No. 22-601

IN THE

Supreme Court of the United States

CHAIRMAN PETER LAKE, PUBLIC UTILITY COMMISSION OF TEXAS, IN HIS OFFICIAL CAPACITY, *et al.*,

Petitioners,

v.

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED, *et al.*,

Respondents.

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

RESPONDENT ENTERGY TEXAS, INC.'S BRIEF IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

In *Gen. Motors Corp. v. Tracy*, this Court recognized that Congress "has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies." 519 U.S. 278, 304–05 (1997). In 1975, the State of Texas imposed a comprehensive system of regulation over electric transmission and distribution utilities. The Texas Legislature found that utilities "traditionally are by definition monopolies in the areas they serve," and so created the Public Utility Commission of Texas ("PUCT") to "regulate utility rates, operations, and services as a substitute for competition." Tex. Util. Code § 11.002(b).

While certain aspects of the electric industry have become more competitive over the last twenty-five years, Texas has continued to regulate transmission and distribution utilities as local monopolies. One feature of this monopoly regime is a utility's right to "continue and extend service within its area of public convenience and necessity." Act of June 2, 1975, 64th Leg., R.S., ch. 721, § 7, sec. 55(b) (now codified at Tex. Util. Code § 37.101(b)). In response to a PUCT decision that would have opened the door to competitive project bidding in certain portions of the state, the Texas Legislature enacted Senate Bill 1938 ("S.B. 1938"), which reaffirmed that local incumbent utilities have the right to build new transmission lines that interconnect with their existing facilities. Tex. Util. Code § 37.056(e).

As Petitioners have stated, the question presented is "whether, consistent with the Commerce Clause, States may exercise their core police power to regulate public utilities by recognizing a preference for allowing incumbent utility companies to build new

transmission lines, as the Eighth Circuit has held, or if such a preference necessarily violates the Commerce Clause, as the Fifth Circuit held below." Pet. at (I).

CORPORATE DISCLOSURE STATEMENT

Entergy Texas, Inc. is a majority-owned subsidiary of Entergy Corporation, which is a publicly-traded company with no parent company, and no publicly held corporation owns 10% or more of Entergy Corporation's stock.

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STATEMENT

A. Texas' History of Regulating Electric Utilities

At the turn of the 20th century, state and local municipalities generally allowed electricity providers to compete, awarding multiple franchises to serve the same area. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 289-90 (1997) (detailing development of gas industry and noting "essentially the same evolution in the electric industry."). "The results were both predictable and disastrous, including an initial period of wasteful competition, followed by massive consolidation and the threat of monopolistic pricing." *Id*. at 289 (quotation omitted). States responded to virtual "economic necessity" by providing "a single, local franchise with a business opportunity free of competition from any source," balanced by "the imposition of obligations to the consuming public upon the franchised retailers." *Id*. at 290.

Like many other states, Texas learned from "chastening experience," *id*., that electric utilities need to be fully regulated in order to advance the public good. The Texas Legislature's enactment of the Public Utility Regulatory Act ("PURA") in 1975 established the PUCT and created comprehensive regulation, giving the agency authority over utilities' rates, operations, and services. *See* Act of June 2, 1975, 64th Leg., R.S., ch. 721, 1975 Tex. Gen. Laws 2327, 2327–52 (current version at Tex. Util. Code §§ 11.001, *et seq*.).

In 1976, Entergy Texas, Inc. ("Entergy") agreed to submit to Texas' system of regulation under PURA, and in exchange, received a "certificate of convenience

and necessity" to provide electric utility service in the region of Texas it had historically served. ROA.778; *see also Lamb Cty. Elec. Coop., Inc. v. Pub. Util. Comm'n*, 269 S.W.3d 260, 265 (Tex. App.—Austin 2008, pet. denied) (describing Texas' imposition of regulation and the PUCT's certification regime). Today, Entergy serves nearly 500,000 customers under rates, operations, and services that are comprehensively regulated by the PUCT. ROA.778.

Texas' model displaces competition altogether in favor of state enforced monopolies - an example of a regulatory "compact," where "a monopoly on service in a particular geographical area . . . is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring)(citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 756-57 (1968)). With PURA's original enactment, Texas conferred to utilities these monopoly rights, which included the right to construct new transmission lines within their service territories: "[n]otwithstanding any other provision of law, a public utility shall have the right to continue and extend service within its area of public convenience and necessity." Act of June 2, 1975, 64th Leg., R.S., ch. 721, §7, sec. 55(b) (now codified at Tex. Util. Code § 37.101(b)).

B. Texas' Partial Deregulation

In 1999, the Texas Legislature revised PURA to deregulate portions of the electricity market within the Electric Reliability Council of Texas ("ERCOT") region. *See* Tex. Util. Code § 39.001(a). ERCOT is a transmission system, or "grid," located entirely within

Texas. It is not generally interconnected with the other regional transmission systems in the U.S., including some that cover portions of Texas. The 1999 revisions required utilities within ERCOT to "unbundle" their generation and retail delivery businesses from their transmission and distribution business. *Id.* at § 39.051(b). However, and conversely, PURA prohibits utilities that serve the portions of Texas outside ERCOT from unbundling. *Id.* at §§ 39.401; 39.452(a); 39.501; 39.551. These utilities remain vertically integrated, providing generation, transmission and distribution, and retail delivery services to customers within their certificated areas.

The other regional transmission systems in Texas besides ERCOT are the Midcontinent Independent System Operator, Inc. ("MISO"), where Entergy is located, the Southwest Power Pool, Inc. ("SPP"), and the Western Electricity Coordinating Council ("WECC"). Because ERCOT is located wholly within Texas and not part of the interstate grid, it is not generally subject to Federal Energy Regulatory Commission ("FERC") regulations. Public utilities operating outside of ERCOT, such as Entergy, are subject to both federal and state regulations. Nonetheless, Texas exercises exclusive jurisdiction over the siting, permitting, and construction of all transmission facilities everywhere in the state. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014).

Texas also sets the transmission rates for every public utility that owns and operates transmission lines in Texas regardless of where the utility is located. Texas, not FERC, exercises rate jurisdiction in ERCOT because the system is wholly intrastate. And Texas retains ratemaking jurisdiction in the

areas outside of ERCOT even though the non-ERCOT utilities' transmission systems are interconnected across state lines, and thus might otherwise be subject to FERC's rate jurisdiction, because the utilities in this part of Texas remain vertically integrated, providing fully-bundled service. *See New York v. FERC*, 535 U.S. 1, 11-12, 25-28 (2002) (affirming FERC's conclusion that states retain ratemaking jurisdiction over bundled retail transmission sales).

C. FERC Order 1000

In 2012, FERC issued Order No. 1000 ("Order 1000") to promote transmission planning within the various regional grids under its jurisdiction. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 48. The order required regional transmission organizations ("RTOs") to develop regional transmission plans that include provisions for allocating the cost of transmission facilities developed under such plans. *Id*. Order 1000 also requires the elimination of federal rights of first refusal afforded to incumbent transmission owners for regional projects, but permits the continued enforcement of federal rights of first refusal for other project types; Order 1000 also specifically preserved and continued the recognition of state rights of first refusal for all project types. *See MISO Transmission Owners v. FERC*, 819 F.3d 329, 335-36 (7th Cir. 2016). Order 1000 thus required RTOs to allow competitive bidding for a narrow slice of projects – but only when the entity eligible to construct the line has not already been determined by state law.

Order 1000 was concerned with ensuring the reasonableness of rates charged under federal tariffs. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 64. FERC was not "effectively making decisions about which

transmission facilities will be sited and constructed." *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000–A, 139 F.E.R.C. ¶ 61,132, para. 191 (May 17, 2012) ("Order 1000-A"). Instead, Order 1000 "take[s] great pains to avoid intrusion on the traditional role of the States," *S.C. Pub. Serv. Auth.*, 762 F.3d at 76, clarifying that "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order 1000, 136 FERC ¶ 61,051, para. 227 (July 21, 2011).

After Order 1000 was issued, RTOs, including MISO, eliminated certain federal rights of first refusal from their tariffs, as FERC required. But several RTOs, including MISO, where Entergy is located, incorporated provisions into their tariffs that give effect to state rights of first refusal. MISO Tariff, Attachment FF, § VIII.A.1.[1] Respondent LSP Transmission Holdings II ("LSP") challenged FERC's authority to approve the revisions giving effect to state rights of first refusal. But the Seventh Circuit rejected LSP's arguments, recognizing that the agency "wanted to 'avoid intrusion on the traditional role of the States' in regulating the siting and construction

[1] The tariff provides: "[t]he Transmission Provider [MISO] shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner." *Available at*: https://docs.misoenergy.org/legalcontent/Attachment_FF_-_Transmission_Expansion_Planning_Protocol.pdf.

of transmission facilities." *MISO Transmission Owners*, 819 F.3d at 336 (quoting *S.C. Pub. Serv. Auth.*, 762 F.3d at 76).

Having lost its challenge to state rights of first refusal at FERC and the Seventh Circuit, LSP sued the Minnesota Public Utilities Commissioners in federal court, alleging that the dormant Commerce Clause invalidates these state provisions. The district court of Minnesota disagreed, dismissing LSP's suit on motions to dismiss under Rule 12(b)(6), a decision that was affirmed by the Eighth Circuit. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1025, 1031 (8th Cir. 2020) *cert. denied*, No. 20-641, 2021 WL 769770 (Mar. 1, 2021).

D. Texas Reaffirms Transmission Rights of First Refusal

After FERC issued Order 1000, SPS and SPP (the regional transmission organization in which SPS operates) asked the PUCT for a declaration regarding whether SPS retained a right of first refusal to build new transmission lines in its service territory, or whether new entrants could be certified to build lines there. ROA.152. The PUCT issued an advisory opinion declaring that it could certify transmission-only utilities outside ERCOT and that SPS did not retain a state right of first refusal. ROA.168. Entergy, SPS, and others appealed that decision. ROA.114. While the appeal was pending, and before any new-entrant certifications, the Legislature passed S.B. 1938 to clarify and reaffirm that incumbent transmission owners retain a right of first refusal to build new lines that connect to their existing

infrastructure.[2] ROA.2153 (Senate Bus. & Commerce Comm., Bill Analysis, Tex. S.B. 1938, 86th Leg., R.S. (2019) ("Today in Texas, the entity that owns the endpoint of an existing transmission line is the entity that has the right to build any new facility that may be interconnected . . . .")).

S.B. 1938 provides in relevant part: "[a] certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility may be granted only to the owner of that existing facility." Tex. Util. Code § 37.056(e). That provision is little more than a statutory corollary to the original Texas right of first refusal law, adopted in 1975: "a public utility shall have the right to continue and extend service within its area of public convenience and necessity." Act of June 2, 1975, 64th Leg., R.S., ch. 721, §7, sec. 55(b) (now codified at Tex. Util. Code § 37.101(b)).

Critically, in addition to preserving Texas' historical regulatory model, S.B. 1938 ensures that Texas retains jurisdiction to set the retail transmission rates charged by utilities that operate within its borders – an express purpose of the legislation. ROA.2153 (Senate Bus. & Commerce Comm., Bill Analysis, Tex. S.B. 1938, 86th Leg., R.S. (2019) ("[T]his legislation will ensure that the PUC maintains its current jurisdiction over transmission rates borne by Texas customers rather than having a federal rate."); *see also New York*, 535 U.S. at 11-12, 25-28. This purpose of S.B. 1938 preserves Texas' ability to advance its own policy and sovereign

[2] *See Entergy Texas, Inc. v. Pub. Util. Comm'n of Texas*, No. 03-18-00666-CV, 2019 WL 3519051, at *1 (Tex. App.—Austin, Aug. 2, 2019) (appeal dismissed as moot).

interest in the establishment of electricity rates paid by Texas citizens.

E. NextEra and the Hartburg-Sabine Project

NextEra and its affiliates ("NextEra") seek to build transmission projects that have been selected for competitive bidding by FERC-regulated regional transmission organizations. ROA.29-30. The relevant NextEra entities are "transmission-only" utilities: they do not own generation or distribution facilities, nor do they serve retail customers.[3] ROA.77. Because transmission-only service, unlike Entergy's, is "unbundled," FERC alone sets these NextEra entities' rates; states lack jurisdiction to do so. *See New York*, 535 U.S. at 23-24.

In February 2018, while the PUCT's advisory opinion was on appeal, and prior to the adoption of S.B. 1938, MISO issued a request for proposals to develop the Hartburg-Sabine Junction 500 kV transmission project, a large transmission facility slated to be located within Entergy's service territory. ROA.52. NextEra was selected, and entered into an agreement with MISO in which NextEra promised to develop the line in exchange for the right to charge rates under MISO's tariff. ROA.425, 444. NextEra's agreement was contingent on obtaining all state regulatory approvals, including a certificate of convenience and necessity from the PUCT. ROA.471.

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[3] Respondents NextEra Energy Transmission Midwest, LLC and NextEra Energy Transmission Southwest, LLC are the relevant transmission-only utilities. ROA. 77.

F. Procedural History

NextEra responded to S.B. 1938's passage by filing suit in the Western District of Texas to invalidate the legislation's provisions under the dormant Commerce Clause and Contracts Clause. ROA.27. The district court granted the Commissioners' motion to dismiss,[4] but a divided Fifth Circuit panel reversed, holding that S.B. 1938 facially discriminates against interstate commerce. Pet. App. 40a.

Despite (and without acknowledging) Texas' 47-year history of regulating the construction, ownership, and operation of transmission lines as a monopoly service, the panel majority declared that the Texas transmission market is "undoubtedly competitive." Pet. App. 21a. According to the panel majority, under S.B. 1938, "[c]ompanies with existing transmission lines in Texas may continue to compete in the transmission line market; companies without any lines in Texas cannot build lines in the state." Pet. App. 34a. The panel concluded that "competition based on the existence or extent of a business's local foothold is the protectionism that the Commerce Clause guards against," and "therefore reverse[d]" the district court's dismissal of NextEra's Commerce Clause claim.[5] *Id.*

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[4] The Petition sets forth much of the procedural history, which Entergy will not repeat here.

[5] The panel affirmed the district court's dismissal of NextEra's Contracts Clause claim, a matter that is not at issue under the Petition.

SUMMARY OF ARGUMENT

Under this Court's "negative" or "dormant" Commerce Clause jurisprudence, the Constitution "prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (citations omitted). While the line between interstate and intrastate commerce in the electricity market has evolved and can sometimes be difficult to parse, *see New York v. FERC*, 535 U.S. at 20-21, 24, none of the Court's dormant Commerce Clause decisions suggest that states are constitutionally required to open their monopoly public utility services to competition. As the Court recognized in *Gen. Motors Corp. v. Tracy*, "Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies." 519 U.S. 278, 304–05 (1997).

Congress' recognition of the states' power to regulate utilities as monopolies should be given controlling weight. Since this Court's decision in *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), Congress, by legislation and delegation, has set out the boundaries of permissible state regulation of electric utilities. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265-66 (2016) (describing Congress' enactment of the Federal Power Act ("FPA") and FERC's subsequent implementation of that legislation). The dormant Commerce Clause thus has little or no work to do in this area. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) ("When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it

matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.").

Because the transmission segment of the electric utility industry is "characterized by natural monopoly," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008), Texas has imposed comprehensive regulation as a complete substitute for competition. Tex. Util. Code §§ 11.002(b); 37.056(e); 37.101(b). Texas' policy choice "favors displac[ing] competition with regulation or monopoly public control in this area." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (quotation omitted). The panel majority "may not agree with that approach, but nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary." *Id.* at 344-45.

The Commissioners' petition for writ of certiorari should be granted.

ARGUMENT

A. The Panel Opinion Conflicts with This Court's Dormant Commerce Clause Precedents

The dormant Commerce Clause prohibits "state regulation . . . that imped[es] free private trade in the national marketplace." *Tracy*, 519 U.S. at 287 (quotation omitted). The predicate to every successful dormant Commerce Clause challenge must therefore involve "free private trade." *Id.* The panel opinion errs at the outset by mistaking the ownership and operation of transmission lines for a competitive

enterprise. Pet. App. 20a. The opinion declares that S.B. 1938 "governs only a competitive market," *id.*, and is impermissibly discriminatory because "[c]ompanies with existing transmission lines in Texas may continue to compete in the transmission line market" while "companies without any lines in Texas cannot build lines in the state," Pet. App. 34a. But Texas' enactment of PURA in 1975, and clarification through S.B. 1938, substitutes comprehensive regulation for competition in the construction, ownership, and operation of transmission lines. Tex. Util. Code §§ 11.002(b); 37.056(e); 37.101(b); *see also* discussion *supra* at 1-4, 6-7. Texas has provided each public utility a franchise "free of competition from any source, within or without the State . . . ." *Tracy*, 519 U.S. at 290.

Texas' policy choice is consistent with FERC's implementation of the FPA, a set of laws intended to fill the "'*Attleboro* gap'—a regulatory void" created by a previous dormant Commerce Clause decision by this Court that "only Congress could fill." *Elec. Power Supply Ass'n*, 577 U.S. 260, 266. While Order 1000 required the removal of federal rights of first refusal from federal tariffs for certain projects, it did not purport to create a competitive market. The order (1) does not even require the implementation of any plan developed under it, FERC Order 1000-A, 139 F.E.R.C. ¶ 61,132, para. 191, and (2) where competitive bidding does take place, "nothing in Order No. 1000 explicitly or implicitly requires that any transmission facilities be sited, permitted, or constructed," *id.* The selection of a developer for a given project "only establishes how the developer may allocate" costs "if it is built." *Id.*

Order 1000 may encourage one minor element of competition, namely, project bidding, but all other

elements of the siting, construction, and operation of transmission lines continue to be regulated either by FERC or state utility commissions. NextEra's Complaint belies the fundamentally non-competitive nature of the transmission industry where it complains that S.B. 1938 bars its "entry to the Texas transmission-development marketplace as regulated utilities." ROA.57. NextEra desires certification as a public utility, ROA.49., so it can charge FERC-regulated rates, ROA.53, for transmission lines it would build after state determinations of need (*id*.). The panel opinion labels this regulatory regime a "competitive system," Pet. App. 9a, then leaps to the conclusion that the transmission market is "undoubtedly competitive" for purposes of dormant Commerce Clause review, Pet. App. 21a, without any basis in this Court's decisions or recognition of Texas' consistent, historical regulation of transmission lines as monopolies.

Instead of creating a new free market for transmission lines, Order 1000 "affirm[s] . . . that the states have a significant jurisdictional role in the siting, permitting, and construction of transmission facilities." Order No. 1000–A, 139 F.E.R.C. ¶ 61,132, para. 187. As a result, FERC appropriately concluded that state right of first refusal laws could be incorporated into federal tariffs. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016). That decision overlaps with another jurisdictional determination relevant here, FERC's decision in Order 888 that states retain jurisdiction to set transmission rates that are part of fully-bundled electric service. *New York*, 535 U.S. at 11-12, 25-28. Every public utility that operates in the non-ERCOT areas of the state provides fully-bundled service, and

S.B. 1938 was enacted specifically to preserve the State's ratemaking jurisdiction over such public utilities. ROA.2153. The entry of transmission-only, unbundled utilities such as NextEra into these areas of Texas would carry with it the yielding of the state's rate jurisdiction to FERC, and with it, the substitution of FERC's rate policy for that of Texas – a result S.B. 1938 was adopted specifically to prevent. *Id*. Texas' assertion of regulatory jurisdiction is permissible under the FPA, and reflects "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

The panel opinion's admitted difficulty in deciphering *Tracy*, Pet. App. 18a-19a, is rooted in a mistake about what remains subject to Commerce Clause review now that Congress (and FERC) have spoken. Since the enactment of the FPA, this Court's "main focus -- in determining the permissible scope of state regulation of utilities" has shifted from the "constitutional issues that concerned [the Court] in *Attleboro* to analyses of legislative intent." *Ark. Elec. Coop. Corp*., 461 U.S. at 379. The areas in which the Court has continued to subject state action involving public utilities to Commerce Clause scrutiny involve a utility's participation in some other, private market, *e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 457 (1992) (utility coal purchases), a "right of access" to natural resources, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982), alleged differential treatment of private marketers and public utilities, *Tracy*, 519 U.S. at 310, or state regulation of otherwise unregulated electric cooperative rates, *Ark. Elec. Coop. Corp*., 461 U.S. at 384. None of these cases

suggest that states' regulation of public utility rates and services is subject to dormant Commerce Clause scrutiny. *See United Haulers Ass'n*, 550 U.S. at 343 ("Nothing in this Court's negative Commerce Clause jurisprudence' compels the conclusion that private marketers engaged in the sale of natural gas are similarly situated to public utility companies." (internal quotation omitted)).

Congress' purpose in passing the FPA was to "fill a regulatory gap, not to perpetuate one." *Ark. Elec. Coop. Corp.*, 461 U.S. at 384. FERC's determinations regarding where federal power ends and state power begins in the electric industry are entitled to deference. *New York*, 535 U.S. at 28. Because Congress has "struck the balance it deems appropriate," the panel majority was "not free" to subject S.B. 1938 to dormant Commerce Clause scrutiny. *Merrion*, 455 U.S. at 154. *Merrion's* admonishment is particularly apt for an industry that has historically operated under state-sanctioned monopolies with Congressional approval, as is the case here. *Tracy*, 519 U.S. at 304–05.

Ultimately, the panel opinion improperly substituted its judgment regarding whether transmission line ownership should be a competitive market for the policy choice already made by Congress, FERC, and Texas. *See United Haulers Ass'n*, 550 U.S. at 343 ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition."). The panel opinion "would broaden the negative Commerce Clause beyond its existing scope, and intrude on a regulatory sphere traditionally occupied

by . . . the States." *Tracy*, 519 U.S. at 313 (Scalia, J., concurring). In doing so it threatens to "destroy[] a regulatory scheme of public service and protection recognized by Congress . . . ." *Id*. at 309.

B. The Panel Opinion Creates and Deepens Circuit Court Splits

The Petition convincingly describes the ways in which the Fifth Circuit panel created and deepened circuit court splits regarding: (1) whether a law that applies evenly to all businesses, regardless of domicile, can run afoul of the dormant Commerce Clause (Pet. at 24-27), and, somewhat relatedly, (2) whether incumbency should be viewed as a proxy for impermissible local favoritism (Pet. at 27-28). Entergy will not repeat those arguments here, but notes that the rule prohibiting state discrimination against interstate commerce follows from the "principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). S.B. 1938 does not discriminate against out of state "citizens" because 10 out of 13 investor-owned utilities that have transmission lines in Texas are owned by companies headquartered outside Texas. ROA.1903-2040. The circuit splits at issue here have wide applicability, and numerous industries would benefit from the Court's guidance on these issues.

C. The Regulation of the Transmission Industry is a Matter of Great Importance

"The electric power sector is among the largest in the U. S. economy, with links to every other sector." *West Virginia v. EPA*, 142 S. Ct. 2587, 2622 (2022)

(Gorsuch, J., concurring) (quoting N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent "Major Questions" Doctrine, 49 Conn. L. Rev. 355, 388 (2016)). The transmission sector is a substantial part of this industry. A single transmission line at issue below, the Hartburg-Sabine transmission project, carried an estimated price tag of between $95 million and $133 million dollars. ROA.306. The costs of these projects are ultimately born by captive ratepayers who have no choice regarding whether or how much they will pay for the service. Texas has a significant interest in ensuring that the utilities provide transmission service in a safe, reliable, and cost-efficient manner. *Ark. Elec. Coop. Corp.*, 461 U.S. at 377.

The panel opinion threatens chaos on the transmission market. It declares the construction, ownership, and operation of transmission lines a "competitive market," that states cannot impede, but does not, and cannot, provide a framework for how the transmission market should operate going forward. *See Tracy*, 519 U.S. at 304. Congress has steadfastly refused to give FERC transmission siting authority or the power to confer eminent domain on transmission owners, except in very narrow circumstances not applicable here. *See* 16 U.S.C. § 824p(a). Instead, Congress has left these areas to state control. "Regulation of land use, as through the issuance of the development permits . . . is a quintessential state and local power." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op.) (citing *FERC v. Mississippi,* 456 U.S. 742, 767–68, n. 30 (1982)).

If the construction, ownership, and operation of transmission lines are truly competitive, are states now to return to the former days of "laissez-faire" and

rely on "competition to protect the public interest"? *Tracy*, 519 U.S. at 289. States have seen this movie before: "the results [are] both predictable and disastrous, including an initial period of 'wasteful competition,' followed by massive consolidation and the threat of monopolistic pricing." *Id.*

If not a truly free market, then have states become, under the panel opinion, mere rubber stamps for the selections produced by Order 1000 projects? *See* Pet. App. 9a. That result is wholly inconsistent with FERC's design, where "nothing in Order No. 1000 explicitly or implicitly requires that any transmission facilities be sited, permitted, or constructed," FERC Order 1000-A, 139 F.E.R.C. ¶ 61,132, para. 191, and states retain a "significant jurisdictional role in the siting, permitting, and construction of transmission facilities," *id.* at para. 187.

The panel majority lacks the "expertness and the institutional resources necessary to predict the economic effects of [its] judicial intervention" in the transmission market. *Tracy*, 519 U.S. at 281. Instead, "Congress has both the power and the institutional competence to decide upon and effectuate any desirable changes in the scheme that has evolved" in the market for transmission lines. *Id.* Texas' continued regulation of transmission as a natural monopoly is fully consistent with federal policy and this Court's dormant Commerce Clause precedents.

CONCLUSION

For the reasons set forth herein and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 2023