No. 22-601

IN THE

Supreme Court of the United States

PETER LAKE, CHAIRMAN, PUBLIC UTILITY COMMISSION OF TEXAS, *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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Texas may prohibit all entities without existing facilities in the State from building, owning, or operating new transmission lines in Texas, where those transmission lines serve interstate power grids and where FERC and interstate power grid operators have allowed competition for building such projects.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents NextEra Energy Capital Holdings, Incorporated; NextEra Energy Transmission, L.L.C.; NextEra Energy Transmission Midwest, L.L.C.; Lone Star Transmission, L.L.C.; and NextEra Energy Transmission Southwest, L.L.C., state that they are all direct or indirect subsidiaries of NextEra Energy, Inc., which is a publicly held corporation with no parent company, and no entity owns 10% or more of its stock.

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STATEMENT

A Texas law prohibits any company without an existing in-state presence from building new transmission lines in the State, even in those parts of Texas serviced by interstate power grids, and even where the operators of those interstate power grids have allowed competitive bidding for contracts to build new transmission lines. The Fifth Circuit correctly held that this law facially discriminates against interstate commerce, and further held that NextEra's[1] challenge to the enforcement of this law should not have been dismissed by the district court. The Fifth Circuit appropriately remanded to the district court for further development on the merits of NextEra's Commerce Clause claims.

The petition should be denied, as the case remains in an interlocutory posture and many of Petitioners' arguments depend on contested issues of fact—such as Petitioners' assertions about the supposed benefits of the challenged law, or about the law's primary beneficiaries. Moreover, although NextEra believes all State right-of-first-refusal laws violate the Commerce Clause, this case is a particularly poor vehicle for resolving the questions Petitioners identify, since the Texas law at issue here is more extreme than the right-of-first-refusal laws in other States. Finally, contrary to Petitioners' arguments, the decision below is correct under this Court's precedents, which have consistently found local-presence require-

1. Respondents NextEra Energy Capital Holdings, Incorporated; NextEra Energy Transmission, L.L.C.; NextEra Energy Transmission Midwest, L.L.C.; Lone Star Transmission, L.L.C.; and NextEra Energy Transmission Southwest, L.L.C. are collectively referred to herein as "NextEra."

ments like the Texas law here to be inconsistent with the Commerce Clause.

I. Statutory and Regulatory Background

A. The Federal Power Act and FERC

In the early 20th Century, "state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in confined geographic areas." *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). Although States possessed broad power to regulate all levels of these systems, in 1927, the Court found that a State's attempt to regulate the rates of electricity sold across State lines violated the Commerce Clause. *Pub. Utils. Comm'n of R.I. v. Attelboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927). The Court reasoned that the regulation imposed a "direct burden upon interstate commerce," and accordingly, only Congress had the power to regulate the interstate transactions. *Id.*

Congress responded by enacting the Federal Power Act ("FPA"). *New York v. F.E.R.C.*, 535 U.S. 1, 6 (2002); *see also* 16 U.S.C. §§ 791 *et seq.* The FPA charges the Federal Energy Regulatory Commission ("FERC") with providing "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York*, 535 U.S. at 6. The FPA gave FERC jurisdiction over the transmission of electricity in interstate commerce. *Id.* at 6-7.

FERC has used this authority to encourage competition for electric infrastructure. Vertically integrated

utilities, which historically operated most transmission infrastructure, often prevented the expansion of new market entrants by refusing to deliver wholesale energy produced by these emerging generators, or by making their transmission lines available to competitors "only on inferior terms." *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 49-50 (D.C. Cir. 2014). To address this anticompetitive behavior, FERC adopted a series of orders to foster competition in the transmission of electricity:

- Order No. 888, adopted in 1996, "required each jurisdictional electric public transmission provider," to set a separate rate for its transmission services and charge all other users the same transmission price it would charge for transmission of its own electricity. *S.C. Pub. Serv. Auth.*, 762 F.3d at 50; *see also New York*, 535 U.S. at 11. The goal was to open the grid to new sources of electric power by allowing new electricity generators access to transmission lines on an equal basis. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 50; *New York*, 535 U.S. at 11.

- Order No. 2000, adopted in 1999, sought to encourage transmission owners operating in interstate commerce to cede operation of their transmission systems to regional transmission organizations ("RTOs") and independent system operators ("ISOs") (collectively "ISOs"). *See* 65 Fed. Reg. 810; Pet. App. 5a. ISOs are non-governmental bodies, created under FERC's authority, which are charged with operating and planning the transmission grid on a regional basis. *See* 65 Fed. Reg. 810; Pet. App. 5a.

- Order No. 890, adopted in 2007, required "each transmission provider to establish an open, transparent, and coordinated transmission planning process." *S.C. Pub. Serv. Auth.*, 762 F.3d at 51.

Finally, in 2011, FERC adopted Order No. 1000. To facilitate investment in new, electric-transmission facilities, Order 1000 required ISOs to eliminate right-of-first-refusal provisions for regional transmission facilities from their FERC-approved tariffs and agreements. *Id.* at 48-53.

Before Order 1000, most ISOs (including the two interstate ISOs in Texas, the Midcontinent Independent System Operator, Inc. ("MISO") and the Southwest Power Pool, Inc. ("SPP")), had tariff provisions that gave incumbent transmission owners the right to construct and operate new transmission facilities in their service areas. ROA.37-38 (¶ 31). In Order 1000, FERC repudiated that practice, finding that "it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Order 1000, *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities*, 136 FERC ¶ 61051 at ¶ 256 (F.E.R.C. July 21, 2011). Thus, failing to remove rights of first refusal "would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs." *Id.* ¶ 253.[2]

2. On April 21, 2022, FERC issued a notice of proposed rulemaking ("NOPR") proposing to, *inter alia*, allow the reinstatement of rights of first refusal for two categories of regionally

B. Order 1000 in Texas

Texas has two federal ISOs and one Texas-only ISO. Pet. App. 6a. Relevant here, the federal ISOs are: (1) MISO, which spans much of the midwestern United States, parts of Canada, and parts of eastern Texas; and (2) SPP, which runs from Canada into parts of eastern Texas and the Texas panhandle. *Id.* The Texas-only operator is the Electric Reliability Council of Texas ("ERCOT"). *Id.*

The areas of Texas within SPP or MISO have transmission systems that cross state lines and are thus subject to concurrent FERC and Public Utility of Texas ("PUCT") jurisdiction. ROA.33-34 (¶ 19). The PUCT sets retail rates, Tex. Util. Code § 36.001, but FERC sets wholesale transmission rates, 16 U.S.C. § 824(b). Because MISO and SPP are FERC-created ISOs, they are subject to Order 1000, and these regions within Texas are the subject of this case. ROA.41 (¶ 42).

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planned transmission projects: (i) joint ownership projects; and (ii) planned in-kind replacements of existing incumbent-owned facilities that are "right-sized" by the planning region to accommodate regional needs. *See Building for the Future Through Electric Regional Transmission Planning & Cost Allocation & Generator Interconnection*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,028 at ¶¶ 336, 408 (2022). Comments filed on the NOPR included significant opposition to FERC's proposed partial reinstatement of federal rights of first refusal. Notably, the U.S. Department of Justice and Federal Trade Commission observed in joint comments opposing the reinstatement of rights of first refusal that "vigorous competition gives consumers the benefits of lower prices, higher quality goods and services, increased access to goods and services, and greater innovation." *See* Joint Comment of the United States Department of Justice and Federal Trade Commission at 3-4, Docket No. RM21-17-000 (filed Aug. 17, 2022). The NOPR is currently pending, with no set timetable for FERC action.

In response to Order 1000, MISO and SPP amended their tariffs to remove their federal rights of first refusal and to implement competitive bidding for new transmission projects that are part of the interstate transmission grid. ROA.41 (¶ 42). MISO, for example, adopted a process governing competitive bids. ROA.42 (¶ 43). When it did so, MISO added language to its tariff to recognize state-created rights of first refusal. ROA.42 (¶ 45). Thus, if a State law mandates the results of a bid, then MISO's tariff does not require competition for no purpose. ROA.42 (¶ 45). But in doing so, MISO did not bless State laws that disrupt competitive bidding. As the Chair of FERC at the time made clear,

> State laws that discriminate against interstate commerce—that protect or favor in-state enterprise at the expense of out-of-state competition—may run afoul of the dormant commerce clause. The Commission's order today does not determine the constitutionality of any particular State right-of-first refusal law. That determination, if it is made, lies with a different forum, whether state or federal court.

ROA.42 (¶ 46).

C. Texas's Historical Treatment of Out-of-State Utilities

Texas law long allowed out-of-state companies to enter Texas and provide transmission services, ROA.45-46 (¶ 61), as recognized by Texas courts, the PUCT, and the Texas Attorney General. For example, in 2005, the Texas Legislature required the PUCT to designate certain ar-

eas as Competitive Renewable Energy Zones ("CREZ"), where Texas turned to competitive transmission to spur development of new lines. ROA.34-35 (¶ 22). After holding a competitive process, the PUCT selected Lone Star Transmission, a subsidiary of NextEra, and two other independent transmission companies to build needed CREZ transmission lines, even though they did not already own endpoints in Texas. ROA.34-35 (¶ 22); ROA 50-51 (¶ 77). Those out-of-state entrants have reliably provided Texans with transmission service since they were allowed to enter the State. ROA.50-51 (¶ 77).

In 2007, another entity that did not own endpoints in Texas, Electric Transmission Texas, LLC, sought approval from the PUCT to commence operations in Texas by seeking a Certificate of Convenience and Necessity to build and operate a transmission line in the ERCOT region, which is wholly within Texas and not part of an interstate ISO. *Pub. Util. Com'n of Texas v. Cities of Harlingen*, 311 S.W.3d 610, 614 (Tex. App. – Austin, 2010, no pet.); ROA.35-36 (¶ 24). The PUCT granted the application, but that determination was challenged by some of the same utilities involved below. *See Harlingen*, 311 S.W.3d at 610. The court rejected those claims, explaining that the PUCT "has been conferred power … to grant a [certificate] to a transmission-only utility that does not have a certificated service area." *Id.* at 619-20.

In 2017, one of two federal ISOs in Texas, SPP, prepared to hold its first competitive bid in Texas. ROA.44 (¶ 56). One of the projects to be bid on was a transmission line connected to a power plant owned by Southwestern Public Service Company ("SPS"). ROA.44 (¶ 56). Before bidding occurred, SPS claimed that it was entitled to

build the project as a matter of Texas law because the line would run in its service area. ROA.44 (¶ 56). SPS and SPP filed a joint request for a declaratory ruling from the PUCT. ROA.45 (¶ 58). They asked whether "SPS ha[d] the exclusive right to construct and operate new, regionally-funded transmission facilities in areas of Texas that lie within SPS's certificated service area." *Joint Petition of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order*, 341 P.U.R. 4th 195 (Oct. 26, 2017). The PUCT found that SPS did not have such exclusive rights, because "[n]owhere does [Texas utility law] explicitly grant utilities an exclusive right to provide transmission-only service—including the right to construct transmission facilities—within their certificated service areas." *Id.* at *16.

The State of Texas agreed. Just a few years before filing the present petition, the Texas Attorney General argued to the Austin Court of Appeals that the case did not even merit oral argument because it was controlled by the *Harlingen* decision, which had allowed out-of-state transmission companies into Texas. *See* Br. of Appellee Public Utility Commission of Texas at 2, *Entergy Texas Inc. et al., v. Public Utility Commission of Texas*, Case No. 03-18-00666-CV (Tex. App. – Austin, Mar. 28, 2019). The State argued that Texas in-state utilities had wrongly asked "the Court *to invent a state-law right* to exclude wholesale transmission competitors from bidding on transmission projects within a vertically-integrated electric utility's certificated retail service area." *Id.* at 30 (emphasis added). The State further explained that "[t]here are no geographic monopolies for transmission," as even vertically integrated utilities in Texas use other companies' transmission lines to serve their customers, and their lines cross each other's service areas. *Id.* at 32.

Thus, the Texas law here represented a dramatic departure from transmission regulation in Texas, as the State's own attorneys recognized only a few years ago.

II. Factual and Procedural History

A. NextEra won two transmission projects after Order 1000.

In 2018, MISO held its first competitive bid in Texas. ROA.52 (¶ 82). It sought proposals for building a competitive transmission project known as the Hartburg-Sabine Junction Transmission Project, to be constructed in the Entergy service territory in East Texas. ROA.52 (¶ 82). After receiving 12 bids, MISO selected NextEra, concluding that NextEra's proposal offered "an outstanding combination of low cost and high value, with best-in class cost and design, best-in-class project implementation plans, and top-tier plans for operations and maintenance." ROA.52-53 (¶ 83). Additionally, MISO indicated that NextEra's bid conveyed "substantial benefits to ratepayers over time." ROA.52-53 (¶ 83).

After being selected, NextEra and MISO executed a "Selected Developer Agreement." ROA.53 (¶ 84). This contract required NextEra to secure the necessary State-law certificate, to be requested from the PUCT under Texas law. ROA.53 (¶ 84). NextEra anticipated being able to demonstrate to the PUCT its qualifications to obtain a certificate. Indeed, MISO found in its selection report that "NextEra identified and provided experience for routing and siting staff, as well as third-party contractors engaged to provide permitting support. NextEra also furnished a clear summary and timeline for the [certificate] process." ROA.53 (¶ 84).

Around this time, in late 2017, another NextEra entity executed an agreement to buy transmission-line facilities (the "Jacksonville-Overton Line") from an electric cooperative in the SPP region. ROA.31 (¶ 10). The contract required the cooperative to transfer its certificate rights associated with the Jacksonville-Overton Line to NextEra, which required PUCT approval. ROA.31 (¶ 10). In October 2018, PUCT staff signed a stipulation recommending approval of the transfer. Stipulation, PUCT Docket No. 48071, Item Number 80.

B. In response, Texas prohibited entities lacking an existing local presence from building transmission lines.

Following NextEra's successful bid on the Hartburg-Sabine project and its contract to acquire the Jacksonville-Overton Line, Texas incumbents turned to the Texas legislature to prevent competition and new entities from obtaining certificate rights to provide transmission service within the State. ROA.45-49 (¶¶ 61-73). They succeeded.

In March 2019, companion bills SB 1938 and HB 3995 were introduced in the Texas Legislature. *Id.* The identical bills sought to amend Texas' Utilities Code in two respects: *first*, the bills would limit the persons to whom the PUCT may grant a certificate to build, own, or operate a new electric transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility to the owner of that existing facility; and *second*, the bills would require that if a certificate holder transfers or sells a certificate, the holder must transfer or sell it to another entity that already holds a certificate in the power region. *Id.* As the sponsor of the House bill

stated, the bill reflected the judgment that "transmission operations are best managed by accountable companies w*ith boots on the ground in our communities*." ROA.47 (¶ 64). That is, only Texas entities would be permitted to build, own, and operate interstate transmission lines in the State.

Texas law as amended by SB 1938 thus now provides that a certificate to build, own, or operate transmission lines "that directly [connect] with an existing electric utility facility … may be granted only to the owner of that existing facility." Tex. Util. Code § 37.056(e). If that incumbent declines to build the new line, *it still may not pass the right to do so to companies without an existing local presence*, like NextEra. Instead, it may only "designate another electric utility that is currently certificated by [PUCT] within the same electric power region [or] independent system operator … to build, own, or operate" the new transmission line. Tex. Util. Code § 37.056(g); *see also id.* § 37.154(a).

The law is ambivalent to business form. It favors all in-state utilities, from "traditional, vertically integrated utilities" that provide generation, transmission, and distribution, Pet. 1-2, to electric cooperatives that provide only generation and transmission services, Pet. App. 26a n.7.[3]

3. In the areas outside of ERCOT, these entities include: East Texas Electric Cooperative (https://www.etec.coop/), Golden Spread Electric Cooperative (https://www.gsec.coop/), Northeast Texas Electric Cooperative (http://northeasttexaselectric.com/), and Western Farmers Electric Cooperative (https://www.wfec.com/about-folder).

C. Procedural History

NextEra filed its complaint in June 2019, soon after SB 1938 was enacted into law. ROA.27-61. NextEra alleged, among other things, that SB 1938 was unconstitutional under the Commerce Clause, ROA.55-59 (¶¶ 90-111), because it discriminates against interstate commerce on its face, in effect, and in purpose, and alternatively because it unduly burdens interstate commerce under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). ROA.55-58 (¶¶ 90-105). NextEra sought preliminary injunctive relief the same day that it filed its complaint. ROA.73-84.

The district court initially set a preliminary injunction hearing for September 2019, ROA.601, then cancelled that hearing to first resolve the motion to dismiss. ROA.2815-16. Argument on that motion was not heard until December 2019, and in February 2020, the district court dismissed the complaint in its entirety with prejudice. Pet. App. 46a–63a. NextEra appealed the next day, ROA.3038, and immediately moved to expedite its appeal, *NextEra v. Lake*, No. 20-50160 (5th Cir. Mar. 6, 2020), ECF No. 8, which was granted, *NextEra v. Lake*, No. 20-50160 (5th Cir. Mar. 13, 2020), ECF No. 44.

On August 30, 2022, the Fifth Circuit issued its opinion reversing the district court. Pet. App. 1a-45a. The Fifth Circuit held that "the very terms of SB 1938 discriminate against interstate commerce," Pet. App. 34a, analogizing to a hypothetical law "saying that only those with existing oil wells in the state could drill new wells," Pet. App. 2a. SB 1938 "added a physical presence requirement to Texas utility law" that "prevents those without a presence in the state from ever entering the portions of

the interstate transmission market that cross into Texas." *Id.* at 29a, 33a. "'[I]n-state presence requirement[s]'"—or "incumbent" requirements, which "is just another word for an entity that already has a presence," *id.* at 32a—"have been a fertile ground for recent dormant Commerce Clause challenges" in this Court, *id.* at 30a. Thus, the Fifth Circuit held, SB 1938 should meet the same fate as the laws in these cases. *Id.* at 30a, 32a (discussing *Granholm v. Heald*, 544 U.S. 460 (2005); *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951)).

The Fifth Circuit also rejected Texas's arguments for a public-utilities exception under *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). "In the market for transmission of electricity," the Fifth Circuit found, "vertically integrated utilities" with a physical presence in Texas "and transmission-only companies" like NextEra "compete and offer the same services: building, operating, and owning transmission lines." Pet. App. 20a. SB 1938 thus "has no application in a 'noncompetitive, captive market in which the local utilities alone operate.'" Pet. App. 21a (quoting *Tracy*, 519 U.S. at 303–04). "Put another way, when it comes to transmission, a vertically integrated utility and a transmission-only company are similarly situated," making *Tracy* inapplicable. Pet. App. 21a. The Fifth Circuit majority panel accordingly reversed the district court's 12(b)(6) dismissal of NextEra's facial-discrimination claim and remanded to the district court to consider whether "Texas has no other means to 'advance[] a legitimate local purpose.'" Pet. 34a–35a.

The Fifth Circuit panel also unanimously "reverse[d] the Rule 12(b)(6) dismissals of the purpose, effects, and

Pike claims," Pet. App. 37a, reasoning that the district court's dismissing them was "premature" because "[c]laims that turn on intent and effects typically require factual development," which, the Fifth Circuit held, "is the case here," Pet. App. 35a-36a. The Fifth Circuit remanded these claims back to the district court to allow for this further factual development. Pet. App. 40a.

Petitioners sought to stay the Fifth Circuit's mandate while they petitioned this Court for a writ of certiorari, which required them to show that they would suffer harm absent a stay and that this Court would likely grant the writ. Motion to Stay the Mandate, *NextEra v. Lake*, No. 20-50160 (5th Cir. Oct. 6, 2022), ECF No. 211. The Fifth Circuit rejected that motion. *NextEra v. Lake*, No. 20-50160 (5th Cir. Dec. 16, 2022), ECF No. 239. This petition followed.[4]

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4. Notably, since NextEra filed its complaint in 2019, SB 1938 has been effective at stifling interstate competition in Texas and squelching NextEra's attempt to enter the market—even after the interstate grid operators determined that NextEra's proposals would benefit all participants in the multistate regions affected. While this litigation remained stalled at the motion to dismiss stage, NextEra lost *both* the Jacksonville-Overton and Hartburg-Sabine projects, as counterparties and grid operators found themselves unable to continue waiting for this litigation to resolve. *See* Order Granting Withdrawal and Dismissing Application, PUCT Docket No. 40871, Item Number 104; *Midcontinent Independent System Operator*, Termination of Hartburg-Sabine Selected Developer Agreement, filed in FERC Docket No. ER23-865-000 (Jan. 17, 2023). Nonetheless, NextEra intends to pursue other projects in Texas. *See* ROA.29-31 (¶¶ 6-10). This case therefore remains ripe for adjudication, as Petitioners concede here, Pet. 8 n.3, and as the Fifth Circuit held without dispute below, Pet. App. 13a-15a; Supp. Br. for Appellees, *NextEra v. Lake*, No. 20-50160 (5th Cir. June 9, 2020), ECF No. 145.

REASONS FOR DENYING THE PETITION

I. The procedural posture of this case makes it a poor vehicle for review.

Petitioners seek review of an interlocutory order. The Fifth Circuit reversed the dismissal of NextEra's claim that SB 1938's terms discriminate against interstate commerce and remanded for further factual development. Pet. App. 34a–35a, 40a. It similarly remanded NextEra's claims that SB 1938 discriminates in its purpose and in its effect, and that it cannot survive *Pike* balancing. Pet. App. 37a, 40a. Such interlocutory orders—and particularly this one—do not warrant the Court's review.

Indeed, the Court "generally await[s] final judgment in the lower court[] before exercising [its] certiorari jurisdiction." *Virginia Mil. Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). That is because only "extraordinary cases" call for issuing the writ before final decree, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), where "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893).

No such extraordinary justifications exist here requiring the Court's immediate intervention. The mandate has issued, *NextEra v. Lake*, No. 20-50160 (5th Cir. Dec. 21, 2022), ECF No. 242, and proceedings can continue at the district court. Following discovery and "entry of final judgment," Petitioners are "free" to bring "a later petition." *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944

(2012) (Alito, J., respecting the denial of certiorari). At that point, the Court will have the benefit of a full factual record, which "would 'significantly advance [the Court's] ability to deal with the legal issues presented and would aid [the Court] in their resolution.'" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). The Court should defer review at least until then, at a minimum to ensure nothing "clouds the record" and "render[s] the case an inappropriate vehicle." *See Jones v. State Bd. Of Ed. Of State of Tenn.*, 397 U.S. 31, 32 (1970) (dismissing as improvidently granted).

Petitioners' theory for why the Court should buck its general practice of not reviewing interlocutory orders is not persuasive. Petitioners argue that the Court's declining to grant review will harm "ratepayers in Texas and surrounding States," Pet. 32, due to "regulatory uncertainty in the energy market," Pet. 23, given that, Petitioners say, "rational" economic actors may lose interest in investing in electricity infrastructure, Pet. 32.

First, this speculative argument is both wrong and ironic. NextEra stands ready to invest millions in that infrastructure. SB 1938 forbids such investment. It is SB 1938 and Texas's interference in interstate markets that harm electric-infrastructure investment in Texas. *See MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016) (rights of first refusal "create[] a potential for higher rates to consumers of electricity than if competition to create transmission facilities in transmission companies' service areas was allowed"); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 74 (D.C. Cir. 2014) ("rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry").

Second, MISO selected NextEra precisely because of its "outstanding combination of low cost and high value, with best-in-class cost and design, best-in-class project implementation plans, and top-tier plans for operations and maintenance" that would "reap 'substantial benefits to ratepayers over time.'" Pet. App. 11a. To the extent that the denial of Petitioners' motion to dismiss signals to "businessperson[s]" that NextEra may soon be allowed to compete for similar transmission projects in the future, Pet. 32, that can only bode well for ratepayers.

Third, if SB 1938 really were necessary to prevent harm to Texas ratepayers, Pet. 32, that would be precisely the type of showing that Petitioners could make in the district court on remand, to show that SB 1938 is the only means of advancing a legitimate local purpose. Pet. 34a-35a. Tellingly, instead of offering to prove this case, Petitioners essentially *concede that they will be unable to do so* on remand. Pet. 31-32 (explaining that this opportunity is "illusory"). Indeed, Petitioners suggest that this Court should intervene to avert a proceeding in which they would be required to prove SB 1938's necessity. Given Petitioners' unwillingness to prove that SB 1938 is necessary to advance legitimate purposes, the assertion that this Court must intervene to protect the law now rings hollow.

At any rate, enforcement of SB 1938 *has not been enjoined*. Petitioners fail to explain how any harms flow from the mere denial of a motion to dismiss and a remand for further factual development. Ordinarily, appellate courts assume that such orders do *not* warrant immediate appeals: a "district court's denial of [a] motion[] to dismiss … ordinarily does not constitute an immediately appeal-

able order." *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 383 (5th Cir. 2014); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 497 (1989) (affirming dismissal of appeal because district court's "orders denying petitioner's motions to dismiss were interlocutory").

Petitioners' exact same argument about purported immediate harms resulting from the decision below failed to convince the Fifth Circuit to stay its mandate. *NextEra v. Lake*, No. 20-50160 (5th Cir. Dec. 16, 2022), ECF No. 239. It should meet a similar fate here.

II. Petitioners' arguments depend on alleged facts outside the complaint.

Compounding the problems with the interlocutory posture here, Petitioners raise facts outside the complaint and ignore the procedural posture of this case, which requires accepting as true plausibly pleaded facts and drawing all reasonable inferences in favor of NextEra. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Take two examples. For one, relying on a website outside the complaint, Petitioners assert that "[w]ith almost complete uniformity, Texas's practice has always been that owners of existing endpoint facilities build new transmission lines." Pet. 6. But as NextEra alleged in its complaint, that is simply not true. *See* ROA.34–36 (¶¶ 21–24); ROA.45 (¶ 59). For example, as discussed above, as far back as 2005, as a part of the CREZ transmission buildout, Texas held a competitive process for the development of new transmission lines—in which a NextEra affiliate (Lone Star Transmission) competed and was selected without ownership of an endpoint facility—and this very case was

prompted by a competitive process conducted by MISO involving 12 different bidders. *See* ROA.34-35 (¶ 22), 52-53 (¶ 83). Petitioners' contrary assertion, at most, highlights "[a]mbiguities in the record" that should be avoided at the certiorari stage. *See Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (dismissing as improvidently granted).

For another, although Petitioners submit that "further factual development is unnecessary," Pet. 30, much of their petition relies on factual assertions (not found in the complaint) about differences between NextEra and certain Texas utilities, such as the products and services provided by each, and the markets in which they supposedly do or do not compete. Pet. 15. Petitioners support these arguments with unfounded assertions about how monopolies are apparently "natural" in Texas's transmission markets, Pet. 3, 18, 20, an issue on which the PUCT and Texas Attorney General took a notably different view just a few years before submitting the current petition. *See* Br. of Appellee Public Utility Commission of Texas at 32, *Entergy Texas Inc. et al., v. Public Utility Commission of Texas*, Case No. 03-18-00666-CV (Tex. App. – Austin, Mar. 28, 2019) (explaining "there are no geographic monopolies for transmission").

That Petitioners must retreat to these outside-the-record factual assertions suggests that "the record" here may not be "sufficiently clear and specific to permit decision" of the "constitutional questions" Petitioners seek to address now. *Com. of Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (dismissing as improvidently granted).

III. Petitioners ignore that SB 1938 is an outlier and overstate the impact of a decision by the Eighth Circuit.

Petitioners suggest that granting certiorari would allow this Court to resolve a circuit split concerning various State-law rights of first refusal. Pet. 23–28. While NextEra believes that all these State laws are unconstitutional, this case is a poor vehicle for resolving that question because Texas's law is far more restrictive than the other State laws identified in the petition. Thus, even if there were a circuit split on this question, there is a risk that the Court could resolve this case on narrow grounds that apply only in Texas.

As the Fifth Circuit explained, "[t]he vast majority of states would not disfavor NextEra in any way," and only a handful of "states would give incumbents a right-of-first refusal." Pet. App. 33a. But SB 1938 is more restrictive than a mere right of first refusal: it "ban[s] new entrants outright," and does so forever. Pet. App. 28a–29a. Put differently, SB 1938 bans companies like NextEra without a preexisting physical presence in the State from forever participating in the State's market for constructing, owning, and operating in-state transmission lines, even when conducted as part of a multi-state ISO's competitive auction. Indeed, even when an originally favored utility chooses *not* to build a transmission line, SB 1938 allows that utility to choose a successor—but *only* among utilities that have already been certificated in the same local region. *See* Tex. Util. Code §§ 37.056(g), 37.154(a). Petitioners identify no case addressing a similarly restrictive State law, and indeed, NextEra is not aware of any other State law that goes so far. Thus, while NextEra

believes other State laws creating a right of first refusal for incumbents also violate the Commerce Clause, this petition is therefore unlike those involving laws enacted in a "large number of states." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 385 (2000); *see also New York v. O'Neill*, 359 U.S. 1, 3 (1959) (granting certiorari to review statute "in force in forty-two States").[5]

For this reason, there is no clear split between the decision below and the Eighth Circuit's decision in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (2020), which rejected a Commerce Clause challenge to a Minnesota right-of-first-refusal law. Pet. 23–27. Unlike SB 1938, the Minnesota law was a right-of-first-refusal law that granted local companies a temporary initial preference—but if the preferred local provider failed to exercise its right to build, non-local companies could take on the project, subject to State regulatory approval. Pet. App. 28a.

The Fifth Circuit recognized that this feature made the Minnesota law significantly different from Texas's SB 1938. Pet. App. 28a–29a (recognizing that Minnesota's law "does not go nearly as far as the Texas law"). Similarly, in successfully opposing certiorari review of the Eighth Circuit's decision in *LSP*, Minnesota's Attorney General explained that the Eighth Circuit's decision "cannot produce a circuit split" with any decision by the Fifth Circuit on SB 1938 because "Minnesota's law contains a

5. Even if SB 1938 were similar to the other State laws, however, the limited proliferation of such laws, and the paucity of decisions addressing them, counsels towards letting these issues percolate further. *See Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (Gorsuch, J., concurring).

[right of first refusal] and allows out-of-state transmission companies to enter the market if [that right] is not exercised," while "Texas's statute completely blocks out-of-state-transmission providers." Brief in Opposition for Respondents at 11, *LSP Transmission Holdings, LLC, v. Sieben*, No. 20-641 (U.S.). In other words, given these differences, there can be no "embarrassing conflict of opinion." *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (dismissing as improvidently granted).

Petitioners respond that this distinction between the Minnesota and Texas laws may not have "constitutional significance," Pet. 25, and indeed, NextEra agrees: NextEra believes *both* laws are unconstitutional. But the distinction has significance at the certiorari stage. The total ban enacted by SB 1938 discriminates to a different, and more extreme, degree than other State laws. Not only does SB 1938 foreclose the ability of new entrants to enter the State entirely to build new transmission facilities, the law also severely restricts the ability of utilities within the State even to sell their existing facilities to the very narrow universe of utilities already certificated to operate within a particular power region in Texas. Granting review of SB 1938 thus risks taking up the Court's time only to decide the question presented on narrow grounds based upon the unique facts of SB 1938. To the extent the Court seeks to resolve the issues presented in the petition, it should wait for a better vehicle.

Petitioners also suggest that the Eighth Circuit's *LSP* decision and the decision below split on another, more metaphysical sub-issue: whether a law favoring incumbents based on their existing facilities in the State can be said to discriminate against interstate commerce when

many of those incumbents are incorporated in, or headquartered, or perhaps merely controlled from elsewhere. Pet. 24-28. Tellingly, this "issue" is not even mentioned in Petitioners' Question Presented—because in fact it is not presented in this case. Indeed, Petitioners concede that "SB 1938 … does not raise" the question of whether an entity with an in-state presence, but headquartered elsewhere, is properly categorized as "in-state" or "out of state." Pet. 25-26. The decision below properly recognized that the Texas statute discriminates based on an entity's in-state presence, not its place of incorporation, headquarters, incumbency status, or anything else.

At any rate, on one side of the purported split, both the Eleventh and First Circuits have squarely "rejected the idea that a law survives Commerce Clause scrutiny if many of the favored interests are incorporated elsewhere." Pet. App. 27a (citing *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230 (11th Cir. 2012); *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005). In *Florida Transportation Services*, the Eleventh Circuit held that "Commerce Clause liability [does not] turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies." 703 F.3d at 1259. And in *Walgreen*, the First Circuit held that its "conclusion" that the statute there "discriminate[d] against commerce" was "unaffected by the fact that a few of the existing [companies] when the Act was passed (and now) are owned by out-of-[state] interests" because there was "no authority for this proposition." 405 F.3d at 57–58. The Fifth Circuit appears to have agreed. *See* Pet 27a ("For the concern about in-state interests being able to obtain favorable treatment over out-of-state interests,

local presence, rather than place of incorporation, should matter.").

The Eighth Circuit in *LSP* did not hold to the contrary. Petitioners concede, as they must, that "[t]he Eighth Circuit declined to decide" this issue. Pet. 26; *see also LSP*, 954 F.3d at 1029 n.7 (explaining it had "not squarely addressed the issue").

That leaves the Fourth Circuit. But Petitioners *do not even contend* that the Fourth Circuit actually made any on-point holding on this issue. They assert only that the Fourth Circuit "warned" about using "incumbency … as the proxy for in-state status," Pet. 27, and "endorse[d] … a place-of-incorporation test," Pet. 28. Petitioners' lack of enthusiasm on this point is for good reason. As the Fifth Circuit points out, the Fourth Circuit was careful to limit its reasoning to the specific, factual "context" before it. Pet. App. 32a n.11 (quoting *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016)).

Colon Health involved a State law that required new entrants in a market to obtain a certificate of need, *regardless* of whether those entrants had previously operated physically in the State. *Colon Health*, 813 F.3d at 149. The law did not have an in-state presence requirement (unlike SB 1938), so its challengers did not argue it was discriminatory on its face—only in its purposes or effects. Pet. App. 32a. n.11 (citing *Colon Health*, 813 F.3d at 152–60). After factual development on these claims, the Fourth Circuit affirmed an expert's looking to an entity's place of incorporation to determine whether a law historically discriminated against out-of-state entities *in its effect*, but again, the court was careful to limit its doing so to

the specific factual "context" before it. *Colon Health*, 813 F.3d at 154.

Even if *Colon Health* could be read broadly to apply beyond the specific context of that case to create a split with the First, Fifth, and Eleventh Circuits, that split is entirely lopsided and unworthy of certiorari review. The Fifth Circuit's ruling establishes a clear (and, as discussed below, correct) consensus in the circuit courts. More important, because Petitioners concede that the law they challenge here *does not raise this issue*, Pet. 26, this entire discussion is better left to academia.

IV. The decision below is consistent with this Court's prior decisions.

A. SB 1938 is an impermissible local-presence requirement.

By its plain text, SB 1938 allows an entity to build, own, or operate a transmission facility in Texas only if it has an "existing facility" in Texas. Pet. App. 67a, SB 1938 § 4. Indeed, should the preferred owners of existing facilities choose not to build, own, or operate a new transmission line, SB 1938 allows them to "designate another electric utility" to do so—but only if that second utility also has an existing local presence, having been "certificated by the commission within the same electric power region." *Id.* at 68a. SB 1938 is thus no different from the various local-presence requirements that this Court has repeatedly found to be discriminatory. *Tenn. Wine*, 139 S. Ct. at 2462; *Granholm*, 544 U.S. at 475; *Dean Milk*, 340 U.S. at 354. By "erecting an economic barrier protecting a major local industry against competition from without

the State," Texas "plainly discriminates against interstate commerce." *Dean Milk*, 340 U.S. at 354.

The discriminatory impact of SB 1938 is not confined to Texas, but rather affects interstate regions of the power grids to which Texas is connected. FERC has ordered those interstate grid operators to allow competition for the right to build new transmission lines, needed to reduce grid congestion and improve power delivery across large, multistate regions of the nation. Having chosen to connect to these interstate grids, Texas "may not employ discriminatory regulation to give [local incumbents] an advantage over rival businesses from out of State." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994); *see also Buck v. Kuykendall*, 267 U.S. 307, 315–16 (1925).

1. The law does not merely "recognize" a "pre-existing" physical-presence requirement.

Petitioners do not really dispute that SB 1938 contains a local-presence requirement but argue that SB 1938 merely "recognizes a *pre-existing* physical-presence requirement." Pet. 20 (quoting Elrod, J., dissenting, Pet. App. 44a). Not so: in the decades prior to SB 1938, an entity seeking a certificate to build, buy, or own a transmission line did not need to have previously established a presence in Texas. While Petitioners are correct that "an electric transmission line *must* be located in Texas to provide electricity in Texas," Pet. 20, there is no reason (beyond SB 1938 itself) that such lines cannot be built, owned, and operated by new entrants, who had no in-state presence before receiving a certificate for the transmission line.

As the Fifth Circuit correctly held: "SB 1938 was not meaningless; it added a physical-presence requirement to Texas utility law." Pet. App. 33a.

2. The law discriminates on presence, not business form.

Alternatively, Petitioners argue that SB 1938 discriminates based on "business form," Pet. 21, 24, wrongly suggesting that the law merely favors "vertically integrated utilities" against all others, Pet. 2. This is belied by the law's plain text, which does *not* draw a distinction based on "vertical integration" or any other business form; it distinguishes only between entities with an "existing facility" in Texas and those without, regardless of their form of business. Pet. App. 67a, SB 1938 § 4. A preference that discriminates among companies based on their "contacts with" the local economy is not an "evenhanded" business-form regulation. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980).

As a result, SB 1938 does *not* benefit only a certain form of business, as Petitioners claim, but benefits all utilities with a pre-existing presence in Texas—several of which are not vertically integrated utilities. As the Fifth Circuit recognized, SB 1938 "allows incumbent entities other than vertically integrated utilities, namely electric cooperatives, to compete." Pet. App. 26a n.7. Contrary to Petitioners' representations, some of these beneficiaries do *not* serve consumers, leaving distribution to other entities in the region. For example, generation-and-transmission cooperatives are favored under SB 1938, but do not serve end-use distribution customers. *See supra* note 3. These cooperatives may hold a certificate to build, own, or oper-

ate transmission lines in Texas under SB 1938, not because of their business form but solely because they have a pre-existing presence in the State.

3. The law is facially discriminatory even if some in-state providers are barred as well.

Petitioners also argue that SB 1938 applies "evenhandedly to all entities" whether "based" in Texas or outside Texas, Pet. 24, because "in-state transmission-only companies would face the same hurdles NextEra faces," Pet. 21. The Court has repeatedly rejected this argument. A law that facially discriminates against interstate commerce cannot be saved by also discriminating against some in-state companies too; such a law is "no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Carbone*, 511 U.S. at 391; *see also Dean Milk*, 340 U.S. at 354 n.4 ("It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.").

4. SB 1938's preference for "incumbents" discriminates against interstate commerce.

Petitioners candidly admit that SB 1938 is a preference for "incumbent[s]" at the expense of all others, Pet. 12–13, 26; indeed, it is a complete ban on all new entrants to the Texas market. This admission dooms SB 1938, as State laws protecting local incumbents against out-of-state competition are at the very heart of what the Commerce Clause forbids. *E.g.*, *Dean Milk*, 340 U.S. at 354-56. Moreover, on its face, SB 1938 discriminates *not* based on incumbency but based on pre-existing local presence: SB

1938 allows utilities to build transmission lines if, but only if, they already have an "existing facility" in the State. State laws may not discriminate based on local presence under the guise of a preference for incumbents. *See Tenn. Wine*, 139 S. Ct. at 2462; *Granholm*, 544 U.S. at 475.

Petitioners rely on *Colon Health*, Pet. 27, in which the Fourth Circuit upheld a program requiring new entrants in a market to obtain a certificate of need—thereby slowing down competition for incumbents, *Colon Health*, 813 F.3d at 149. Texas, too, has a certificate-of-necessity program for transmission services, which authorizes the PUCT to determine whether an applicant is qualified to construct transmission facilities and provide transmission service—but under SB 1938, those certificates now can only be awarded to incumbents with existing facilities in Texas. Nothing in *Colon Health* suggests that the Fourth Circuit would uphold a scheme that allowed *only* the in-state incumbents to receive a certificate.

5. A local-presence requirement is facially discriminatory even if some of the favored entities are incorporated elsewhere.

Although SB 1938 facially favors utilities based on their local presence, Petitioners argue that the law is not discriminatory because some of the favored entities with a local presence happen to be incorporated outside the State. Pet. 26. None of this Court's jurisprudence supports this bizarre defense. As the Fifth Circuit observed, this Court "did not even mention the place of incorporation for the wineries in New York, coal mines in Oklahoma, or dairies in Madison, Wisconsin that received an unlawful benefit because of their local presence," nor did it consider

"the place of incorporation of the company that operated the solid waste transfer station granted an unlawful monopoly by [the] small New York town" in *Carbone*. Pet. App. 25a-26a.

In fact, this Court's cases reject such a rule. For example, in *Granholm*, this Court acknowledged that the State law favored out-of-state wineries who established an in-state presence. Far from saving the law, the Court recognized that this was merely another form of facial discrimination: States "cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Granholm*, 544 U.S. at 475. Just as New York could not privilege foreign wineries that established an in-state presence, Texas may not privilege utilities incorporated elsewhere based on their prior ownership of facilities in Texas. This rule makes sense: as the Fifth Circuit observed, the Commerce Clause's "primary concern" is "in-state interests being able to obtain favorable treatment over out-of-state interests," and thus "local presence, rather than place of incorporation" is what matters. Pet. 27a.

Finally, even if the place of incorporation were relevant, whether SB 1938 benefits few or many entities incorporated elsewhere is an entirely factual inquiry that has not been developed at this stage. For example, in the case of the Hartburg-Sabine project, SB 1938 granted a discriminatory preference to Entergy Texas, Inc., ROA.776-77, a company which is incorporated in Texas.[6] And SB 1938 benefits other Texas entities with an existing presence, including local cooperatives, beside the

6. https://www.sec.gov/edgar/browse/?CIK=1427437.

handful of intervenors in this case. These issues remain undeveloped due to the posture of this case; for now, the complaint plausibly alleges that the favored in-state businesses here are "Texas utilities." ROA 45 (¶ 57); *see also* ROA.47 (¶¶ 62-63); ROA.30 (¶ 4) ROA.49 (¶ 69).

B. *Tracy* does not immunize utilities from commerce-clause analysis.

Because ordinary Commerce Clause principles make this a simple case, Petitioners attempt to construe this Court's decision in *Tracy* as effectively immunizing State utility regulations from Commerce Clause scrutiny. Tellingly, Petitioners' only support for a "'public utilities' exception" comes from a *dissent*. Pet. 18 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting)). In fact, the Court in *Tracy* itself rejected any such rule, noting that even "state regulation of retail sales is not, as a constitutional matter, immune from our ordinary Commerce Clause jurisprudence." 519 U.S. at 291 n.8. Properly understood, *Tracy* has no application here—which is why neither the Fifth nor Eighth Circuits relied on it in reaching their decisions.

Tracy involved a tax law, under which a State taxed natural gas differently depending on whether it was sold by regulated utilities servicing consumers (taxed less) or by independent marketers (taxed more). *Id.* at 282–83. Critically, there were two separate markets for the natural gas: one was a non-competitive, "captive" market of retail consumers with no choice but to purchase natural gas from their local utility; the other market involved large industrial consumers who could choose between

purchasing natural gas from utilities or marketers. *Id.* at 282-85, 297-98, 300-304. Since there was no competition in the "captive" market in which the utilities sold their gas, the Court found no Commerce Clause issue in taxing the utilities' gas sales differently, even though those utilities also sold gas in a competitive, noncaptive market. *Id.* at 303-04, 310.

Unlike *Tracy*, SB 1938 addresses only a single market: the market for building, owning, and operating transmission facilities for electric power grids, a market in which various providers can and would compete for business but for the discriminatory impact of SB 1938. As the Fifth Circuit explained, there is no second market: SB 1938 does not apply to any "noncompetitive, captive market in which the local utilities alone operate." Pet. App. 21a. In the market for transmission projects—the only market in which SB 1938 applies—the in-state and out-of-state providers are similarly situated, and similarly regulated, in all relevant respects. Any entity building a transmission line in Texas (whether vertically integrated or not) would, "by definition," be characterized as "an electric utility" under Texas law, subject to all regulations that apply to Texas electric utilities. *Harlingen*, 311 S.W.3d at 617; Tex. Util. Code § 31.002(6). Thus, it would have the same obligations as any other electric utility to "furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable," Tex. Util. Code § 38.001, and to construct facilities compliant with PUCT regulations, *id.* § 35.005(b).

Petitioners assert, without support, that the competition for the right to build, own, and operate transmission facilities is not the type of "competition" addressed in

Tracy, because "*Tracy* contemplated competition in the market for *customers*," and Petitioners apparently think "customers" include only retail power consumers. Pet. 18. This argument does not help Petitioners at all: to the extent that this is not the type of competition addressed by *Tracy*, it only confirms that (as the Fifth Circuit held) *Tracy* is simply inapplicable to this case. Regardless, there is no merit to the distinction Petitioners draw. FERC itself recognized that the elimination of rights of first refusal would increase competition in this market. *E.g.*, Order 1000, 136 FERC ¶ 61051 at ¶ 268. Absent SB 1938, multiple providers would compete to build new regional transmission lines for interstate grid operators, such as MISO and SPP. Those grid operators would hold a competitive solicitation for bids, select the most competitive offer, and ultimately contract with the winning bidder for services—just like any other market in which businesses compete to provide large projects for customers. The fact that the "customer" for these projects is an interstate grid operator, rather than in-state power consumers, only heightens the degree to which this law interferes with interstate commerce.

Moreover, the fact that regulatory approval is required after the competitive solicitation finishes does not mean, as Petitioners argue, that the competition at issue here is merely competition "for regulatory approval," Pet. 19. As seen in the Hartburg-Sabine solicitation, bidders compete on all the grounds expected in any market for large infrastructure projects: price, efficiency, quality, and overall value. ROA.62 (¶ 83). It was only after the enactment of SB 1938 that "regulatory approval" became the sole criteria for winning projects in non-ERCOT regions of Texas.

Finally, this case differs from *Tracy* in another fundamental respect: whereas SB 1938 distinguishes between entities with an existing local presence and those without, the law in *Tracy* distinguished between forms of business, privileging local distribution companies over non-distribution entities. *Tracy*, 519 U.S. at 282-83. Petitioners try to paint SB 1938 in the same way, misleadingly suggesting that SB 1938 only favors utilities that are "traditionally structured to provide generation, transmission-and-distribution, and retail." Pet. 22; *accord id.* at 2. That is simply not the line that SB 1938 draws, as its plain text reveals. And as explained above, SB 1938 does not even work that way in practice; in fact, it favors local incumbents that are *not* "traditionally structured" (such as cooperatives providing only generation and transmission), merely because they have a local presence, while excluding similar entities from other States, merely because they lack a local presence. Nothing in *Tracy* remotely condones such blatant discrimination against interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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