

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 16, 2026

No. 25-50879

Thomas B. Plunkett, III
Clerk

GH AMERICA ENERGY, L.L.C.,

Plaintiff—Appellant,

versus

DOUGLAS FOHN, *in his official capacity as Assistant General Counsel
of the Electric Reliability Council of Texas, Inc. (“ERCOT”),*

Defendant—Appellee,

KEN PAXTON, *Attorney General, State of Texas,*

Intervenor Defendant—Appellee,

PABLO VEGAS, *Chief Executive Officer of the Electric Reliability Council of Texas, Inc.*; PAUL FOSTER, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; BILL FLORES, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; CARLOS AGUILAR, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; LINDA CAPUANO, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; JULIE ENGLAND, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; ROBERT FLEXON, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; PEGGY HEEG, MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.; JOHN SWAINSON,

MEMBER OF THE BOARD OF DIRECTORS OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS, INC.; HOLLY HEINRICH,
in her official capacity as a Legal/Regulatory Counsel of ERCOT,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:24-CV-648

Before SMITH, HAYNES, and ENGELHARDT, *Circuit Judges*.^{*}

JERRY E. SMITH, *Circuit Judge*:

This case turns on whether the CFIUS regime preempts LSIPA.

The Texas Lone Star Infrastructure Protection Act of 2021 (“LSIPA”)¹ prohibits certain contracts with foreign-owned companies or citizens of Russia, Iran, North Korea, and as relevant to this appeal, China. LSIPA prohibits such entities’ investment in critical infrastructure such as Texas’s electric grid, which is managed by the Electric Reliability Council of Texas, Inc. (“ERCOT”). The Committee on Foreign Investment in the United States (“CFIUS”) is the federal interagency task force that reviews foreign-facing financial transactions for national security and economic strategic risks. CFIUS originates in § 721 of the Defense Production Act of 1950, 50 U.S.C. § 4565 (the “DPA”).²

^{*} Judge HAYNES concurs in the judgment.

¹ TEXAS LEGISLATURE ONLINE, S.B. No. 2116 (enrolled version) (<https://perma.cc/5LJW-KEX9>).

² U.S. GOV’T PUBLISHING OFFICE, Pub. L. 81-774, *The Defense Production Act of 1950*, *33 (<https://www.govinfo.gov/content/pkg/COMPS-8323/pdf/COMPS-8323.pdf>). In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (“FIRRMA”) expanding the statutory authority for CFIUS to enable it to review minority positions, all investments involving critical technologies and sensitive personal

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GH America Energy (“GHAE”) is a Texas LLC and subsidiary of a Chinese company that sought to buy energy assets in Texas and was blocked by LSIPA. It brought a range of constitutional claims, including the preemption claims now on appeal, against Douglas Fohn, in his official capacity representing ERCOT. The district court granted defendants’ motion to dismiss with respect to each claim.³

GHAE appeals solely on the preemption issue. GHAE insists that LSIPA is properly characterized as a statute targeting foreign investment *per se*, while Texas characterizes it as an energy-utility regulation within the heart of the state’s police power.

We hold that the CFIUS regime does not impliedly preempt LSIPA because (i) GHAE fails to identify any conflict between LSIPA and the statutory text authorizing CFIUS and (ii) LSIPA is in purposive harmony with CFIUS and, if anything, provides even greater protection as a positive upward variance for Texan security. LSIPA is also not field preempted where Congress is silent and CFIUS does not amount to the kind of all-encompassing regulatory regime that ousts and precludes any related legislation.

Because the CFIUS regime neither conflict- nor field-preempts LSIPA, we AFFIRM.

I.

LSIPA prohibits a governmental entity or critical infrastructure-related business from entering into an agreement with a company that is

data, and even real estate transactions close to sensitive United States sites and key infrastructure. *See* 50 U.S.C. § 4565 (granting CFIUS “[a]uthority to review certain mergers, acquisitions, and takeovers”).

³ *GH Am. Energy LLC v. Vegas*, 815 F. Supp. 3d 537, 558 (W.D. Tex. 2025)

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majority owned or controlled by a citizen of China or the Chinese government, or is headquartered in China, if the agreement would give that company “direct or remote access to or control of critical infrastructure in this state.”⁴ “Critical infrastructure” includes the Texas grid managed by ERCOT.⁵

GHAЕ operates exclusively in Texas and is a subsidiary of Xinjiang Guanghui Industry Investment (Group) Company, Ltd., which is headquartered in China and majority owned by Sun Guangxin—a billionaire Chinese citizen who is neither a citizen nor resident of the United States. This case concerns ERCOT’s action in 2022, per LSIPA, denying GHAЕ’s request to interconnect a proposed solar-energy project, known as the Blue Star Solar Project (“Blue Star”), to the Texas grid.

A.

In 2015, Xinjiang and GH America Investments Group, Inc. (“GH America”), an oil-and-gas business unit affiliated with Xinjiang, gave notice to CFIUS regarding a proposed transaction by which Xinjiang and GH America, through a subsidiary, would acquire assets of several U.S. companies (the “GH Transaction”). CFIUS delegated review to the Department of Defense (“DoD”),⁶ which determined that the GH Transaction presented a national security risk and informed Xinjiang and GH America that they would be required to enter a mitigation agreement with respect to the national security risks. CFIUS then concluded action on that transaction.

From 2016 through 2018, Xinjiang and GH America, acting through

⁴ TEX. BUS. & COM. CODE § 117.002; TEX. GOV’T CODE § 2275.0102.

⁵ TEX. BUS. & COM. CODE § 117.001; TEX. GOV’T CODE § 2275.0101(2).

⁶ Also known as the Department of War.

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subsidiary Texas LLCs, bought 131,290 acres of land in Val Verde County, Texas. In 2018, Xinjiang and GH America formed GHAE as a new subsidiary for renewable energy projects, and GHAE began investing in wind and solar resources as well as electric grid-connection consulting studies, intending to sell their energy into Texas. GHAE notified the DoD, which was still delegated oversight by CFIUS, and DoD objected to some of the renewable energy projects because of their proximity to Laughlin Air Force Base in Val Verde County. GHAE and CFIUS then updated the mitigation agreement to provide for expanded oversight.

The Texas Legislature soon passed LSIPA, and when it came into effect in 2021, GHAE had pending ERCOT interconnection requests for several renewable energy projects, including Blue Star. As part of ERCOT's generator-interconnection application process, GHAE informed ERCOT under LSIPA that it was majority-owned by Xinjiang.

In October 2022, Fohn (ERCOT's Assistant General Counsel) notified GHAE that it was noncompliant with LSIPA and that ERCOT was therefore canceling the Blue Star Solar Project's interconnection application. GHAE claimed that that denial of its interconnection requests caused it to sell two other renewable energy projects (apart from Blue Star) "at a substantial loss."

Yet GHAE persisted on Blue Star, asking ERCOT whether it could "pursue a screening study" to determine whether the land it had leased in Val Verde County was "interconnectable and saleable to potential customers who would be in compliance with" LSIPA, meaning it asked whether it could scrap the project for value. ERCOT denied that request as well, allegedly because of the sole fact that GHAE did not comply with LSIPA. GHAE maintains that, but for LSIPA, it would immediately submit interconnection requests to ERCOT for solar and wind energy projects in Val Verde County,

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notably, for Blue Star.

In 2023, the Texas Legislature recognized a need to defend the electric grid further and to bolster the security of Texas power against outside attacks. It therefore specifically commanded ERCOT not to register or provide interconnections to a business entity “unless the business entity attests that [it] complies with” LSIPA.⁷

B.

In June 2024, GHAE sued Fohn, ERCOT, and the other individual ERCOT-side defendants. GHAE asserted variously that LSIPA is preempted by the CFIUS regime and related statutes such as the DPA and FIRRMA; that LSIPA is unconstitutional under the Dormant Commerce Clause; and that LSIPA violates the Equal Protection Clause on account of race, ethnicity, alienage and national origin. GHAE sought injunctive and declaratory relief and damages. Following the defendants’ motions to dismiss, GHAE twice amended its complaint to drop its claims against ERCOT itself and focus on Fohn in his official capacity; to drop the Dormant Commerce Clause claim; to revise the Equal Protection claim and focus only on national origin; and to drop a request for damages.

The district court granted Fohn’s motion to dismiss and, in relevant part, ruled that LSIPA is not preempted by the CFIUS regime or the dormant foreign affairs preemption doctrine (which latter point GHAE does not appeal). The district court also dismissed the remaining Equal Protection claim (which decision GHAE also does not appeal). GHAE timely appeals

⁷ TEX. UTIL. CODE, § 39.360(b); *see generally* TEX. ATT’Y GEN. OP. KP-0388 (2021) (“[B]y granting the generation owner the ability to connect the generator to the transmission system, a generation interconnection agreement gives that company direct or remote access to critical infrastructure ...”).

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the dismissal of the preemption claim, as to which the district court found “that GHAE’s conflict and field preemption claims fail on the merits.”⁸

The district court began with Congress’s purpose embodied in the relevant text and regulatory structure: “‘First, the purpose of Congress is the ultimate touchstone in every pre-emption case,’ and that intent ‘primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it.’”⁹ The court then introduced the presumption that states’ police power will not be overridden absent “‘the clear and manifest purpose of Congress,’” especially in fields of legislation “‘which the States have traditionally occupied.’”¹⁰ The district court noted that “[b]oth the U.S. Supreme Court and Fifth Circuit have long recognized the States’ ability to regulate utilities as ‘one of the most important of the functions traditionally associated with the police power of the States.’”¹¹ And it rejected the idea that LSIPA was oriented to foreign policy, describing it as a measure “only to secure the electric grid.”¹²

The district court proceeded to analyze conflict preemption, stating that it “exists where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹³ It then

⁸ *GH Am. Energy*, 815 F. Supp. 3d at 549.

⁹ *Id.* (quoting *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1094 (11th Cir. 2021) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (further citation omitted))).

¹⁰ *Id.* (quoting *Marrache*, 17 F.4th at 1095; then quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (further citation omitted)).

¹¹ *Id.* at 549–50 (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989) (“*NOPSI*”), and *ERCOT v. Just Energy Tex., L.P. (In re Just Energy Grp., Inc.)*, 57 F.4th 241, 252 (5th Cir. 2023)).

¹² *Id.* at 552 (distinguishing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000)).

¹³ *Id.* at 550 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

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rejected GHAE’s argument that LSIPA stands as an obstacle to federal laws governing the field of “foreign investments in the United States.” *Id.*

The district court reasoned that LSIPA did not impair CFIUS’s goals—first, because CFIUS applies only to a limited set of transactions such that LSIPA was generally outside its scope,¹⁴ second, because Texas has a strong state interest in protecting ERCOT,¹⁵ and third, that *access* to that grid is an intrastate activity particularly germane to state regulation. The court added that LSIPA does not conflict with CFIUS’s safe harbor regulatory provision, which provides that a “transaction can proceed without the possibility of subsequent suspension or prohibition under section 721”¹⁶ because that regulation insulates a transaction only from further CFIUS review and is silent with respect to all other laws, thereby not excluding those other laws. In sum, the district court held that GHAE failed to meet the “high threshold” for showing conflict preemption by obstacles-to-purpose.¹⁷

The district court then proceeded to field preemption, faithfully restating this court’s reasoning that “field preemption exists only where a federal statutory scheme is ‘so pervasive as to make reasonable the inference

¹⁴ Indeed, the district court questioned at some length whether CFIUS supplies *any* jurisdiction over a new power plant company, because it does not involve any transaction acquiring an already-existing U.S. business. *See* 50 U.S.C. § 4565(a)(4)(B).

¹⁵ *GH Am. Energy*, 815 F. Supp. 3d at 551 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003) (“It would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.”)).

¹⁶ 73 Fed. Reg. 74569 (Dec. 8, 2008).

¹⁷ *GH Am. Energy*, 815 F. Supp. 3d at 554 (quoting *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (“Our precedents ‘establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.’” (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 110 (1992) (KENNEDY, J., concurring in part and concurring in the judgment)))).

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that Congress left no room for the States to supplement it,’ or that it ‘touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”¹⁸ The district court added that field preemption is strongly disfavored, such that federal courts will hesitate to find it unless plaintiffs show that a “‘complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress.’”¹⁹

Applying those principles, the district court found that the CFIUS statutes did not evince a Congressional intent to create an all-pervasive regulatory regime effecting a complete ouster of related state power, but, instead, merely authorized national security review of certain cases on a narrow timeline.

II.

A.

The Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. By it, Congress possesses “the power to preempt state law,”²⁰ either “through express language in a statute” or implicitly.²¹ “But the exercise of

¹⁸ *Id.* at 554 (quoting *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 796 (5th Cir. 2024) (quoting *English*, 496 U.S. at 79)).

¹⁹ *Id.* (quoting *Nat’l Press Photographers*, 90 F.4th at 795–96 (further citation omitted)).

²⁰ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

²¹ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).

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that power is not lightly presumed.”²²

In light of the dual sovereignties between the federal government and the states, “barring any contradiction, the States retain their sovereign prerogatives to regulate.”²³ The Supreme Court has disclaimed any “brooding federal interest” or “judicial policy preference” that might generically “win preemption of a state law.”²⁴ “Preemption analysis begins with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”²⁵

So where appraising preemption, we start with the opposite presumption—the “presumption against preemption”—which is heightened in “areas of law traditionally reserved to the states.”²⁶ And that heightened presumption against preemption applies in substantive “areas of tradi-

²² *AbbVie, Inc. v. Murrill*, 180 F.4th 747, 758 (5th Cir. 2026).

²³ *Zyla Life Scis., L.L.C. v. Wells Pharma of Hous., L.L.C.*, 134 F.4th 326, 328 (5th Cir. 2025); accord *Wyeth v. Levine*, 555 U.S. 555, 584 (2009) (THOMAS, J., concurring in the judgment) (explaining that under our federalist system, “States retain substantial sovereign authority”) (citing the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)); *Parker v. Brown*, 317 U.S. 341, 359–60 (1943) (the “governments of the states are sovereign within their territory,” and nothing in the Constitution “wholly withdraw[s] from the states the authority to regulate . . . matters of local concern, on which Congress has not spoken”).

²⁴ *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion of GORSUCH, J.).

²⁵ *Deanda v. Becerra*, 96 F.4th 750, 761 (5th Cir. 2024) (cleaned up); accord *Va. Uranium*, 587 U.S. at 779 (even if “Congress might have chosen to regulate the more novel aspects of” a specific area, the states still retain “their traditional function of regulating” whatever falls within their historic police powers).

²⁶ *Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 407 (5th Cir. 2010) (en banc) (cleaned up).

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tional state regulation,”²⁷ as well as critical areas of state prerogative such as control of essential intrastate utilities.²⁸ Indeed, “utility regulation is one of the most important of the functions traditionally associated with the police power of the States.”²⁹ A plaintiff seeking to show federal preemption in those areas “must clear a high threshold.”³⁰

To appraise preemption, we start, as always, with the text of the relevant statutes.³¹ This court recently restated the framework for textualist preemption analysis: The Supreme Court has established “a preemption taxonomy,” first dividing “between express and implied preemption.”³² Implied preemption is further divided into two types: field preemption and conflict preemption.³³

²⁷ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001); accord *Hillman v. Maretta*, 569 U.S. 483, 490–91 (2013) (listing state laws governing domestic relations, and family and family-property law, as readily-apparent examples); *NOPSI*, 491 U.S. at 365 (“regulat[ing] utilities” is “one of the most important of the functions traditionally associated with the police power of the States”).

²⁸ See *Texas v. EPA*, 829 F.3d 405, 431 (5th Cir. 2016) (“In its electrical grid, as in so many things, Texas stands alone.”); see also *Zyla*, 134 F.4th at 334 (“The Federal Government has limited resources,” so “it often welcomes state aid in enforcing shared legal norms.”); see generally *California v. Zook*, 336 U.S. 725, 738 (1949) (just as “the nation may [regulate] for the safety and welfare of interstate commerce,” “the State may [regulate] as it has in the present case for the safety and welfare of its inhabitants”).

²⁹ *ERCOT*, 57 F.4th at 251 (cleaned up).

³⁰ *Deanda*, 96 F.4th at 761.

³¹ See *id.* at 761–62 (“The Secretary properly begins with [the] text.”).

³² *Zyla*, 134 F.4th at 328 (5th Cir. 2025) (quoting *Kansas*, 589 U.S. at 202–03); see also *La Union del Pueblo Entero v. Abbott*, 151 F.4th 273, 290 (5th Cir. 2025) (recognizing three species of preemption—express, field, and conflict).

³³ *Zyla*, 134 F.4th at 328.

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B.

Conflict preemption again divides into impossibility preemption and obstacles-and-purposes preemption (of which only the latter is relevant here). *Zyla*, 134 F.4th at 328–29. Obstacles-and-purposes preemption arises “when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* at 329 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). “In all these types of preemption, however, evidence of pre-emptive purpose must be sought in the text and structure of the federal provision at issue.” *Id.* (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)) (cleaned up).

The text of the DPA provides the jurisdiction of the CFIUS regime over “covered transactions.” 50 U.S.C. § 4565(a)(4); *see id.* at (b)(1)(A). As relevant here, covered transactions include:

(i) Any merger, acquisition, or takeover . . . by or with any foreign person that could result in foreign control of any United States business, including such a merger, acquisition, or takeover carried out through a joint venture.

(ii) . . . [T]he purchase or lease by, or a concession to, a foreign person of private or public real estate that is located in the United States . . . in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security

(iii) Any other investment, subject to [certain regulations defining foreign persons as well as defining access to material nonpublic information of critical infrastructure] by a foreign person in any unaffiliated United States business that owns, operates, manufactures, supplies, or services critical infrastructure; produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies; or maintains or collects sensitive personal data

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(iv) Any change in the rights that a foreign person has with respect to a United States business in which the foreign person has an investment, if that change could result in foreign control of the United States business

(v) Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of this section

50 U.S.C. § 4565(a)(4)(B)(i)–(v).³⁴

Notably not among those transactions are self-investment in a business’s own assets; generic purchases of land; or transactions merely amounting to contract formation with distributors or suppliers of one’s product. Instead, the provisions above divide into two logical categories: land purchases near important U.S. federal property (prong (ii)) and corporate-control transactions (prongs (i) and (iv)), including the kinds of minority- or low-stake investments that would give access to Material Nonpublic Information (prong (iii)). Finally, like any good statutory list, § 4565(a)(4)(B) includes a catchall that maps back onto the substantive categories it bookends.³⁵

Below we revisit that statutory text and compare it with the relevant provisions of LSIPA.

C.

Field preemption turns on whether Congress has occupied a domain of regulation such that states may not impose their own parallel regime within that domain. *Arizona v. United States*, 567 U.S. 387, 399 (2012); *Hines*, 312 U.S. at 66–67. Field preemption applies only where Congress has “occu-

³⁴ The DPA defines “United States business” as any person engaged in interstate commerce. 50 U.S.C. § 4565(a)(13).

³⁵ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199–200 (2012) (on the *ejusdem generis* canon).

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pie[d] an entire field,” reflecting “a congressional decision to foreclose any state regulation in the area.”³⁶

“Field preemption of state law is disfavored,” *Nat’l Press Photographers*, 90 F.4th at 796, which is why it is so “rare” to find in practice, *Kansas v. Garcia*, 589 U.S. 191, 208 (2020). No less than “an unambiguous congressional mandate” suffices to field preempt state law,³⁷ which is why courts should “hesitate” before inferring field preemption.³⁸ “Only a demonstration that *complete ouster* of state power . . . was the *clear and manifest purpose* of Congress” justifies a finding of field preemption.³⁹

That complete ouster can be identified only where a federal statutory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it” or where it invades “a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Nat’l Press Photographers*, 90 F.4th at 796 (citation omitted).

GHAE takes issue only as to *implied* preemption, which bifurcates into

³⁶ *Arizona*, 567 U.S. at 401; accord *Crystal Clear Special Util. Dist. v. Jackson*, 142 F.4th 351, 364 (5th Cir. 2025).

³⁷ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963).

³⁸ *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018).

³⁹ *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (emphasis added) (cleaned up); see also WILLIAM BAUDE ET AL., HART & WECHSLER’S THE FEDERAL COURTS & THE FEDERAL SYSTEM 833 (8th ed. 2025) (observing that “the Court’s standards for field preemption have become stricter in recent years”).

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conflict and field preemption.⁴⁰ GHAE lodges alternative theories on both.⁴¹

III.

A.

GHAE principally contends that LSIPA is conflict preempted where “Congress chose a centralized, Executive-led framework for national-security screening of foreign investment that relies on individualized review, tailored mitigation, and ongoing monitoring.” Throughout its briefing, GHAE submits that the district court engaged in “a series of framing errors.” As GHAE would have it, this case is not about state control of utilities, but instead concerns “whether Texas may impose a categorical foreign-ownership ban that functions as a parallel foreign-investment gatekeeping regime in a domain Congress assigned to the federal government.”

GHAE first frames the question at a high level of generality: “whether state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁴² GHAE theorizes that Congress chose a centralized, Executive-led CFIUS regime in the DPA and FIRRMA, and that the “calibration” of that regime supports Congress’s and the Execu-

⁴⁰ Field preemption and conflict preemption “are not rigidly distinct.” *Crosby*, 530 U.S. at 372 n.6 (quoting *English*, 496 U.S. at 79 n.5). We acknowledge the overlap, but the principled logical distinction between conflict preemption and field preemption is that, though conflict preemption always needs to be negatively inferenced with a federal law impairing the purposes of Congress, field preemption is logically broader, such that Congress can prospectively occupy a field and prevent any novel conflicts from arising through related law and can deny states the possibility of enacting overlapping *compatible* regimes through an interest in uniformity and efficient allocation of resources.

⁴¹ Because we affirm, we need not reach Fohn’s additional arguments.

⁴² Quoting *English*, 496 U.S. at 79 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

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tive’s “flexibility to balance security, economic, and diplomatic interests.”⁴³ GHAE posits that LSIPA conflicts with that “flexible” federal “calibration” by substituting a “categorical, nationality-based disqualification” and muddying Congress’s planned approach of conditional clearance and threat-mitigation deals.

GHAE continues to theorize that CFIUS embodies “Congress’s broader policy judgment that foreign investment yields substantial economic benefits and that the United States should maintain an open investment policy” GHAE complains that “LSIPA forecloses outcomes” foreseen by CFIUS, while couching Congress’s purpose and the types of transactions it controls through CFIUS as “any transaction that presents national security risks.” GHAE then proposes an *even broader* field of “any foreign investment” that Congress purportedly seeks to control and which would preempt any contrary state law.

Fohn counters that the “CFIUS regime is narrow and largely voluntary.” He asserts that “GHAE describes that regime only vaguely” and “[b]ecause the statutory text is key to assessing GHAE’s preemption claims,” he undertakes to describe CFIUS and LSIPA in some detail.

As Fohn explains,

Under § 721 of the Defense Production Act of 1950, the President has authority to ‘investigat[e] and determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States’ CFIUS was initially created as a non-statutory interagency committee in 1975 to administer § 721 [and] . . . [b]efore 2018, CFIUS had jurisdiction only over a ‘merger,

⁴³ Citing *Crosby*, 530 U.S. at 373–74.

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acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.’^[44]

Fohn adds that FIRRMA expanded CFIUS’s jurisdiction beyond M&A, to review a slightly wider set of “covered transactions,” discussed *supra*. But he highlights that, under CFIUS’s specific grants of jurisdiction, no “covered transaction” is in play here, including as to the creation of a *new* business (he also points out that it is possible to comply with both laws).⁴⁵ Fohn reasons that CFIUS’s jurisdiction is mainly voluntary and expressly foresees the President’s “suspending and prohibiting any covered transaction” provided that “*other provisions of law* do not ‘provide adequate and appropriate authority for the President to protect the national security.’”⁴⁶

Fohn also reminds that “preemption must be found in the statutory text, not a party’s or court’s subjective beliefs about what Congress intended.”⁴⁷ And Fohn asserts that “GHAE never acknowledges this frame-

⁴⁴ Citing Defense Production Act of 1950, Pub. L. 100-418, 102 Stat. 1107, § 5102; Exec. Order No. 11858, 3. C.F.R. 990 (1971–1975); 50 U.S.C. § 4565(a)(3) (amended 2018).

⁴⁵ Citing 31 C.F.R. § 800.301(e)(7) (providing that if a foreign person “incorporat[es] a newly formed subsidiary” and “construct[s] . . . a plant to make a new product,” it “will not have acquired a U.S. business, and its greenfield investment is not a covered control transaction”).

⁴⁶ Quoting 50 U.S.C. § 4565(d)(4). Texas Attorney General Paxton’s brief also argues against field preemption where the federal regulations “‘appear to contemplate some concurrent state regulation’” (quoting *Nat’l Press Photographers*, 90 F.4th at 796 (quoting *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 149 (1986) (further citation omitted))).

⁴⁷ Citing *La Union*, 151 F.4th at 291; *id.* at 295 (“If Congress’s ‘purposes and objectives’ are to displace state law, those purposes and objectives must be gleaned from the text of a federal law enacted through the procedures demanded by the Constitution.”); *Va. Uranium*, 587 U.S. at 777 (obstacle preemption cannot “elevate abstract and unenacted legislative desires above state law”). See also *Kansas*, 589 U.S. at 214 (THOMAS, J., concurring, joined by GORSUCH, J.) (suggesting that the “‘purposes and objectives’ preemption doctrine” is “contrary to the Supremacy Clause” because it “impermissibly rests

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work” and “makes no effort to identify a preemptive purpose in § 721’s text” apart from describing CFIUS as a “calibrated” framework.

Thus, Fohn posits that CFIUS is orthogonal to LSIPA and implies that CFIUS exhibits a purpose to play nicely in the sandbox with other law.⁴⁸

In response, GHAE criticizes the district court for inflating the “traditional police powers” interest and imposing some “heightened obstacle-preemption threshold.” GHAE asserts that the “relevant question remains the ordinary one: whether LSIPA stands as an obstacle to Congress’s purposes and objectives embodied in Section 721... .” Here, Fohn counters that Texas’s control of ERCOT is at the heart of its historic police powers⁴⁹ and that there is not “clear conflict” with any “express federal policy” as in *Garramendi*, 593 U.S. at 425.

GHAE also quibbles with the district court’s handling, *supra*, of the CFIUS safe harbor provision. Attorney General Paxton’s brief responds to that point by noting that the safe harbor provision only insulates a proposed control- or real estate-transaction from *further CFIUS review*, while remaining silent as to any other body of law.⁵⁰

on judicial guesswork about broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law” (cleaned up)).

⁴⁸ Citing 50 U.S.C. § 4565(i) (“No provision of this section shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, or review provided by or established under any other provision of Federal law ...”).

⁴⁹ See, e.g., *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 310, 321 n.6 (5th Cir. 2022) (acknowledging the unique power of the State of Texas to exclude non-incumbent transmission operators from the “intrastate ERCOT market”).

⁵⁰ Cf. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (holding that “matters left unaddressed in [a comprehensive federal statutory] scheme are presumably left subject

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GHAE next points to *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), and claims that *Crosby*’s holding—that Congress’s Act⁵¹ imposing sanctions on Burma conflict-preempted Massachusetts’s Burma Act—applies to and controls the facts of this case.

Finally, GHAE revisits the jurisdictional question, averring that its voluntary letter of agreement brings it into the CFIUS regime. GHAE insists that the letter “supplies the [jurisdictional] hook” needed to create a conflict, as the letter subjects it to continuing federal notice, monitoring, and objection by the DoD. DHAE disclaims the need to identify any separate “covered transaction” that would bring GHAE or Blue Star within the CFIUS framework. Fohn responds by noting that GHAE never alleged before the district court that its interconnection application constituted any “Asset Purchase” under the LOA and that it has never submitted the project to CFIUS. GHAE then proclaims that “against that backdrop” the district court adopted an “unduly narrow reading of Section 721.”

B.

Not every incidental obstacle meets the bar for obstacle-and-purpose preemption. In performing this analysis, “courts may not conduct ‘a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives.’”⁵² “Such an endeavor ‘would undercut the principle that it is Congress rather than the courts that pre-empts state law.’”⁵³

to the disposition provided by state law”).

⁵¹ Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009–121 to 3009–172.

⁵² *Barrosse v. Huntington Ingalls, Inc.*, 70 F.4th 315, 320 (5th Cir. 2023) (quoting *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up)).

⁵³ *Whiting*, 563 U.S. at 607 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in the

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It is always the plaintiff’s burden to identify evidence of preemptive purpose in the “text and structure of the federal provision at issue.”⁵⁴ “Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law.” *Va. Uranium*, 587 U.S. at 767 (lead opinion of GORSUCH, J.). So, any inquiry into whether the DPA conflict-preempts LSIPA turns on the federal statutory scheme’s “text and structure.”⁵⁵

The text and structure of the DPA providing for CFIUS review demonstrate that Congress conferred authority to CFIUS over a specific, narrow class of transactions—not every transaction that might involve a foreign party. *See* 50 U.S.C. § 4565, discussed at some length *supra*. Accordingly, the federal scheme here does not affect a “clear and manifest” preemption of LSIPA. *Deanda*, 96 F.4th at 761.

First, there is no clear obstacle in LSIPA that would impede CFIUS.⁵⁶ LSIPA only purports to block “agreement[s] relating to critical infrastructure,” which generally refers to contracts such as the blocked interconnection agreement, rather than corporate control transactions as in CFIUS.⁵⁷ So, LSIPA does not intersect with any focus of CFIUS. LSIPA also targets a different class of transactions—energy grid interconnections—as distin-

judgment)).

⁵⁴ *Zyla*, 134 F.4th at 329 (cleaned up); *see also Kansas*, 589 U.S. at 214 (THOMAS, J., concurring) (explaining that textualism should guide preemption analysis).

⁵⁵ *Va. Uranium*, 587 U.S. at 768; *see also Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (courts should “examine the federal statute as a whole and identify its purpose and intended effects”) (cleaned up).

⁵⁶ *See* S.B. No. 2116, § 113.002 (a)(1); § 113.002(b).

⁵⁷ TEX. BUS. & COM. CODE § 117.002(a); TEX. GOV’T CODE § 2275.0102(a).

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guished from foreign investment *per se*. Cf. 50 U.S.C. § 4565(a)(4)(B)(i) (covering “*any* merger, acquisition, or takeover”) (emphasis added). Indeed, LSIPA tenably has nothing to do with *federal* critical infrastructure, such as U.S. military basis. Cf. *id.* § 4565(a)(4)(B)(ii). Moreover, even if there is an overlapping scope of federal authority between the generalized interest in ‘all foreign investment’ and the specific state interest in utility regulation, the provision of energy through a power grid to the citizens of one’s own state falls squarely within the heart of the state’s historic police powers. See *NOPSI*, 491 U.S. at 365. And even if we accept GHAE’s premise that the proper target of the regulation is foreign ownership *per se*, in close cases “when there is doubt about preemption, the ‘tie goes to the state.’”⁵⁸

Second, assuming *arguendo* that LSIPA presents any obstacle, it does not *conflict* with the purpose of CFIUS. Little in the express text of CFIUS evinces a purpose discretionarily to balance foreign security threats; instead, the apparent statutory goal is to mitigate and eliminate them. See 50 U.S.C. § 4565(l)(3)(A) (Mitigation—Agreements and conditions). Moreover, LSIPA points in the direction of national security: Responsibly managing interconnections with Texas’s energy grid to ensure its continuous, effective, and safe functioning in providing energy to Texas residents is harmonious with LSIPA but works in a separate lane. As the state puts it, “[e]ach leaves room for the other to operate.” So even assuming GHAE’s argument that LSIPA is a foreign policy statute, it strengthens and does not undermine the United States’ negotiating position. Cf. *Crosby*, 530 U.S. at 373.

Ultimately, GHAE adduces no statutory conflict between CFIUS and LSIPA; no provision of CFIUS’s authorizing statutes or related regulation

⁵⁸ *AbbVie, Inc. v. Fitch*, 152 F.4th 635, 645 (5th Cir. 2025) (quoting *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, 420 F.3d 366, 370 (5th Cir. 2005)).

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tending to exclude tangentially connected State laws; and there is no hard evidence showing that CFIUS's purpose and policy contradicts that of LSIPA.

GHAE's invocation of *Crosby* is also inapposite.

First, the federal statute in *Crosby* (i) imposed mandatory sanctions and (ii) expressly granted the President broad discretion regarding those sanctions, authorizing him to impose "further sanctions subject to certain conditions" and "to waive, temporarily or permanently, any sanction . . . if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." 530 U.S. at 369–70 (citation to the statute omitted).

Second, the Massachusetts Act covered any person doing business essentially of any kind in Burma, which brought it into *statutory conflict* with the federal sanctions regime targeting investments into Burma, *id.* at 366–67, including "by penalizing individuals and conduct that Congress has *explicitly exempted or excluded* from sanctions" and falling outside Congress's "specific range" of sanctions, *id.* at 377–78 (emphasis added). *Crosby* is an example of a case with both textual and purposive conflict between state and federal regimes. This case poses neither.

GHAE similarly confuses the meaning of *Arizona v. United States*, 567 U.S. 387, 399 (2012), as that case contains a more subtle conflict pre-emption analysis, *id.* at 399–415. There, the Court invalidated several provisions of an Arizona law imposing criminal sanctions intended to punish and deter illegal immigration. *Id.* at 393. The Court related the challenged provisions of Arizona's law to specific overriding federal laws, reasoning:

(1) that Arizona's alien-registration requirement was *field* pre-empted by the federal alien registration and work-visa or green-card regime, *id.* at 400–03;

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(2) that the text of the Immigration Control and Reform Act of 1986 conflicted with Arizona’s effort to criminally punish unlawful *employees*, where the ICRA expressly chose to punish *employers*, where the ICRA’s legislative report stated that such penalties would be “unnecessary and unworkable,” and where *other* federal regulations already punished unlawful work, *id.* at 403–07; and

(3) that Arizona’s provision authorizing State officers to conduct warrantless arrests presented an obstacle to federal prosecutorial and investigative discretion as well as to several federal statutes providing for delegations of federal authority to state officers in immigration matters, *id.* at 407–10.

As in *Crosby*, the *Arizona* Court identified specific, textual conflict between the state and federal regimes. In contrast, GHAE speculates about a high-level difference in attitude between LSIPA and CFIUS. Conflict preemption requires more specificity.

IV.

A.

Turning to field preemption, GHAE principally argues that “LSIPA is field-preempted” where “the proper field” “is foreign-actor national security screening and gatekeeping,” which it calls “an area requiring national uniformity and Executive discretion.” GHAE admits that “the field-preemption inquiry must be conducted at the right level of generality,” and then claims that § 721 of the DPA and FIRRMA reflect Congress’s judgment that “national-security risks arising from foreign investment *must* be addressed through a centralized federal process administered by the Executive Branch.”

GHAE characterizes LSIPA as a “gatekeeping rule that bars participation in a sector of Texas’s economy based on nationality and foreign control”; GHAE equates it to Congress’s discretionary and voluntary regime

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reviewing foreign-party control transactions (which refers to mergers, acquisitions, joint ventures, minority stakes and similar corporate transactions rather than any contract involving a foreign entity). GHAE urges that LSIPA supplies a different “rule of decision,” one that is “categorical exclusion rather than federal screening and mitigation.” And GHAE heralds that “[a]llowing LSIPA to stand would fracture the national screening regime into [50] state-by-state enclaves.”

Fohn counters that LSIPA cannot be field preempted because § 721 expresses no intent for a “complete ouster of state power,” and, instead of creating a comprehensive regulatory scheme, provided a voluntary system for reviewing a narrower set of foreign investment transactions.⁵⁹ Fohn contends that GHAE “fail[ed] to properly identify the relevant field” under this court’s requirement that “the relevant field should be defined narrowly.”⁶⁰

Fohn doubts that CFIUS is pervasive in the relevant sense, submitting that “a single nationally accountable mechanism rather than fifty separate state regimes” is present “almost any time Congress grants power to an administrative agency,” but that “few such grants are field preemptive.” Fohn adds that “[w]hen Congress leaves matters ‘unaddressed in an otherwise comprehensive and detailed federal regulatory scheme,’ the unregulated matters ‘are presumably left subject to the disposition provided by state law.’”⁶¹ Fohn also implies that CFIUS’s narrow jurisdiction and lack of express preemption—when compared to LSIPA’s narrow purpose of protecting state infrastructure—fails to show any strongly dominant federal pur-

⁵⁹ Citing *AbbVie, Inc. v. Murrill*, 166 F.4th 528, 539 (5th Cir. 2026) (cleaned up).

⁶⁰ Citing *El Cenizo*, 890 F.3d at 177.

⁶¹ Quoting *AbbVie, Inc. v. Fitch*, 152 F.4th 635, 646 (5th Cir. 2025) (cleaned up).

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pose.⁶² On that point, Attorney General Paxton adds that CFIUS’s *voluntary* reporting and limited scope cut against its dominance and pervasiveness.

B.

The triggers of field preemption are complete pervasiveness and total dominance. *Nat’l Press Photographers*, 90 F.4th at 796. As the district court correctly held, “nothing in the CFIUS statutes suggests an intent to create a pervasive” federal regulatory regime, and so LSIPA is not field preempted.⁶³ CFIUS, as explained above, wields limited authority—and that limited authority does not reflect a Congressional desire to exclusively control all foreign-investment screening.

As a matter of statutory interpretation, we do not infer positive content from silence; neither do we infer an opposite intent. We just infer *no* intent.⁶⁴ For its part, GHAE only gestures at the various structural features of CFIUS, without supplying any language indicating a purpose tending to exclude compatible or even tangentially related state laws, to insist that the federal design is “pervasive” and “dominant.” Whatever brooding impression we might take from the CFIUS regime, unless Congress says something explicitly—which is well within its power—we decline to find field

⁶² Suggesting that immigration exhibits a dominant federal purpose, per *Arizona*, 567 U.S. at 395.

⁶³ *GH Am. Energy*, 815 F. Supp. 3d at 554.

⁶⁴ See generally Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 376 (1986) (the absence of a Congressional statement of intent is not negative intent, it is *no* intent); accord Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997) (against overreading legislative history for underdetermined evidence of Congressional intent).

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preemption.⁶⁵

This court recently addressed a field preemption argument in *AbbVie, Inc. v. Murrill*. 166 F.4th at 538. We upheld Louisiana’s Act 358, which was a state law prohibiting drug manufacturers from interfering with delivery of discounted 340B drugs to contract pharmacies, against the drug manufacturers’ challenge claiming that § 256b of the Veterans Healthcare Act of 1992 creating the 340B program preempted related state laws. “Because [the federal] § 340B evinces no clear and manifest intent to preempt state laws regulating the distribution of drugs to patients and the role of pharmacies in such distribution, [Louisiana] Act 358 is not field preempted.” *Id.* at 540 (cleaned up). So too here, especially where CFIUS expressly disclaims preempting related federal law.⁶⁶ In addition, last year a sister circuit *a fortiori* rejected a field-preemption argument nearly identical to the one GHAE now advances.⁶⁷

* * * * *

If states can impose their own environmental standards or health and safety standards⁶⁸ without triggering field preemption in any area of econ-

⁶⁵ Moreover, there are many bodies of federal economic regulatory law that do not preempt overlapping state laws. Consider, for example, the Securities Regulatory laws vs. State Blue-Sky laws and the Federal Environmental Regulations vs. State environmental standards. Each of those economic regulatory regimes plausibly has incidental effects upon international commerce, but neither is preempted.

⁶⁶ 50 U.S.C. § 4565(i) (“No provision of this section shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, or review provided by or established under any other provision of Federal law ...”).

⁶⁷ See *Shen v. Comm’r, Fla. Dep’t of Agric. & Consumer Servs.*, 158 F.4th 1227, 1262-66 (11th Cir. 2025) (rejecting a § 721-based preemption challenge to Florida’s statute imposing land-ownership restrictions on certain aliens including those from China).

⁶⁸ Cf. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (upholding California’s livestock animal welfare regulation).

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omic regulation, it follows that they can protect their energy grids from data theft and computer viruses. One may disagree with LSIPA and think that the benefits of foreign direct investment include deeper capital markets and potentially greater growth or more efficient pricing. Conversely, the benefits of LSIPA are to provide greater security to Texas's power grid. That kind of discretionary policy-balancing is emphatically *not* the province and role of the judiciary to decide. Where Congress has been silent, and where we do not see any clear conflict or field preemption, Texas has a free lane to enact and enforce LSIPA.

The judgment is AFFIRMED.