No. 20-641

In The
Supreme Court of the United States

LSP TRANSMISSION HOLDINGS, LLC,

Petitioner,

v.

KATIE SIEBEN, DAN M. LIPSCHULTZ, MATTHEW SCHUERGER, JOHN TUMA, VALERIE MEANS, STEVE KELLEY, ITC MIDWEST LLC, NORTHERN STATES POWER COMPANY d/b/a XCEL ENERGY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Minnesota discriminated against interstate commerce in violation of the dormant Commerce Clause by giving its existing regulated providers the right—and a corresponding obligation, if the state regulator so chooses—to build new electric transmission lines that will physically connect to their existing facilities.

CORPORATE DISCLOSURE STATEMENT

Northern States Power Company d/b/a Xcel Energy is a Minnesota public utility corporation that is wholly owned by Xcel Energy, Inc. No publicly held corporation owns 10% or more of Xcel Energy, Inc.'s stock.

ITC Midwest LLC, a Michigan limited liability company, discloses that it is a wholly owned subsidiary of ITC Holdings Corp ("ITC Holdings"). ITC Holdings's sole shareholder is ITC Investment Holdings Inc. FortisUS Inc. owns 80.1 percent of ITC Investment Holdings Inc. FortisUS Holdings Nova Scotia Limited wholly owns FortisUS Inc. Fortis Inc. ("Fortis") wholly owns FortisUS Holdings Nova Scotia Limited. Fortis has no parent company, and no publicly held company has a 10 percent or greater ownership interest in Fortis. Eiffel Investment Pte. Ltd. ("Eiffel"), which is wholly owned by GIC (Ventures) Pte. Ltd. ("GIC Ventures"), indirectly owns 19.9 percent of ITC Investment Holdings Inc. GIC Ventures is affiliated with GIC Private Limited ("GIC"), an investment company that manages the Government of Singapore's foreign reserves, and GIC Special Investments Pte. Ltd., the private equity and infrastructure arm of GIC. GIC and GIC Ventures are each wholly owned by the Government of Singapore through the Ministry for Finance, a statutory corporation set up by the Government of Singapore to own and administer government assets. The Ministry for Finance has no parent company, and no publicly held company has a 10 percent or greater ownership interest in the Ministry for Finance.

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INTRODUCTION

Petitioner LSP Transmission Holdings, LLC ("LSP") wants the Court to make itself an energy-policy czar and order States to rely on unbridled competition rather than regulated monopolies to provide safe, reliable electricity to their citizens. But the actual federal regulator, the Federal Energy Regulatory Commission ("FERC"), has declined to adopt Petitioner's favored policy, and the Commerce Clause provides no basis for arrogating this policymaking role to the judiciary. LSP identifies no basis for the Court to grant review in this case.

First, there is no split in the Circuits. Indeed, the decision below is the first opinion by any appellate court *anywhere* to apply dormant Commerce Clause principles to a state law providing regulated owners of existing electric transmission facilities with a right—and a corresponding obligation, if the state regulator so chooses—to build new transmission lines that will connect to their facilities. Nor is there any conflict between the Eighth Circuit's decision and the decisions of this Court. Quite the contrary, the decision below is entirely consistent with—if not compelled by—this Court's decision in *General Motors Corp.* v. *Tracy*, which rejected a Commerce Clause challenge to another state's utility regulations.

Second, there is no need for judicial intervention because the federal policymaking branches are actively overseeing the underlying regulatory issue. Indeed, just recently, FERC considered and rejected Petitioner LSP's request to require States to take a competitive rather than regulated approach. FERC chose instead to allow States to make their own regulatory choices, deferring to their role in our federalist system.

Third, the decision below was correct in any event. As it recognizes, Minnesota's right-of-first-refusal statute makes the legitimate policy choice to have new transmission lines presumptively be built by the regulated owners of the facilities to which those lines will connect—giving those owners the right of first refusal to build the lines, but also authorizing the state regulator to order them to build the lines. The statute applies this approach neutrally to all companies. All existing facility owners receive the right and bear the potential obligation with respect to new lines that will connect to their own facilities, regardless of whether they are Minnesota or foreign companies. And companies that do not own the facility to which a new line will connect neither receive the right nor bear the obligation, regardless of whether they are Minnesota or foreign companies. There is, in short, no discrimination against interstate companies.

Finally, given the splitless nature of the question and the active involvement of federal authorities, there is no reason for short-circuiting this Court's usual practice of allowing issues to be fully developed in the lower courts before addressing them. That is particularly so because other States enacted similar laws after FERC put the choice to them, which will allow numerous other Circuits to address these issues.

The petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

1. Historical Regulation of the Electricity Market

Ever since electricity was introduced in the United States, policymakers at both the State and federal levels have continuously assessed and adjusted the balance between competition and regulation in the quest to ensure safe, reliable, and cost-effective service.

Many jurisdictions first tried a wholly free-market approach. But as this Court recounted in *General Motors Corp.* v. *Tracy*, "[t]he results were both predictable and disastrous, including an initial period of 'wasteful competition,' followed by massive consolidation and the threat of monopolistic pricing." 519 U.S. 278, 289 (1997) (footnote omitted); see also *id.* at 289 & n.7 (referring to natural gas and noting that "[t]he public suffered through essentially the same evolution in the electric industry," where the open-market approach was "ruinous and short-lived" (internal quotation marks omitted)).

The States thus "learned from chastening experience" that "competition would simply give over to monopoly in due course" and that it was therefore "virtually an economic necessity for States to provide a single, local franchise with a business opportunity free of competition from any source," balanced "by regulation and the imposition of obligations to the consuming public." *Id.*, at 290.

When a State chooses to take a regulated approach, "the two prime requirements of competition as the governing market institution—freedom of entry and independence of action—are deliberately replaced." Kahn, The Economics of Regulation 20 (1988). Instead, the government "determines specifically who shall be permitted to serve; and when it licenses more than one supplier, it typically imposes rigid limitations on their freedom to compete." *Ibid.* The regulator also "determines price, quality and conditions of service, and imposes an obligation to serve." *Ibid.* This balanced structure—a carefully calibrated mix of benefits and obligations for the regulated entity—is frequently referred to as the regulatory "compact." See, *e.g.*, *Jersey Central Power & Light Co.* v. *FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987).

Minnesota is among the many States that learned the danger of relying too heavily on the free market to deliver electricity and chose to take a regulated approach. Its legislature found it "to be in the public interest that public utilities be regulated in order to provide the retail consumers of . . . electric service in this state with adequate and reliable services at reasonable rates." Minn. Stat. § 216B.01.

2. FERC and Its Regulatory Decision to Defer to States in Order No. 1000

Electricity regulation is currently divided between federal and state authorities. This was not always so. Originally, "state and local agencies oversaw nearly all generation, transmission, and distribution" functions. *FERC* v. *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016). But that changed when this Court held that States could not regulate the interstate sale of electricity. See *Pub. Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927), abrogated by *Arkansas Elec. Co-op Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983).

In response to the regulatory void *Attleboro* created, Congress enacted the Federal Power Act ("FPA"). See FPA, ch. 687, Title II, 49 Stat. 838 (1935) (codified as amended at 16 U.S.C. § 824 *et seq*. (2015)). In the FPA, Congress asserted federal regulatory power over "those matters which are not subject to regulation by the States," 16 U.S.C. § 824(a), while expressly preserving State jurisdiction over facilities used for "the generation of electric energy," "local distribution," and "transmission of electric energy in intrastate commerce," *id.* § 824(b)(1). Under the FPA, "[t]he states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities," including facilities that transmit electricity in interstate commerce—the topics at issue in this case. *Piedmont Env. Council* v. *FERC*, 558 F.3d 304, 310 (4th Cir. 2009).

To implement the portion of regulatory power held by the federal government, Congress created a federal executive agency (now FERC) and gave it authority over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(a), (b). Consistent with Congress's direction, FERC has long acknowledged the state interest in regulating "transmission siting," even for interstate lines. *New York* v. *FERC*, 535 U.S. 1, 24 (2002) (quoting FERC); see also *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities*, Order No. 1000, 136 FERC ¶ 61051, ¶ 107 (July 21, 2011) (hereinafter "Order No. 1000") ("We acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relating to siting, permitting, and construction").

Over time, FERC has studied and restudied the balance between competition and regulation, making different decisions for different segments of the electricity industry as its views have changed over time. With regard to *transmission planning*, FERC has shifted to a *regional* approach over the last two decades, guiding the creation of regions that encompass multiple States (and even, in some cases, parts of Canada). See *Reg'l Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61285, ¶ 1 (Dec. 20, 1999); 18 C.F.R. § 35.34. To facilitate planning within these regions, FERC authorized the creation of non-governmental, non-profit entities known as either Regional

Transmission Organizations ("RTOs") or Independent System Operators ("ISOs"). *Ibid.* RTOs and ISOs help to determine when new regional transmission lines should be built.

The issue of regulatory policy underlying this case is not a matter of transmission *planning* (i.e., *whether* a transmission line should be built), but rather of transmission *construction* (i.e., *who* should build the line).

Before 2011, FERC adopted as a matter of federal law the same approach to selecting the builders of new lines that Minnesota has now chosen as a matter of state law—that any new transmission project approved by the ISOs would presumptively be built by the regulated incumbent provider to whose facilities the new line would connect. Order No. 1000, 136 FERC ¶ 61051, ¶ 313.

In 2011, however, FERC revisited its policy choice in order to allow States to make their own regulatory choices about how to select the builders. In its Order No. 1000, FERC decided not only that each State may choose the builders for regionally planned transmission lines located within its borders, but also that States may choose *how* to choose those builders. *Id.*, ¶¶ 7, 107, 227, 253 n.231, 287; see also *MISO Transmission Owners* v. *FERC*, 819 F.3d 329, 332–33 (7th Cir. 2016) (describing this choice). In taking this step, FERC allowed States to adopt a competitive approach, but it did not mandate that approach. States could open themselves to competition if they chose, or they could retain the traditional regulated model that the federal government had previously mandated.

In response to FERC's new approach, some objected that, by eliminating the federal presumption for the incumbent (known as the federal right of first refusal), FERC had intruded on the States' traditional authority to regulate. But as FERC explained, "[e]liminating a *federal* right of first refusal in Commission-jurisdictional tariffs and agreements does not, as some commenters contend, result in the regulation of matters reserved to the states." Order No. 1000, 136 FERC ¶ 61051, ¶ 287 (emphasis added). Quite the contrary, FERC was *deferring* to the States by allowing each one to decide whether to maintain their incumbent providers or adopt new policies that incorporated competition in some form. FERC expressly acknowledged some States would choose to maintain the traditional non-competitive, regulated approach, stating "that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions." *Ibid.* FERC likewise made perfectly clear that Order No. 1000 *would not* "limit, preempt, or otherwise affect" these "state or local laws or regulations." *Ibid.*; see also *id.*, ¶¶ 107, 227, 253 n.231.

Since Order No. 1000 was issued, FERC has repeatedly reaffirmed its stance of deferring to the States' regulatory choices regarding how to choose the builders of regionally planned transmission lines. Indeed, it has emphasized that "state-granted rights of first refusal . . . still exist under state or local law . . .

and nothing in Order No. 1000 changes that law or regulation, for Order No. 1000 is clear that nothing therein is 'intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'" See, *e.g.*, *S.C. Elec. & Gas Co.*, Order on Rehearing, 147 FERC ¶ 61126, ¶ 127 (May 15, 2014).

A federal policy of cooperating with and deferring to state laws, FERC explained, advances the "purpose of Order No. 1000 . . . to facilitate the likelihood that needed transmission facilities will move forward." *Id.*, ¶ 128; see also *PJM Interconnection, L.L.C. Indicated PJM Transmission Owners PJM Interconnection, L.L.C. Pub. Serv. Elec. & Gas Co.*, Order On Rehearing, 147 FERC ¶ 61128, ¶¶ 61730–32 (May 15, 2014).

3. Minnesota's Exercise of Its Regulatory Judgment in Section 216B.246

After FERC issued Order No. 1000 in 2011, Minnesota enacted a statute in 2012 that adopted for Minnesota the same rule that FERC had previously followed at the federal level: new transmission lines would presumptively be built by the existing regulated provider to whose facilities the new line would connect. See Minn. Stat. § 216B.246.

Section 216B.246 fits within Minnesota's broader framework for regulating "large energy facilit[ies]," of which large electric transmission lines are a subset. *Id.*, §§ 216B.243, 216B.2421 subd. 2. The statute both offers benefits to and imposes obligations on owners of transmission facilities. As to benefits, it gives "the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan" to the "incumbent electric transmission owner" whose facilities the new line will "connec[t] to." *Id.*, § 216B.246, subd. 2. As to burdens, the law empowers Minnesota's Public Utilities Commission to *compel* an incumbent to "build the electric transmission line," even if the incumbent initially declines its option to do so. *Id.*, subd. 3(b).

The statute applies equally and identically to *all* incumbent transmission owners, regardless of whether they are Minnesota companies or are instead incorporated, headquartered, or predominately located out of state. Section 216B.246 defines an "incumbent electric transmission owner" as "*any* public utility that owns, operates, and maintains an electric transmission line in this state; *any* generation and transmission cooperative electric association; *any* municipal power agency; *any* power district; any municipal utility; or *any* transmission company. . . ." *Id.*, subd. 1(c) (emphases added). Many of Minnesota's incumbent electric transmission owners are out-of-state entities, including entities headquartered in Iowa, North Dakota, South Dakota, and Wisconsin. Indeed, Respondent ITC Midwest is a Michigan limited liability company headquartered in Iowa.

Just as Section 216B.246's neutral incumbency preference can work to the advantage of out-of-state companies, it also can work to the disadvantage of

Minnesota companies. Minnesota companies whose facilities will not connect to the new transmission line have no ability to compete for that line, just as out-of-state companies whose facilities will not connect to it have no ability to compete for it. There is, in other words, no preference given to "in-state" companies as such. The only preference is given to the companies to whose existing facilities the new lines will connect, regardless of where those companies are from.

4. LSP's Unsuccessful Challenge to FERC's Regulatory Choice

After Minnesota enacted Section 216B.246, the ISO covering Minnesota—the Midcontinent Independent System Operator, Inc. ("MISO"), which encompasses 15 States and parts of Canada—amended its tariff to implement the rights of first refusal that Minnesota and other states had enacted. Consistent with its decision in Order No. 1000 to defer to States, FERC approved that approach in 2015. *Midwest Indep. Transmission Sys. Operator, Inc.*, Order On Rehearing, 150 FERC ¶¶ 61037, 61176 (Jan. 22, 2015).

After FERC approved the tariff, LSP objected and sought reconsideration, arguing that because FERC had eliminated the *federal* right of first refusal, it was obligated to override *State* rights of first refusal. *Id.*, ¶¶ 2, 17–22. FERC rejected LSP's argument as resting on a fundamental misunderstanding of Order No. 1000. By removing a *federal* right of first refusal while reserving the policy choices to the *States*, FERC explained, Order No. 1000 had "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states." *Id.*, ¶ 27. Accordingly, FERC confirmed, it was entirely "appropriate for MISO to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process." *Id.*, ¶ 25.

Having failed to persuade FERC as a matter of regulatory policy, LSP challenged FERC's approval of the MISO tariff in the Seventh Circuit, arguing that FERC's decision to defer to the States was improper under the Federal Power Act. See *MISO Transmission Owners* v. *FERC*, 819 F.3d 329, 336 (7th Cir. 2016). The Seventh Circuit disagreed, holding that FERC's desire "to avoid intrusion on the traditional role of the States in regulating the siting and construction of transmission facilities" was a "proper goal." *Ibid.* (internal quotation marks omitted).

B. Procedural History

1. The District Court Dismisses LSP's Complaint

Then came LSP's third bite at the apple. Having lost on policy grounds before FERC, and having lost on statutory grounds before the Seventh Circuit, LSP decided to argue that the *Constitution* requires all States to adopt its preferred balance of competition versus regulation for the selecting the builders of electric transmission lines.

This suit arose after Respondents Xcel Energy and ITC Midwest exercised their rights of first refusal under Section 216B.246 to build a new 40-mile, 345-kilovolt intrastate electric transmission line. The line will connect on one end to Xcel Energy's Wilmarth substation, north of Mankato, Minnesota, and on the other end to ITC Midwest's Huntley substation, south of Winnebago, Minnesota. App. 7. LSP filed suit in federal district court in September 2017, arguing that Section 216B.246 violates the dormant Commerce Clause.

Respondents Xcel Energy and ITC Midwest sought and were granted leave to intervene, and all defendants moved to dismiss. The District Court granted the motion to dismiss for essentially three reasons. *First*, under this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997), the District Court held that non-incumbent, would-be competitors such as LSP are not "similarly situated" to the existing, regulated transmission facility owners to whose facilities a new line will connect, and thus that distinguishing between them is not discrimination under the dormant Commerce Clause. In so holding, the court emphasized that the State regulators have greater institutional competence than the judiciary to set electricity regulatory policy, and that the judiciary should therefore review their regulatory judgments with due deference. App. 41–42.

Second, the District Court held that, even if those two classes of entities were similarly situated, Section 216B.246's incumbency preference "does not discriminate against out-of-state entities." App. 44. Instead, the court explained, the "statute draws a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state." *Ibid.* Demonstrating that this non-discriminatory character was more than academic, the court observed that, of the sixteen entities that would qualify as "incumbents" under Minnesota law, five "are headquartered outside of Minnesota." *Ibid.* The court also rejected LSP's argument that "any owner of a transmission facility in Minnesota, regardless of their actual headquarters, should be considered 'in-state,'" explaining that "[i]ncumbency bias is not the same as discrimination against out-of-state interests." *Ibid.* (citing *Colon Health Ctrs. of Am., L.L.C.* v. *Hazel*, 813 F.3d 145, 158 (4th Cir. 2016)).

Third, the District Court rejected LSP's claim that Section 216B.246 violates the dormant Commerce Clause by unduly burdening interstate commerce under this Court's decision in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The court held that this claim failed as a matter of law because of Minnesota's "strong and well-recognized interest in regulating the market for electricity that serves its citizens," App. 45, as well as FERC's decision to strike "an important balance" between federal and state regulation by deferring to State rights of first refusal, App. 48.

2. The Eighth Circuit Affirms

LSP appealed, and the Eighth Circuit affirmed, concluding that Section 216B.246 neither overtly discriminates against, nor unduly burdens, interstate commerce.

On the question of overt discrimination, the Court of Appeals concluded that Section 216B.246 does not discriminate on its face, in its effects, or in its purpose. The statute is facially non-discriminatory, the court concluded, because it draws a line based on *incumbency*, not where a company is organized or headquartered. App. 12–14. Nor did the court deem Section 216B.246 discriminatory in its purpose, concluding that the statute is primarily aimed not at protecting in-state interests but at maintaining a regulatory system that has worked and provided adequate and reliable electricity service at reasonable rates to Minnesota residents. App. 17 (internal quotation marks omitted). Finally, Minnesota's right-of-first-refusal law is not discriminatory in effect, the Eighth Circuit ruled, because the "incidental burden" imposed by the statute falls equally on *every* non-incumbent—"whether a Minnesota or an out-of-state entity." App. 19.

Regarding undue burden, the court concluded that the Minnesota legislature's "goal . . . to preserve the historically-proven status quo for the construction and maintenance of electric transmission lines . . . [wa]s within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy." App. 20 (citing 16 U.S.C. § 824(b)(1)) (internal quotation marks omitted). On the other side of the balance, the court concluded that the Complaint did not allege facts showing "that the burden imposed by Minnesota's [right-of-first-refusal] law is clearly excessive in relation to Minnesota's legitimate state interests in regulating its electric industry and maintaining the status quo." App. 21.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted for at least three reasons.

First, there is no conflict that requires resolution. LSP points to no contrary holding of any court of appeals regarding how the dormant Commerce Clause applies to state right-of-first-refusal statutes. Nor is there any conflict with this Court's cases addressing a State's policy choice to take a regulated approach to the service provided by natural gas and electricity utilities. To the contrary, the decision below fully aligns with the case from this Court that is most closely on point—*General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997).

In attempting to create the appearance of a certworthy conflict where none exists, LSP ignores the most on-point cases (i.e., those applying dormant Commerce Clause principles to markets that have historically been regulated and non-competitive), and instead invokes inapposite decisions invalidating laws that discriminated against the flow of articles across State lines. No such flow-control regulation is at issue here: FERC exclusively regulates the sale of interstate electricity, and the only things regulated by Section 216B.246 are the immovable (and entirely intrastate) physical facilities over which the electricity flows. Moreover, because the Eighth Circuit's decision below is the first decision by any appellate court in the country to address this question, the Court would be well-served by allowing the issue to percolate before granting review.

Second, LSP tries to induce the Court to grant certiorari by imagining a race to the bottom among States that would supposedly undermine federal policy. But if there is any real need for federal intervention, as opposed to an imaginary one, it can be addressed by Congress and FERC. In declining to preempt the very state laws at issue here when changing its own policy in 2011, FERC—the responsible federal regulator—has concluded that federal policy is fully consistent with allowing a diversity of state regulatory approaches. Indeed, FERC has refused a request *from this very Petitioner* to *take the same policy approach* that Petitioner asks this Court to mandate as a matter of federal constitutional law. The Court should reject LSP's demand that it usurp the political branches' policymaking prerogative.

Third, this case was correctly decided. Section 216B.246 does not in any way discriminate against interstate commerce. Instead, it applies neutrally and evenhandedly to *all* potential builders of new, significant transmission facilities: Only the owners whose existing facilities will physically connect to the new transmission line have the right to build it. That preference applies equally to all incumbent facility owners, several of whom are organized and headquartered out of state. Moreover, if those owners waive the right of first refusal, there is no preference for prospective bidders incorporated, headquartered, or operating in Minnesota. Simply put, Section 216B.246 is a neutral *incumbency* preference, not a mechanism for disfavoring non-Minnesota economic actors. There is no basis for disturbing the Eighth Circuit's recognition of that reality.

I. THE PETITION FAILS TO DEMONSTRATE A CONFLICT WITH *ANY* PRIOR DECISION OF *ANY* COURT.

A. There Is No Conflict in the Circuits.

The petition identifies no Circuit split on the application of dormant Commerce Clause principles to state right-of-first-refusal laws. Rather, the decision below is (to Respondents' knowledge) the first appellate decision in the country to address that topic.

What is more, the closest cousin to the decision below—*Allco Finance Ltd.* v. *Klee*, 861 F.3d 82 (2d Cir. 2017)—is fully consistent with the Eighth Circuit's analysis. At issue in that case was a Connecticut statute that allowed its electric utilities to meet renewable energy standards by purchasing renewable energy certificates, but only from generation facilities located within or adjacent to Connecticut's regional system

(ISO-NE, similar to MISO in this case). *Id.*, at 92–93. A Georgia-owned generator whose certificates were excluded argued that the statute discriminated against interstate commerce. But the Second Circuit rejected that argument, holding that Connecticut had made a legitimate policy decision permitted by Congress and FERC. Specifically, it held that Connecticut customers had a separate interest in developing renewable energy sources in their region. *Id.*, at 105. The court determined that it should give "controlling significance" to this policy decision, *id.*, at 106, and rejected the Georgia certificate-issuer's Commerce Clause challenge, *id.*, at 107 (citing *Tracy*, 519 U.S., at 307).

Lacking any contrary case decided on even distantly analogous facts, LSP invokes two inapposite decisions from the First and Eleventh Circuits: *Walgreen Co.* v. *Rullan*, 405 F.3d 50 (1st Cir. 2005), and *Florida Transportation Services* v. *Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012).

Neither case supports LSP's claim that a split exists. *Walgreen* involved pharmacies, not electric utilities, and it was premised on the allegedly discriminatory *application* of state requirements to exclude out-of-state competitors. 405 F.3d, at 56. Here, by contrast, LSP raises only a facial challenge. It never argues that Section 216B.246 has been discriminatorily applied to exclude out-of-state companies—and it could not, given that several out-of-state companies are current providers in Minnesota. Still further afield is *Florida Transportation Services*, which involved stevedores, not electric utilities. It also addressed an as-applied challenge rather than a facial one, and it did not even address the question of "discrimination" because the statute at issue was struck down under the *Pike* balancing test, which LSP does not argue in this Court. Compare 703 F.3d, at 1257, with Pet. i. There is no split between the decision below and the decision of any other court of appeals.

Although the decision below is the first circuit-level decision applying the dormant Commerce Clause to right-of-first-refusal statutes like Section 216B.246, that is all but certain to change over time, because—as LSP itself points out—numerous States in at least four other Circuits have enacted similar statutes. See Pet. 35 (citing similar right-of-first-refusal laws enacted in Texas, Oklahoma, Alabama, and Indiana). As evidenced by a challenge to Texas's right-of-first-refusal law that is currently pending in the Fifth Circuit,[1] there is every reason to believe that this issue will benefit from percolation in the lower courts.

The Court should therefore deny the petition.

B. There Is No Conflict with This Court's Cases.

There also is no conflict between the decision below and this Court's cases. The decisions that LSP

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[1] See *NextEra Energy Capital Holdings* v. *D'Andrea*, No. 20-50160 (5th Cir.). The district court decision upheld the Texas law, consistent with the Eighth Circuit's decision below. *NextEra Energy Capital Holdings, Inc.* v. *Walker*, No. 1:19-CV-626-LY, 2020 WL 3580149 (W.D. Tex. Feb. 26, 2020).

relies on in claiming a conflict either involved fundamentally different types of state laws or did not address the issue on which LSP claims a "conflict" supposedly exists. Moreover, the decision of this Court that is most directly on point—*General Motors Corp.* v. *Tracy*—entirely supports, if not compels, the decision below.

1. In claiming a conflict, LSP does not rely on a single decision of this Court addressing a state law selecting the builder for physical, utility infrastructure that everyone agreed had to be built within the state. Instead, LSP relies on entirely inapposite "flow-control" cases that fall into two categories.

In the first category are cases in which the State law either banned or discriminated against goods being imported from out of state. Falling into this bucket are *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), where Massachusetts discriminated in favor of fluid milk produced in the state by giving it a tax subsidy that was denied to milk produced out-of-state, and *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), where Oklahoma required domestic utilities, which historically had purchased virtually all of their coal from mines in Wyoming, to purchase a substantial portion of their coal from mines in Oklahoma instead. From the same mold is *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), where Pennsylvania discriminated in favor of trucks registered in Pennsylvania by providing credits on their registration fees to offset a trucking tax that out-of-state registrants had to pay in full.

To state the obvious: unlike the laws at issue in these cases, Section 216B.246 does not discriminate against a product being imported from out of state. The only product flowing across state lines here is electricity—and the authority to regulate "the transmission of electric energy in interstate commerce" belongs exclusively to FERC. 16 U.S.C. § 824(b)(1). LSP misleadingly intimates (and one of its amicus wrongly argues) that Section 216B.246 should be viewed as a regulation of electricity itself. See, *e.g.*, Pet. 18; Br. of Resale Power Group of Iowa, et al. 14 ("The [Minnesota statute] applies explicitly, and exclusively, to certain interstate commerce within its borders, specifically, the interstate transmission of electricity that is the subject of prior 'federal' review and approval"). But that is plainly wrong. The only item regulated by Section 216B.246 is the fixed, physical infrastructure through which the electricity will flow—and that infrastructure will be (and, for reasons of physics, must be) located quite immovably within Minnesota.

LSP thus turns to a second bucket of cases involving state regulations of facilities. In those cases, however, the state laws unnecessarily required a producer to own or use an in-state facility as a prerequisite to importing a product from out of state. In *Granholm* v. *Heald*, 544 U.S. 460 (2005), the law required out-of-state wineries to establish an in-state distribution operation as a precondition to selling wine directly to consumers, even as it permitted in-state wineries to ship directly to consumers without having distributors. Section 216B.246, in contrast, does not condition access to

Minnesota's electricity customers on owning any transmission facility in Minnesota. The State of Minnesota does not condition the sale or purchase of electricity on ownership of so much as a foot of transmission line. See generally *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 FR 21540-01 ("Order No. 888") (May 10, 1996) (concerning non-discriminatory open access to wholesale markets).

In another case Petitioner cites, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951), the ordinance imposed the (unnecessary) requirement that milk be processed at one of the city's approved plants before it could be sold in the city as pasteurized. But here, no one argues that Section 216B.246 *unnecessarily* requires transmission facilities to be located in Minnesota. To the contrary, the decisions on what lines to build are made in the FERC-sanctioned, regional planning process. Order No. 1000, 136 FERC ¶ 61051, ¶ 6; Minn. Stat. § 216B.246. Section 216B.246 addresses only the question of who should build the transmission lines that the federal process has decided should be built in Minnesota.

In short, Section 216B.246 does not engage in any of the kinds of discrimination against interstate commerce that this Court has struck down. There is no conflict between the decision below and this Court's precedents.

2. Lacking a decision from this Court striking down any similar state regulation, LSP attempts to manufacture a conflict on a matter of high theory: whether a company is considered an in-state entity for dormant Commerce Clause purposes whenever it has *any* "in-state presence" (*e.g.*, property or employees), regardless of the type or magnitude of that presence, and regardless of whether the company is legally organized and physically headquartered out of state. See generally Pet. 22–25.

But while LSP argues that the Eighth Circuit's decision contradicts "decades" of this Court's precedent on this question, in fact not a single case has ruled on or even discussed it. Indeed, LSP tacitly admits this in observing that the Court must have "s[een] no need" to address the question. Pet. 23. But to admit that the question was not addressed is to admit that there is no precedent to conflict with. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925); see also *Lopez* v. *Monterey County*, 525 U.S. 266, 281 (1999) ("[T]his Court is not bound by its prior assumptions").

Moreover, the reason the Court's decisions do not address the issue is because they turn on other grounds. The opinion in *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), is illustrative. There, the Court struck down a statute because it directly discriminated against an out-of-state product (coal) by requiring a percentage of the coal used by coal-fired electric utilities to be mined in-state. The Court thus had no reason to (and therefore did not) examine where the relevant entities were organized, headquartered, or had facilities or employees. The same is true for the other cases that LSP wrongly claims decided the issue: *Dean Milk Co.*, *supra*; *West Lynn Creamery*, *supra*; and *American Trucking*, *supra*.[2]

In short, there is no conflict between the decision below and this Court's cases.

3. Not only is there no conflict between the decision below and this Court's case law, but the Eighth Circuit's decision is fully consistent with this Court's decision most closely on point: *Tracy*, which establishes the rubric by which dormant Commerce Clause challenges to State utility regulations must be assessed.

The core insight of *Tracy* is that when a State has chosen, both historically and in the present day, to take a regulated approach to utilities rather than a competitive one, then courts must be both cautious and deferential in applying dormant Commerce Clause principles to that policy choice. See 519 U.S., at 289 & n.7; *id.*, at 307 (observing that the "noncompetitive character" of Ohio's natural gas market and "the values served by its traditional regulation . . . counsel caution" before concluding that regulated-entity

[2] By contrast, at least one decision of this Court, *Lewis* v. *BT Inv. Mgrs., Inc.*, 447 U.S. 27 (1980), indicates that the location of a company's principal place of business *is* relevant in identifying the actors burdened (or benefited) by a given State's law, *id.*, at 31, 32 n.2.

participants and non-regulated would-be participants are similarly situated for Commerce Clause purposes); *id.*, at 309.

The dispute in *Tracy* centered on an Ohio statute that imposed a five percent tax on sales of natural gas made by independent marketers and producers but which exempted sales made by the regulated, domestic utilities in the interstate competitive market. 519 U.S. at 281–82. The domestic utilities also faced regulatory obligations, due to their status as regulated utilities, that the independent marketers did not.

General Motors, which bought most of its natural gas from out-of-state suppliers, claimed that "by granting the tax exemption solely to [the regulated utilities], which are in fact all located in Ohio," the State had discriminated against out-of-state entities and violated the dormant Commerce Clause. *Id.*, at 285–86.

The Court rejected that argument, concluding that even though the two sets of actors *did* compete in some respects, three considerations obligated it to give greater weight to the areas in which those actors did *not* compete—and thus to hold that they were not "similarly situated" for Commerce Clause purposes. *Id.*, at 303.

Each of those three considerations applies with equal, if not greater, force here.[3]

First, when the regulations in question address important public services—such as providing natural gas and electricity—courts should tread carefully when evaluating a challenge that could disrupt those services. That policy is fully at stake in this case, where LSP is asking this Court to upend regulations of electrical infrastructure that Minnesota adopted expressly because it believed they were the best way to ensure the health and well-being of its citizens. See Minn. Stat. § 216B.01; *supra*, at 4, 9–11.

Second, because the courts are "institutionally unsuited to gather the facts upon which economic predictions can be made, and [are] professionally untrained to make them," they should defer to the policy-making branches of state governments in matters of utility regulation. *Tracy*, 519 U.S., at 308. In *Tracy*, this Court concluded that the judiciary is "ill qualified to develop Commerce Clause doctrine dependent on predictive

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[3] LSP seeks to cast the Eighth Circuit's recognition of Minnesota's legitimate interest in regulating the "siting, permitting, and constructi[on of] transmission lines" as the "creat[ion of] a special immunity from Commerce Clause scrutiny." Pet. 30 (discussing App. 17). Its argument is doubly flawed. *First*, LSP misrepresents the reasoning of the Court of Appeals, which was that Section 216B.246 was not enacted with a discriminatory purpose because the Legislature's goal in enacting the law was to further its legitimate and longstanding interest in providing for the efficient operation of its domestic electricity market. *Second*, LSP has not sought review of the Eighth Circuit's discriminatory-purpose analysis in this Court, see *infra*, at 30 n.5, so its out-of-context quotation has no bearing on the question before the Court.

judgments" about economic consequences of different approaches to balancing competition and regulation in utility markets. *Id.*, at 309. Here, LSP certainly has not shown any way in which the courts' institutional capabilities have grown or expanded in the past two decades. Accordingly, as *Tracy* recognized, the courts should hesitate to create *constitutional* Commerce Clause doctrine based on economic prognostication.

Third, the *Tracy* Court emphasized that the federal judiciary should be especially reluctant to override State regulations when Congress and the Executive have exercised frequent, active, and minute oversight. *Tracy*, *supra*, at 304. When that is the case—as it is here—there is every reason to believe that, "should intervention by the National Government be necessary," the political branches will provide it. *Ibid.*; *id.*, at 310 (quoting *Nw. Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 302 (1944) (Black, J., concurring)).

In short, not only is there no circuit split and no conflict between the decision below and any decision of this Court, but the decision below is entirely consistent with this Court's decision in *Tracy*.

II. THE CLOSE INVOLVEMENT BY CONGRESS AND FERC COUNSELS AGAINST REVIEW.

Despite the absence of any conflict, LSP argues that review is needed—and needed now—because the consequences of declining to intervene will be dark and dire for the national energy market. See Pet. 35. But this argument cannot be reconciled with the policy judgments of Congress and FERC on the very regulatory issues underlying this case.

First, Congress has decided that, in our federal system, the regulation of electricity will be divided between the national government and the States. The national government—through FERC—will regulate the interstate transmission of electricity. But the States will regulate the construction of the fixed physical facilities over which transmission will occur. See *Piedmont Env. Council*, 558 F.3d, at 310 (4th Cir. 2009); see also *New York*, 535 U.S., at 24; *MISO Transmission Owners*, 819 F.3d, at 336. Thus, although Congress *could have* overridden state authority over construction of these facilities, see U.S. Const. art. I, § 8, cl.3; *United States* v. *Lopez*, 514 U.S. 549 (1995); *Gonzalez* v. *Raich*, 545 U.S. 1 (2005), as it did for natural gas, see 15 U.S.C. § 717f, it chose instead to preserve state authority. This alone counsels against judicial intervention.

Second, when it comes to deciding who will build those facilities, FERC has decided *not* to require competition, even for facilities identified for construction in a regional planning process. Instead, FERC has preserved State authority to decide whether instead to maintain a regulated-incumbent approach. *Midwest Indep. Transmission Sys. Operator, Inc.*, Order On Rehearing, 150 FERC ¶ 61037, ¶ 61176–77 (Jan. 22, 2015). Indeed, FERC expressly rejected Petitioner's demand to require States to adopt a competitive approach. See *ibid.* This speaks volumes about the need for *any* kind of federal displacement of state law—

much less displacement on a *constitutional* ground that assumes an absence of federal policymaking action.

All of this shows the wisdom of this Court's deliberative and measured approach, expressed in *Tracy*, to intervening on issues where Congress and the relevant Executive Branch regulator are actively involved in policing the proper balance between state and national control over utilities, and the range of permissible policy choices in how those entities can be regulated.[4]

III. THE DECISION BELOW WAS CORRECT.

Finally, review should be denied because the Eighth Circuit correctly held that Section 216B.246 does not discriminate against interstate commerce on its face.[5]

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[4] Given LSP's patent failure to demonstrate discrimination, the Eighth Circuit found no need to address the deference required by *Tracy*. App. 11. But *Tracy*'s deferential approach would be squarely before this Court on review, and the Court would be required to address it without any assistance from any prior court of appeals decision discussing it. This is all the more reason to deny the petition to allow percolation in the lower courts.

[5] In the text of the question presented and the arguments raised in the petition, LSP asserts only that Section 216B.246 discriminates against interstate commerce on its face. LSP has thus abandoned the arguments on discriminatory purpose, discriminatory effects, and *Pike* balancing claims it advanced in the District Court and Court of Appeals. See Pet. i ("The resulting *facial* discrimination in an interstate market violates even the narrowest conception of the Commerce Clause" (emphasis added)); Pet. 17 (arguing that anti-interstate-commerce discrimination is "obvious on the face of the statute"); Pet. 26–27 (dismissing the

Section 216B.246 makes the policy decision to have new transmission lines presumptively be built by the regulated owners of the facilities to which those lines will connect—giving those owners the right of first refusal to build the lines, and authorizing the state regulator to order them to build the lines. Section 216B.246 applies this approach neutrally to all companies. All existing facility owners receive the right and bear the potential obligation with respect to new lines that will connect to their facilities, regardless of whether they are Minnesota or foreign companies. All companies that do not own the facility to which a new line will connect receive neither the right nor the obligation, again regardless of whether they are Minnesota or foreign companies.

LSP's discrimination claim rests on a misrepresentation of how Section 216B.246 operates. Instead of recognizing that Minnesota has made the regulatory choice to have new transmission lines presumptively be built by the owner (or owners) of the facility (or facilities) to which they will physically connect, LSP erroneously describes Section 216B.246 as creating a pool of favored companies that will be considered for ***all*** new projects in the state. See, *e.g.*, Pet. 22 (describing Section 216B.246 as "facially discriminat[ing] in favor of entities with an existing *presence* 'in this state' "); Pet. 11 ("The statute preserves opportunities

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relevance of *Colon Health Ctrs. of Am., LLC* v. *Hazel*, 813 F.3d 145 (4th Cir. 2016), because it was a "discriminatory effects" case). This piecemeal application of the dormant Commerce Clause framework likewise weighs against review.

for 'incumbents,' defined as entities that have existing transmission facilities 'in this state'"). That is simply incorrect, because the statute does not create a competitive market with a pool of favored participants. Instead, the statute takes a regulated approach, where competition is deliberately replaced by state oversight as the means for ensuring safe, reliable, cost-effective electricity. LSP thus errs in suggesting that Section 216B.246 creates a preference for "in-state" economic actors as a class.[6] In fact, there is no in-state/out-of-state divide that could even trigger Commerce Clause scrutiny.

These features of Section 216B.246 also render inapposite LSP's repeated invocation of this Court's decision in *Tennessee Wine & Spirits Retailers Association* v. *Thomas*, 139 S. Ct. 2449 (2019). At issue in that case was Tennessee's alcohol-licensure regime, which explicitly discriminated against non-residents by denying them alcohol-distribution licenses. *Id.*, at 2461–62. To be eligible for a license, individual applicants were required to have personally resided in Tennessee for two years, and corporate applicants were required to show that their directors, offices, and shareholders had resided in Tennessee for that period. *Id.*, at 2457. This overtly discriminatory scheme is nothing like Section 216B.246, which does not impose *any* Minnesota residency requirement on the directors,

[6] LSP might also argue that it is willing to take on the burdens imposed by the state regime in order to receive its benefits. Yet LSP points to no case holding that the dormant Commerce Clause requires the State to extend its regulatory compact to any entity that wishes to join it. Such a rule would overturn more than 100 years of public utility regulation.

officers, or shareholders of companies. To the contrary, companies that are headquartered, incorporated, and have all of their directors and officers located outside Minnesota are treated on exactly the same terms as companies that are entirely Minnesotan.

Indeed, the fact that companies that are headquartered, incorporated, and principally located outside Minnesota can receive the benefits of the statute is fatal to LSP's facial challenge. Applying Section 216B.246 to benefit such out-of-state entities—entities like Respondent ITC Midwest, which is organized in Michigan and headquartered in Iowa—would plainly not offend the dormant Commerce Clause. But "a plaintiff can only succeed in a facial challenge by 'establish[ing] that ***no set of circumstances exists*** under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added).

Finally, as discussed above, there is no support for LSP's effort to classify all entities that operate any transmission facilities in Minnesota as "Minnesota entities," even if they are incorporated and headquartered in States *other than Minnesota* and operate predominantly outside Minnesota. See Pet. 22–25; App. 13, 18–19. Accepting the proposition that any in-state presence makes a foreign company "local" for purposes of assessing discrimination under the dormant Commerce Clause, would not only expand dramatically the class of allegedly "discriminatory" laws, but also dilute the concept of discrimination to the point of incoherence. A Minnesota law benefiting a Delaware company headquartered in New York City that operates primarily outside Minnesota would be categorized as discriminating against interstate competitors, as indeed would a law benefiting a Chinese company headquartered in Beijing. LSP cites no basis in precedent or first principles that supports judicial displacement of state police power based on such a topsy-turvy approach.

CONCLUSION

Because LSP has identified no split, no conflict with this Court's cases, no error in the decision below, and no supervening need to use the dormant Commerce Clause to overrule the considered policy choices of both Congress and FERC, its petition for certiorari should be denied.

Respectfully submitted,

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