No. 19-42

In the Supreme Court of the United States

NORTH CAROLINA UTILITIES COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing a petition for judicial review, brought by a state agency under a provision of the Natural Gas Act, 15 U.S.C. 717r(b), for lack of Article III standing where the agency failed to demonstrate a concrete and particularized injury in fact.

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (D.C. Cir.):

North Carolina Utilities Commission v. *Federal Energy Regulatory Commission*, No. 18-1018 (Apr. 3, 2019)

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 761 Fed. Appx. 9. The orders of the Federal Energy Regulatory Commission (Pet. App. 5a-344a) are reported at 156 F.E.R.C. ¶ 61,022, 156 F.E.R.C. ¶ 61,092, 158 F.E.R.C. ¶ 61,125, 161 F.E.R.C. ¶ 61,211, 161 F.E.R.C. ¶ 61,212, and 161 F.E.R.C. ¶ 61,250.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2019. The petition for a writ of certiorari was filed on July 2, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Natural Gas Act (NGA or Act), ch. 556, 52 Stat. 821 (15 U.S.C. 717 *et seq.*), provides the Federal

Energy Regulatory Commission (FERC or Commission) with exclusive authority to regulate wholesale sales and transportation of natural gas in interstate commerce. 15 U.S.C. 717(b); see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). That authority includes determining whether to approve proposed interstate natural gas pipeline facilities. See 15 U.S.C. 717f(c). To construct, operate, or expand such a pipeline, a company must first obtain from FERC a "certificate of public convenience and necessity," issued under Section 7(c) of the NGA, *ibid.* See *Schneidewind*, 485 U.S. at 302-303. FERC may issue such a certificate only if it finds that the proposed facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. 717f(e).

When FERC grants a certificate of public convenience and necessity, it also approves an initial cost-based recourse rate that must be available to pipeline customers, known as shippers, that seek to transport gas over the pipeline's facilities. See Pet. App. 141a, 159a; see also *Missouri Pub. Serv. Comm'n* v. *FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010) (*Missouri II*). FERC applies a "public interest" standard to initial recourse rates, *Missouri Pub. Serv. Comm'n* v. *FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003) (*Missouri I*) (citing *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 391 (1959)), and its policy is to set the initial recourse rate according to the pipeline's rate of return from its most recent general rate case, filed pursuant to Section 4 of the NGA, 15 U.S.C. 717c. Pet. App. 159a & n.60. The initial rate therefore is based on an estimate of the pipeline's projected costs on the new facilities, which is in turn based on the pipeline's past costs on its existing infrastructure. See *ibid.* The initial rate is temporary:

It applies "'to protect the public interest until the regular rate setting provisions' [of § 4 of the NGA, 15 U.S.C. 717c,] . . . come into play." *Missouri II*, 601 F.3d at 583 (quoting *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 534 F.2d 952, 956 (D.C. Cir. 1976)). By contrast to the "public interest" standard FERC employs for initial recourse rates, Section 4 requires regular rates to be "just and reasonable," 15 U.S.C. 717c(a)—a more demanding standard. See *Missouri I*, 337 F.3d at 1070.

Although a pipeline's Section 7(c) certificate includes an approved initial recourse rate, shippers do not necessarily pay that rate during the period in which it is in effect. A pipeline may agree to a negotiated rate with shippers, so long as the shippers have the option of paying the recourse rate instead. See *Natural Gas Pipeline Negotiated Rate Policies & Practices*, 104 F.E.R.C. ¶ 61,134, at 61,482 (2003), on reh'g, 114 F.E.R.C. ¶ 61,042 (2006). Negotiated rates are filed with the Commission for its approval. *Id.* at 61,186-61,187; 114 F.E.R.C. ¶ 61,042, at 61,123.

b. FERC regulations establish two tracks for intervening as a party in a Section 7 proceeding before the Commission. See 15 U.S.C. 717n(e); 18 C.F.R. 385.214(a). A state utility commission—like petitioner here—may intervene as of right by filing a notice with FERC. 18 C.F.R. 385.214(a)(2). Other entities must file a motion with FERC seeking leave to intervene. 18 C.F.R. 385.214(a)(3).

FERC decisions relating to the issuance of certificates of public convenience and necessity are subject to judicial review under a framework set forth in 15 U.S.C. 717r. Once FERC issues an order granting or denying such a certificate, any party to the proceeding that is

"aggrieved" by the order may seek rehearing with the Commission. 15 U.S.C. 717r(a). A party that has sought rehearing but remains aggrieved (for example, because the Commission has denied rehearing) may petition for judicial review in the United States Court of Appeals for the D.C. Circuit, or in an appropriate regional court of appeals. 15 U.S.C. 717r(b).

2. In March 2015, Transcontinental Gas Pipe Line Company (Transco) filed three applications for certificates of public convenience and necessity to construct and operate natural gas pipeline facilities in the eastern United States. Pet. App. 2a; see *id.* at 5a, 91a, 136a. Transco explained that it had executed binding precedent agreements with shippers for all capacity on each of the proposed pipelines. *Id.* at 8a, 93a, 142a-143a; see *Myersville Citizens for a Rural Cmty., Inc.* v. *FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015) ("A precedent agreement is a long-term contract subscribing to expanded natural gas capacity."). Each of those shippers agreed to pay a negotiated rate, rather than Transco's proposed initial recourse rate set forth in its applications. Pet. App. 8a, 94a n.5, 144a.

Petitioner is a North Carolina agency that regulates the sale and transportation of natural gas in North Carolina. See N.C. Gen. Stat. §§ 62-2, 62-32, 62-36.01, 62-133.4 (2017). Petitioner (among others) intervened as a party in all three Transco certificate proceedings. Pet. App. 67a, 121a, 144a; CP-15-117 Notice of Intervention (FERC Apr. 22, 2015). Notwithstanding Transco's representation that none of the shippers would pay the proposed recourse rates, petitioner challenged those rates as unreasonable. Pet. App. 82a, 130a-131a, 281a. Petitioner did not dispute that Transco's use of the specified pre-tax return most recently approved in a

Section 4 rate case was consistent with Commission policy. See, *e.g.*, *id.* at 84a. Instead, petitioner pointed out that the prior rate case was 14 years old, and it contended that the rates approved in the current proceedings should take into account changes in financial markets since that time. *Id.* at 82a.

In July 2016, August 2016, and February 2017, the Commission issued Transco three conditional certificates of public convenience and necessity. Pet. App. 5a, 91a, 136a. In those orders, the Commission approved recourse rates it determined met the NGA's public interest standard, rejecting petitioner's challenge to Transco's use of the pre-tax return from its most recently approved Section 4 rate case. See *id.* at 16a-26a, 108a-109a, 165a-166a.

Petitioner and the New York State Public Service Commission (collectively, State Commissions) sought rehearing. Pet. App. 81a, 130a-131a, 275a. FERC denied the petitions, again finding that the use of a pre-tax return from Transco's most recent Section 4 rate case was proper. *Id.* at 83a-86a, 131a-134a, 282a-285a.

In both its original orders and its orders denying rehearing, FERC pointed out that Transco would be required to file an NGA Section 4 rate case by August 31, 2018 that would establish permanent rates to replace the initial recourse rates. Pet. App. 22a-23a, 86a, 106a, 134a, 162a-163a, 285a. Transco filed its Section 4 rate case on that date, see RP18-1126-000 Tariff Filing (FERC Aug. 31, 2018), and that proceeding remains pending, see *Transcontinental Gas Pipe Line Co., LLC*, 164 F.E.R.C. ¶ 61,236, at 62,347, 62,353 (2018) (accepting Transco's proposed Section 4 rates on September

28, 2018, subject to the outcome of hearing and settlement judge procedures); see generally FERC Docket No. RP18-1126-000.

3. The State Commissions sought judicial review of the series of six orders certificating the pipeline facilities and denying rehearing. Pet. App. 2a. As they had before FERC, the State Commissions contended that Transco's recourse rates relied on an outdated and inflated pre-tax return, which allegedly would result in ratepayers in their States paying unreasonably high rates for natural gas. *Id.* at 2a-3a.

In a unanimous, unpublished judgment, the court of appeals dismissed the State Commissions' petition for review for lack of Article III standing. Pet. App. 1a-4a. The court explained that the State Commissions failed to show a concrete and particularized injury in fact. *Id.* at 3a. The court observed that petitioner merely "'assume[d]' that ratepayers in [North Carolina] will use the facilities certificated on" one of the three projects, but had not demonstrated a "'substantial probability'" that capacity from that project would flow into the State, let alone that North Carolina ratepayers would pay higher rates because of the project. *Ibid.* (quoting *Kansas Corp. Comm'n* v. *FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018), and Pet. Br. 31). With respect to the other two projects, the court found that the State Commissions "offer[ed] no evidence of injury" at all. *Ibid.* The court determined that "[a]ny harm is therefore either non-existent or 'conjectural or hypothetical,' which does not suffice to demonstrate injury in fact." *Ibid.* (quoting *Kansas Corp. Comm'n*, 881 F.3d at 930).

4. Neither petitioner nor the New York State Public Service Commission sought rehearing or rehearing en

banc. Only petitioner filed a petition for a writ of certiorari.

ARGUMENT

The court of appeals correctly determined that petitioner lacked Article III standing to challenge the Commission's certification of Transco's pipeline facilities. Its unpublished disposition of the petition for review does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. This Court has explained that "the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Ibid.* To establish injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

The court of appeals correctly held that petitioner failed to demonstrate that it suffered an injury in fact from the pipeline certifications. Petitioner argued that the Commission's orders approving allegedly "overstated" initial recourse rates harmed North Carolina ratepayers because those recourse rates failed to "provide the necessary check on the pipeline's market power during the establishment of the negotiated rates." Pet. C.A. Br. 30. But petitioner failed to show a "substantial probability" that North Carolina ratepayers would be harmed by the recourse rates. Pet. App. 3a (quoting

Kansas Corp. Comm'n v. *FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018)). Petitioner did not show that any North Carolina ratepayers would pay higher rates due to the certificated projects, or that subscribed capacity from any of the projects would even be delivered to North Carolina. See *ibid.* Instead, petitioner simply "'assume[d]' that ratepayers in [North Carolina] w[ould] use the facilities certificated" by the Commission. *Ibid.* (quoting Pet. C.A. Br. 31).

Moreover, petitioner failed to show that any ratepayers—whether located in North Carolina or elsewhere—*could* be harmed by the challenged initial recourse rates. By the time FERC approved those rates, each of the three projects was fully subscribed by shippers who had agreed to pay negotiated rates. Pet. App. 8a, 93a, 94a n.5, 142a-144a. While an initial recourse rate might in some circumstances influence parties' negotiated rates, petitioner did not show that the later-approved recourse rates in this case tainted the negotiated rates that *already* had been agreed to. See Gov't C.A. Br. 27-29 (making this point in terms of traceability and redressability).

2. Petitioner does not appear to dispute the court of appeals' determination that it did not satisfy Article III's injury-in-fact requirement. See Pet. 7-12. Instead, relying on *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), petitioner contends (Pet. 7-12) that the court erred in failing to afford it "special solicitude" in the standing analysis. See *Massachusetts*, 549 U.S. at 520. Specifically, petitioner argues (Pet. 7, 9-10) that because Section 4 certification decisions assertedly implicate its quasi-sovereign interests, and Congress has granted state commissions a right to intervene in Commission proceedings and then, as a party, to challenge

the Commission's decision, petitioner was relieved of the obligation "to demonstrate injury-in-fact that is traceable to the challenged action and redressable by the court." Pet. i-ii.

a. Petitioner misconstrues this Court's decision in *Massachusetts*. In that case, private organizations, joined by Massachusetts and other state and local government intervenors, challenged the Environmental Protection Agency's determination not to issue mandatory regulations to address global climate change. 549 U.S. at 514. This Court determined that Massachusetts had standing. *Id.* at 516-526. While the Court considered Massachusetts' status as a sovereign State to be "of considerable relevance" to the standing inquiry, it did not relieve the State of the need to demonstrate a concrete and particularized injury in fact. *Id.* at 518; see *id.* at 521-523. Instead, the Court recognized that Massachusetts and its residents had suffered a "concrete" injury: "rising seas" that had "already begun to swallow Massachusetts' coastal land." *Id.* at 519, 522. And the Court observed that "[b]ecause the Commonwealth 'owns a substantial portion of the state's coastal property,' it has alleged a particularized injury in its capacity as a landowner." *Id.* at 522 (citation omitted).

Thus, contrary to petitioner'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. Instead, that "special solicitude" reflected a State's unique right to sue to protect its quasi-sovereign interests, including its "desire to preserve its sovereign territory" and "'the earth and air within its domain.'" *Id.* at 519 (quoting *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). It is well-established, however, that a State still must show

a concrete and particularized injury to its interests. See *id.* at 518-519, 522; see also *Coalition for Responsible Regulation, Inc.* v. *EPA*, 684 F.3d 102, 148 (D.C. Cir. 2012) (per curiam) ("[N]othing in [*Massachusetts*] remotely suggests that states are somehow exempt from the burden of establishing a concrete and particularized injury in fact."), aff'd in part, rev'd in part *sub nom. Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302 (2014); *Wyoming* v. *United States Dep't of Interior*, 674 F.3d 1220, 1238 (10th Cir. 2012) (recognizing that, under *Massachusetts*, States must still establish a concrete injury); *Delaware Dep't of Natural Res. & Envtl. Control* v. *FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("[S]pecial solicitude does *not* eliminate the state petitioner's obligation to establish a concrete injury, as Justice Stevens' opinion [for the majority in *Massachusetts*] amply indicates.").

b. Nor does a State's right to intervene in agency proceedings and then seek judicial review relieve it of the need to demonstrate injury in fact. See Pet. 10-11. In *Massachusetts*, the Court observed that the Clean Air Act, 42 U.S.C. 7401 *et seq.*, afforded States the right to challenge EPA's rejection of a petition for a rulemaking to curb greenhouse gas emissions. 549 U.S. at 520. And the Court stated that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests * * * can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 517-518 (quoting *Lujan*, 504 U.S. at 572 n.7). That is because vindication of a procedural right may result in agency action that redresses the alleged harm. See *id.* at 518 (citing *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)). But the procedural right still must be tethered to a concrete

injury: "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009). Thus, while the existence of a procedural right "can loosen the strictures of the redressability prong of [the] standing inquiry," "the requirement of injury in fact is a hard floor of Article III jurisdiction." *Id.* at 497.

3. Contrary to petitioner's assertion (Pet. 12-14), the unpublished, non-precedential decision below does not implicate any inter-circuit conflict on the proper application of *Massachusetts*. See D.C. Cir. R. 36(e)(2). In fact, the cases on which petitioner relies confirm that the special solicitude accorded the State in *Massachusetts* did not eliminate the need for a State to demonstrate an injury in fact.

In *Center for Biological Diversity* v. *United States Department of Interior*, 563 F.3d 466 (2009), the D.C. Circuit "assum[ed] *arguendo*" that the tribal-government petitioner was "a sovereign that might be entitled to 'special solicitude' under *Massachusetts*." *Id.* at 477. Nonetheless, the court determined that the tribal government failed to show an injury to its own interests and therefore lacked Article III standing. *Ibid.* In reaching that conclusion, the court observed that, in *Massachusetts*, the State "had shown a sufficiently particularized injury because Massachusetts had alleged that its particular shoreline had actually been diminished by the effects of climate change." *Id.* at 476; accord *Government of Manitoba* v. *Bernhardt*, 923 F.3d 173, 182 (D.C. Cir. 2019) (holding that State lacked standing and distinguishing *Massachusetts*, in which the State "alleged its own harm to establish an injury-in-fact"); *Kansas Corp.*

Comm'n, 881 F.3d at 929-930 (requiring a state utilities commission to satisfy the *Lujan* Article III standing test).*

Similarly, in *Texas* v. *United States*, 809 F.3d 134 (2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016), the Fifth Circuit assessed States' standing to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Although the court determined that the state plaintiffs were entitled to "'special solicitude'" under *Massachusetts*, it required them to "show an injury that is 'concrete, particularized, and actual or imminent.'" *Id.* at 150-151 (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). The court determined that Texas had met that burden because issuing drivers' licenses to DAPA beneficiaries would require the State to incur "millions of dollars of losses." *Id.* at 152-153; see *id.* at 155-156.

Nor does the Second Circuit's decision in *Connecticut* v. *American Electric Power Co.*, 582 F.3d 309 (2009), aff'd on jurisdiction by an equally divided Court, 564 U.S. 410, 420 (2011), hold that a State need not demonstrate a concrete and particularized injury in fact. See Pet. 13. To the contrary, the court determined that "all of the plaintiffs"—including the States—"met the *Lujan* test for standing." *American Elec. Power*

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* Citing Judge Brown's concurrence in *Arpaio* v. *Obama*, 797 F.3d 11 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 900 (2016), petitioner suggests (Pet. 13) that the D.C. Circuit is internally divided regarding the relationship between *Lujan* and *Massachusetts*. But Judge Brown acknowledged that under *Massachusetts*, a State must demonstrate a "concrete injury." 797 F.3d at 27. In any event, a concurrence could not create an intra-circuit conflict, and an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Co., 582 F.3d at 338. Although the court suggested that *Massachusetts*' discussion of standing "arguably muddled state proprietary and *parens patriae* standing," it declined to decide whether a State relying on the latter theory must meet *Lujan*'s requirements. *Id.* at 337-338. Moreover, to the extent petitioner here relies on a *parens patriae* theory of standing, its allegations have little in common with those at issue in *American Electric Power Co.* There, the court observed that the States had "adequately" "alleged that the injuries resulting from carbon dioxide emissions will affect virtually their entire populations." *Id.* at 338. By contrast, here, the court of appeals determined that "[a]ny harm" to North Carolina "end-users" was "either non-existent or 'conjectural or hypothetical.'" Pet. App. 3a (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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