electric Company v. FERC*, Nos. 24-2527 *et al.*, 2025 WL 1912363, at *3 (9th Cir. July 11, 2025) (unpub.) ("*PG&E*"), in effect aligning with the Sixth Circuit, only deepens the split.[2]

a. The government does not refute this circuit conflict, and indeed admits—contrary to the Sixth Circuit's holding that Ohio's law is not field-preempted because it "primarily regulates intrastate transmission,"

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[2] Public Utilities Commission of Ohio's ("PUCO") case-by-case quibbles (BIO 6-13) do not refute that the other circuits held that (1) FERC has exclusive jurisdiction over interstate transmission facilities; and (2) intrastate transmission on facilities connected to the grid is not possible outside Alaska, Hawaii, and parts of Texas. Although states generally retain authority over "siting, permitting, and construction" of interstate transmission facilities (OCC BIO 31; Pet. 21 n.11), Ohio's statute regulates *operational control* of *already-built* interstate transmission facilities.

Pet. App. 37a—"that the facilities at issue here are engaged in the *interstate* transmission of electricity insofar as they are serving the interconnected nationwide electrical grid, and that the facilities are therefore subject to regulation by FERC." BIO 27 (emphasis added).

Instead, the government (BIO 27) asserts that the Sixth Circuit held that interstate transmission facilities are subject to *dual* regulation by federal and state authorities. But numerous circuits disagree. *See, e.g., Green Dev. LLC v. FERC*, 77 F.4th 997, 1000 (D.C. Cir. 2023) (FERC has "*exclusive* jurisdiction of [interstate] transmission facilities") (emphasis added); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 247 (3d Cir. 2014) (similar); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006) (similar); *Cent. Iowa Power Co-op v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 907-08 (8th Cir. 2009) (similar). The government does not address these cases, apart from meekly observing that one (*Green*) discussed the point "in the 'Background' section of the court's decision." BIO 25.[3]

b. Respondents argue that a state may regulate interstate transmission facilities if the state is

[3] The government asserts that, because "Petitioners … have expressed no desire to withdraw from RTO membership," this case is "a poor vehicle for clarifying the general scope of States' authority to regulate transmission of electricity." BIO 25-26. The government simply speculates that FirstEnergy's concern is limited to availability of the RTO Adder. In any event, the government cites no authority that the reason why a petitioner is aggrieved makes a case or good or bad vehicle. This Court has granted certiorari to address preemption where the harm was a denial of money. *E.g.*, *Boggs v. Boggs*, 520 U.S. 833, 841 (1997); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 143 (2001); *Hillman v. Maretta*, 569 U.S. 483, 485 (2013).

motivated by *intrastate concerns*. Gov't BIO 26; PUCO BIO 16; OCC BIO 31. But the FPA contains no savings provision based on a state's concerns. *Cf.* 42 U.S.C. § 2021(k). Accordingly, the "reliability, efficiency, and costs" of interstate transmission (Pet. App. 37a), even when they impact end-use customers in a state, remain within FERC's exclusive jurisdiction. *See New York v. FERC*, 535 U.S. 1, 20 (2002) ("FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer").

The government argues that courts have "emphasized the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." BIO 24 (quoting *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015)) (emphases in BIO). But unlike the generally-applicable state regulation in *Oneok*, 575 U.S. at 384, Ohio's statute on its face aims at a federally-preempted target because it regulates "control [of] transmission facilities as defined under federal law," Ohio Rev. Code § 4928.12(A), and used "in the interstate transmission of electricity" (Gov't BIO 27).

OCC erroneously characterizes (BIO 28-30) Ohio's statute as regulating transmission *rates*: In fact, it regulates "*control of [transmission] facilities*." Ohio Rev. Code § 4928.12(A) (emphasis added). The impact on rates is a byproduct of the Sixth Circuit's additional (and incorrect, *see* Point III, *infra*) interpretation of FPA Section 219(c). But even if Ohio's statute were analyzed as a regulation of rates, it would still be field-preempted. Like the state regulation in *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 164 (2016), the Ohio statute (plus the Sixth Circuit's construction of Section 219(c)) directly modifies a FERC-approved rate by removing the RTO Adder.

c. Respondents fail to negate the issue's importance. Regarding the impact of the Ohio and similar state statutes on the RTO Adder's availability, it is crucial that this Court resolve the issue now given the national energy emergency of an "increasingly unreliable grid," 90 Fed. Reg. 8433,[4] and the fact that the Sixth Circuit's approach creates an "uneven playing field" for utilities in different states competing to attract investment capital to address the emergency, Pet. App. 207a n.4 (Chatterjee, Comm'r, dissenting). The emergency remains pressing, including in California, which, like Ohio and other mandatory-RTO-membership states, has disadvantaged its transmission owners. *See, e.g.*, David Krause, *Data Centers 'Exacerbating' Tx Line Overload Forecasts in Bay Area*, RTO Insider, Sept. 30, 2025, at 25.

The government (BIO 21) and OCC (BIO 33-34) speculate that FERC could mitigate the uneven playing field *in the future* by using Section 219(a) and (b)(2), which authorize FERC to establish by rule "incentive-based … rate treatments," *inter alia*, to "provide a return on equity that attracts new investment in transmission facilities." But FERC did not announce any such effort in the course of its newly-minted interpretation of Section 219(c). Indeed, the main thrust of a pending FERC rulemaking is to limit the RTO Adder even further by taking it away from members that have belonged to an RTO after three years of membership.[5] The remote prospect that

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[4] *See also* Exec. Order No. 14262, 90 Fed. Reg. 15521 (Apr. 8, 2025) ("Lack of reliability in the electric grid puts the national and economic security of the American people at risk.").

[5] *Elec. Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 175 FERC ¶ 61,035, at P 1 (2021).

FERC might mitigate the uneven playing field in the future is no basis for this Court to postpone review.

d. The Sixth Circuit's holding also has implications beyond whether states can require transmission owners to join an RTO or the availability of an RTO Adder. While Ohio's statute requires transmission owners to transfer operational control of their facilities *to an RTO*, the Sixth Circuit's parsimonious conception of exclusive federal authority as not extending to control of interstate transmission facilities would leave a state free to require a utility to transfer control of those facilities *to the state itself*. And states may be motivated to do so: several have expressed frustration with the PJM RTO and hence may desire to obtain increased leverage. *See, e.g.*, Ivan Penn, *As Energy Costs Surge, Eastern Governors Blame a Grid Manager*, N.Y. Times, June 10, 2025 (recounting Governor Shapiro's statement that "[w]e've got to re-examine whether or not Pennsylvania should be a member of PJM").

III. RESPONDENTS CONCEDE THAT REASONABLE DECISIONMAKERS HAVE DISAGREED ON WHETHER SECTION 219(C) DENIES THE RTO ADDER TO TRANSMISSION OWNERS COMPELLED BY STATE LAW TO JOIN AN RTO

There is no dispute that FERC commissioners have disagreed on Section 219(c)'s "best meaning," *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024), or that, if other circuits follow the Sixth and Ninth, a patchwork will result: Transmission-owning RTO members in California, Colorado, Illinois, Ohio, Michigan, Nevada, Virginia, and Wisconsin will not receive the RTO Adder (*see* Pet. 19-20 nn.8-9), while transmission-owning RTO members in other states will.

a. The government acknowledges but understates the disagreement. BIO 20. Among recent commissioners, not only Commissioner Danly (Pet. App. 209a), but also Commissioner Chatterjee, concluded that "[n]owhere in the statute is the Commission directed to provide incentives only … to those that *voluntarily* joined a Transmission Organization." *Elec. Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 175 FERC ¶ 61,035 (2021) (dissent), at P 2 (emphasis in original) (footnotes omitted); *accord*, Br. of Resp't PJM Interconnection, L.L.C. in Support of Certiorari at 10. And regarding the commissioners who issued Order 679, the government incorrectly suggests that "Order No. 679 itself did not endorse petitioners' current view that voluntariness is irrelevant to eligibility for the RTO adder." BIO 20. To the contrary, those commissioners declined commenters' proposals "that the incentive should not apply where a transmission owner is ordered to join a RTO/ISO by statute." *Promoting Transmission Investment Through Pricing Reform*, 116 FERC ¶ 61,057, at P 316 (2006). And FERC granted the RTO Adder to such utilities for more than a decade after. *See* Pet. 6.

b. As discussed *supra*, at 8-9, this Court should address the question now given the national energy emergency and the uneven playing field it creates for transmission owners competing for investment to fund grid improvements that will address the emergency.

c. The government's defense (BIO 15-17) of the Sixth Circuit's interpretation of Section 219(c) lacks merit.

Like the Sixth Circuit, the government glosses over the statute's award of the RTO Adder to any "utility that joins a Transmission Organization" (with no limitation on the reason for joining), by focusing on the word "incentives" earlier in the sentence. But in the

context of the sentence, as well as ordinary usage, "incentives" does not mean something that is given only when it induces certain behavior. *See, e.g.*, Br. of Resp't Duke Energy Ohio, Inc. in Support of Certiorari at 7 ("[A] cell phone company might offer an 'incentive': sign a contract and get a price cut on the phone itself. … But the company offers the same 'incentive' to everyone who signs a contract, regardless of why.").

Nor does Section 219(a)'s term "incentive-based" "refe[r] specifically to regulations offering an award to a utility that *voluntarily* takes some future action." Pet. App 25a (emphasis in original). Congress knew how to require that the incentive be awarded only when it actually induced certain behavior. *See, e.g.*, *City and Cnty. of San Francisco v. EPA*, 604 U.S. 334, 344 (2025). In subsection (b)(2), Congress required "a return on equity *that attracts new investment in transmission facilities*." 16 U.S.C. § 824s(b)(2) (emphasis added). In subsection (c), by contrast, Congress did *not* require "incentives to each transmitting utility or electric utility *that is attracted to join* a Transmission Organization." Instead, Congress simply required "incentives to each utility or electric utility *that joins* a Transmission Organization," *id.* § 824s(c) (emphasis added), full stop.[6]

[6] The government unpersuasively suggests (BIO 20-21) that the Sixth Circuit gave FERC freedom to return to its original interpretation of Section 219(c) in the future. As an initial matter, FERC's current interpretation and the Sixth Circuit's affirmance of it are presently before the Court. Moreover, neither the government nor the Sixth Circuit explain how their unyielding interpretation of the statute's "best meaning" could accommodate the exact opposite interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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