No. 25-1095

In the Supreme Court of the United States

DAVID W. SUNDAY, JR., ATTORNEY GENERAL OF PENNSYLVANIA, AND DARRYL A. LAWRENCE, PENNSYLVANIA CONSUMER ADVOCATE,

Petitioners,

v.

TRANSOURCE PENNSYLVANIA, LLC, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE MARK C. CHRISTIE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Mark C. Christie ("Christie") respectfully submits this brief *amicus curiae* in support of Petitioners David W. Sunday, Jr., Attorney General, on behalf of the Commonwealth of Pennsylvania, and Darryl A. Lawrence, the Pennsylvania Consumer Advocate.[1]

Christie is a former Chairman and Commissioner of the Federal Energy Regulatory Commission ("FERC"), on which he served for four and a half years (2021-25). He served as Chairman of FERC from January 2025 until his term expired in August 2025. Prior to taking office as a FERC commissioner, Christie was the Chairman of the Virginia State Corporation Commission ("VSCC"), the public utilities regulator for the Commonwealth of Virginia, on which he served as a commissioner for nearly seventeen years (2004-21). Commissioners of the VSCC are elected by the members of the General Assembly of Virginia and Christie was elected three times by bipartisan majorities of both houses of Virginia's legislature.

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[1] Pursuant to this Court's Rule 37.2, counsel of record for Petitioners and Respondents received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Christie currently serves as a faculty member of the William & Mary Law School, where he teaches energy and regulatory law and is the Founding Director of the law school's Center for Energy Law and Policy.

As a state public utilities regulator for seventeen years within the PJM Interconnection, LLC ("PJM") transmission planning region, [2] and former FERC Commissioner and Chairman, Christie offers a unique, valuable perspective based on extensive practical, real-world experience in the issues presented by this case.[3]

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[2] PJM is the regional transmission planning organization in which Virginia's two largest utilities, Dominion Energy and Appalachian Power, are members. PJM also covers Pennsylvania and all or parts of 12 other states, as well as the District of Columbia. *See* PJM, Territory Served, *available at* https://www.pjm.com/about-pjm/who-we-are/territory-served (last accessed Apr. 16, 2026).

[3] In his role as FERC Commissioner and Chairman, Christie did not participate in this specific matter, which arises from a judicial appeal of a Pennsylvania state regulatory decision. He has addressed general issues of federal-state authority implicated by the Third Circuit and District Court decisions. *See*, *e.g.*, *Balt. Gas & Elec. Co.*, 187 FERC ¶ 61030 (Apr. 23, 2024) (Christie, dissenting); *PPL Elec. Utils. Corp.*, 188 FERC ¶ 61084 (July 29, 2024) (Christie, dissenting); *PJM Interconnection, L.L.C.*, 191 FERC ¶ 61056 (Apr. 17, 2025) (Order Dismissing Waiver Request) (Christie, concurring*); Valley Link Transmission Maryland,* 191 FERC ¶ 61113 (May 13, 2025) (Christie, concurring and dissenting).

SUMMARY OF ARGUMENT

This case presents an issue of national importance: whether a state statute requiring a transmission developer to prove public necessity before the developer may construct a transmission line within that state's borders can be preempted by a private entity's[4] administrative transmission planning process because that process, which is unrelated to the state's statutory permitting procedure, was approved by FERC. In deciding that question, the Third Circuit erroneously concluded that the state was preempted.

Underlying the Third Circuit's error is a fundamental misunderstanding of the vastly different roles served by RTO planning procedures and state permitting authority. The RTO planning process is administrative, typically computer model-driven, *ex parte*, and focused on the planning of an entire portfolio of regional transmission projects. State permitting, by contrast, is a quasi-judicial exercise of sovereign police power, determining from an evidentiary record whether a *specific* facility should be built within the State. By conflating the two vastly different roles, the courts below enabled federal

[4] PJM Interconnection, LLC ("PJM") is a private entity that operates the power grid for Pennsylvania and 12 other states. As a private "regional transmission organization ("RTO")," PJM plans regional transmission lines within its territory, using FERC-approved administrative planning methodologies. PJM is the private entity relevant to this proceeding. Notably, PJM has no authority under federal law to permit transmission lines for construction.

preemption through administrative "planning," which Congress has never authorized.

The Federal Power Act ("FPA"), 16 U.S.C. §§ 791a *et seq.*, forecloses that result. It preserves a dual system of clearly defined federalism: through its ratemaking authority, FERC regulates transmission sales and wholesale power sales in interstate commerce; the states retain authority over siting and permitting of specific utility assets within their borders, not just of transmission lines, but of all utility assets, including generation plants and distribution networks. This Court has repeatedly enforced that boundary. Nothing in the statute permits FERC (or PJM, a private entity operating under a FERC-approved tariff) to override a state's denial of a permit to construct a transmission project within its borders pursuant to its own statutes.

Moreover, such a result violates basic statutory principles. Courts do not find sweeping preemption, especially in areas of traditional state authority, by implication. If Congress intended to displace state permitting authority nationwide, it would have said so clearly, but it did not.

The stakes here are significant: state sovereignty, consumer costs, and control over massive transmission investment. The error is clear and the consequences immediate. Accordingly, the Court should grant certiorari, summarily reverse, and remand with instructions permitting intervention.

REASONS FOR GRANTING THE PETITION

Underlying Petitioners' request to intervene so that they may seek *en banc* review of the Third Circuit's panel decision[5] are fundamental questions of state sovereignty and cooperative federalism under the FPA.

The FPA contains no broad grant of federal preemption: it limits federal authority to the setting of rates applicable to transmission sales in interstate commerce and wholesale power sales in interstate commerce, while "the siting, permitting, and construction of transmission facilities" are "made at the state level" by state regulators.[6] Enabling each sovereign to carry out its designated role is essential to the FPA's cooperative federalism structure. The

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[5] *Transource v. DeFrank, et al.*, No. 24-1045 (3d Cir.) (judgment entered on Sept. 5, 2025; petition to intervene denied on Nov. 6, 2025; petition for rehearing before the Court *en banc* on the denial of intervention denied on Dec. 15, 2025).

[6] *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, PP 227, 253 n.231, 287, 76 Fed. Reg. 49,842 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000–A, 139 FERC ¶ 61,132, P 342, 77 Fed. Reg. 32,184 (2012) ("Order No. 1000–A"), *order on reh'g*, Order No. 1000–B, 141 FERC ¶ 61,044, 77 Fed. Reg. 64,890 (2012) ("Order No. 1000–B"), *aff'd sub nom., S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *see, e.g., Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154-155 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266-267 (2016) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction").

Third Circuit's (and District Court before it)[7] disregard for that federal-state division of authority was based on a fundamental error: conflating the purely administrative *planning* role of PJM, a private entity designated as an RTO,[8] with the very different constitutional and statutory role played by the *situs* state when it exercises its inherent police-power authority to *permit* for construction a transmission line within its borders, in a legal proceeding conducted pursuant to its own state laws governing such proceedings, which typically contain statutory criteria for when a transmission project should be approved.

The administrative planning of regional transmission projects by RTOs, which are regulated by FERC, and the permitting of transmission projects—historically regulated by the states, along with all other utility assets, such as distribution lines and generation plants—are two fundamentally different functions with fundamentally different methodologies.[9] Administrative planning regulated by

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[7] *Transource v. DeFrank*, No. 1:21-cv-01101-JPW (M.D. Pa.) (judgment entered on Dec. 6, 2023).

[8] Pursuant to Order No. 1000, public utilities must participate in a "regional transmission planning process that produces a regional transmission plan." 76 Fed. Reg. at 49,842; *see Preventing Undue Discrimination & Preference in Transmission Serv.,* Order No. 890, FERC Stats. & Regs. ¶ 31,241, 72 Fed.Reg. 12,266, ¶¶ 425, 440, 444 (2007).

[9] *See, e.g., Balt. Gas & Elec. Co.,* 187 FERC at 61144 (Christie, dissenting) (" … the regional planning process in a transmission planning organization is *not* remotely the equivalent of a serious,

FERC is a non-adjudicatory, administrative exercise that may be driven by computer modeling, and produces a number of recommended projects for inclusion in a regional transmission plan.[10] Conversely, state permitting subject to a state's police power is project-specific, aimed at balancing public necessity with economic benefits and costs to the state's retail consumers, and often entails a quasi-adjudicatory, evidentiary process.[11] The difference

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litigated state [permitting] process, which includes witness cross-examination and is open to intervenors such as consumer advocates…") (emphasis in original); *see also PJM Interconnection, L.L.C.*, 191 FERC at 61487 (Christie, concurring).

[10] *See* FERC Order No. 1000, 76 Fed.Reg. at 49,842; FERC Order 1000-A, 77 Fed.Reg. at 32,184. In selecting projects for inclusion in the regional plan, the PJM Board does not conduct evidentiary hearings, develop a factual record, take sworn testimony, or permit cross-examination, briefing or argument by interested parties. Dist. Ct. Docket, 164-1 (Ex. A, David Souder Dep. Tr., at 59). FERC's role in the process is limited to approval of the cost-benefits methodology that PJM uses to determine whether a project included in its regional plan should be approved.

[11] Pennsylvania requires entities seeking to site and construct high voltage transmission lines within its borders to establish, by a preponderance of the evidence, that there is a public "need" for the project. *See* 66 Pa.C.S. § 1501; *see also* 52 Pa. Code § 57.76. To determine whether there is a "need," the Pennsylvania Public Utility Commission considers evidence on, among other items, the "present and future necessity of the proposed [high voltage] line in furnishing service to the public." 52 Pa. Code § 57.75(e)(1) (emphasis added). Those with "a direct interest in the proceeding" or who "might be aggrieved by an order of the

between these two very different types of actions is not without purpose or consequence.

Under the FPA, states are the default siting authorities.[12] As FERC recognized in Order No. 1000, while FERC regulates RTOs and ISOs such as PJM, in no way does that regulatory oversight represent any intent to pre-empt the states' decades-old authority to conduct state permitting proceedings that consider issues of need and prudence.[13] Allowing FERC to approve planning processes that effectively dictate when and where transmission must be permitted transforms PJM's administrative role into a vehicle for federal preemption, which is inconsistent with the FPA's purpose. *PJM is a private entity, it is not a sovereign*. It exercises no independent federal power. Its authority derives entirely from tariffs approved by FERC under the FPA. Accordingly, PJM cannot

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Commission in the proceeding," including "statutory advocates" are authorized to participate in such proceedings. 52 Pa. Code §§ 5.74, 5.75. These requirements are not unique to Pennsylvania. Over forty states require state permits and siting approval for high voltage electric transmission facilities within their state lines. *See* James J. Hoecker and Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 Energy L.J. 71, 82 (2014).

[12] *See* 16 U.S.C. §§ 824(a), 824p.

[13] *See* Order No. 1000, 76 Fed. Reg. at 49861 (noting that "there is longstanding state authority over ...matters relevant to siting, permitting, and construction"); *id.* at 49880 ("[N]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.").

possess (or be used as a conduit for) authority that FERC itself does not have. Congress did not create RTOs to serve as instruments for bypassing state permitting authority.

When Congress intends to displace state authority, it does so explicitly and within defined limits.[14] Congress has now had multiple opportunities to federalize transmission siting authority and has repeatedly declined to do so. For example, when Congress enacted § 216 of the FPA, it created only a limited, conditional "backstop" permitting role for FERC.[15] And when Congress revisited that framework in the Infrastructure Investment and Jobs Act, it expanded certain aspects of that backstop authority, but again stopped well short of usurping the state's police power over the permitting of facilities within its borders.[16] That restraint was not accidental. Section 216 reflects a deliberate structural compromise: it allows FERC to issue permits overriding a state denial

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[14] Where the question is whether "a state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority," the state authority is entitled to an "assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *New York v. FERC*, 535 U.S. 1, 17 (2002) (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)).

[15] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[16] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

only where Congress has authorized such displacement, *i.e*, where the proposed facility lies within a United States Department of Energy - designated National Interest Electric Transmission Corridor. Outside those narrowly-drawn corridors, the FPA does not empower FERC to displace state permitting determinations. That limitation is not a mere technicality; it is the core boundary between federal and state authority that Congress drew.

The decision below collapses that boundary. Under the reasoning adopted by the District Court and affirmed by the Third Circuit panel, FERC may approve a "regional transmission planning process" that, in practical effect, compels the development of specific transmission facilities regardless of whether a state has affirmatively denied permitting approval. That result cannot be reconciled with § 216 or with the overall structure of federal-state authority in the FPA. Yet that is precisely what the decision below permits: by approving PJM's planning determinations, FERC enables those determinations to function as a *de facto* federal permitting mandate that displaces state authority.

If Congress had intended such a sweeping change to historic utility permitting practices, it could have provided that *all* state-regulated utilities must join federally-regulated RTOs and that such RTO planning decisions would pre-empt the exercise of the states' long-time permitting authority, but the FPA contains no such language. The FPA does not provide that when the planners at a federally-regulated RTO such as PJM administratively include a transmission

project in its regional plan, such administrative action pre-empts the exercise of the states' historic permitting authority with regard to that project or any other project in the regional plan. Nor does the FPA require that state-regulated utilities even join an RTO. The Third Circuit's conclusion that an administrative *ex parte* action by RTO planners can pre-empt the states' exercise of their historic permitting authority ignores the FPA's paradigm entirely.[17] It flouts the core principle embodied in this Court's Major Questions Doctrine, that administrative actions that cause major social and economic consequences must be based on explicit and clear statutory text.[18] As Justice Scalia famously observed, "Congress does not hide elephants in mouseholes … "[19]

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[17] The Third Circuit wrote, "*To summarize*, Congress *intended* to establish a system of federal supervision over interstate electricity transmission and wholesale sales to ensure just, reasonable, and nondiscriminatory rates and practices, while promoting regional interconnection." *Transource* at 47 (emphasis added).

[18] *See, e.g., West Virginia v. EPA,* 597 U.S. 697, 721 (2022) (observing that while in an "ordinary case," the context of a statute "has no great effect on the appropriate analysis," "our precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.") (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000)).

[19] *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental

Yet, that is what the Third Circuit concludes, that Congress hid an elephant—federal displacement of permitting authority specifically and historically reserved to the states under the FPA—in the mousehole that is the FPA's federal "backstop" authority[20] or in some more nebulous theory that because FERC approved PJM's administrative planning procedures, that approval represents congressional intent to preempt entirely the states' historic permitting authority. The Third Circuit panel's fundamental error of law is contrary to the statutory division of authority between federal and state regulators, as embodied in the FPA for nearly a century. That error must be addressed.

The core merits issue of this case is just as important as that presented in major Supreme Court decisions such as *New York v. FERC*,[21] *Hughes v. Talen Energy*,[22] *FERC v. Electric Power Supply*

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details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.").

[20] 16 U.S.C. § 824p(a) (2021).

[21] 535 U.S. 1 (2002) (holding FERC did not exceed its jurisdiction by including unbundled retail transmissions within the scope of FERC's open access requirements where the plain language of the FPA gave FERC jurisdiction over "electric energy in interstate commerce," and the unbundled transmissions that FERC targeted made such transmissions "interstate" by the national grid's nature.).

[22] 578 U.S. 150, 151 (2016) (holding that Maryland's program requiring load servicing entities to enter into a 20-year pricing

Association,[23] and *Oneok v. Learjet*,[24] each of which explored the fundamental division of authority between federal and state regulators. This case presents the same important issue of federal-state authority.

The first procedural step, however, is to allow Petitioners to intervene in order to seek *en banc* review in the Third Circuit. Because of the fundamental importance of the core merits issue in this case—the line between federal and state authority and its impact on potentially hundreds of billions of dollars' worth of transmission projects, dollars that will ultimately be paid by consumers—this Court should grant *certiorari*.

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contract at a rate set by an independent power generator contravened the "FPA's division of authority between state and federal regulators" by requiring the independent power generator to participate in PJM's capacity auction, but guaranteeing the operator a rate distinct from the clearing price for interstate sales of capacity to PJM.)

[23] 577 U.S. 260 (2016) (construing the FPA as "limiting FERC's 'affecting' jurisdiction [over wholesale rates] to rules or practices that '*directly* affect the [wholesale] rate.'") (quoting *California Indep. Sys. Operator Corp. v. FERC*, 372 F. 3d 395, 403 (D.C. Cir. 2004) (emphasis added by the U.S. Supreme Court)).

[24] 575 U.S. 373, 388 (2015) (holding that the Natural Gas Act, which "'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way,'" could not pre-empt state-law antitrust suits.) (quoting *Panhandle E. Pipe Line Co.* v. *Pub. Serv. Comm'n of Ind.*, 332 U. S. 507, 517-518 (1947)).

CONCLUSION

For the reasons stated above, Christie asks that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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