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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

***Cases (ctd.)*:**

Statutes and Rules:

Page(s)

***Statutes and Rules (ctd.)*:**

Other Authorities:

In accordance with Rule 15.8, Petitioners respectfully submit this supplemental brief in response to the United States' invited amicus brief of October 23, 2023.

INTRODUCTION

In its brief to this Court, the United States does not dispute that reliable electricity is fundamental to the health, safety, and welfare of Americans. It cannot. For that reason, this Court has unequivocally described regulation of public utilities as "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); *see also Munn v. Illinois*, 94 U.S. 113 (1876). Moreover, recognizing not just the limited role of courts in our constitutional system but also their limited capacity to balance the long-term costs and benefits of regulations in the energy market, this Court has required "extreme caution" before they "mak[e] a choice that could strain the capacity of the States to continue to demand . . . regulatory benefits" from public utilities. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307, 310 (1997) (citing *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (Black, J., concurring)).

Abandoning that prudence in favor of a maximalist view of federal power, the United States insists that Texas facially violated the so-called dormant Commerce Clause when it sought to ensure that fundamental need is met by passing S.B. 1938, Act of May 7, 2019, 86th Leg., R.S., ch. 44, §§ 1, 2, 4, 5, 7, 2019 Tex. Gen. Laws 90, 90-91 (codified at Tex. Util. Code §§ 37.051(a), .053(a), .056, .057, .154(a)). As described in the petition (at 12-13), this statute serves to protect the electrical grid in Texas by preventing unregulated, transmission-only

companies like NextEra from culling benefits of serving Texas's ever-growing population centers while leaving the burdens of transmitting electricity to the State's hundreds of thousands of square miles of sparsely populated landscape to those utilities subject to the State's comprehensive regulatory regime. And S.B. 1938 is entirely consistent with this Court's Commerce Clause jurisprudence because it regulates two different markets: a market for transmission-only services where the customers are electricity retailers, and a market for "bundled" electricity services sold directly to consumers. Pet. 14-17 (quoting *Tracy*, 519 U.S. at 297).

Because the United States adds little to NextEra's legal arguments about the Commerce Clause, Texas will reserve any further comment on those topics until such time as the Court grants review on the merits—which the United States does not seem to seriously contest would be appropriate at some unspecified future date.

But at least two other errors in the United States' brief demonstrate why the Court should not wait. *First*, to reach the conclusion it wants—that S.B. 1938 impermissibly impinges on power reserved for Congress—the United States mischaracterizes the Texas energy market itself. *Second*, the United States manufactures vehicle problems while ignoring the State's urgent need for this Court's immediate review.

For these reasons as well as those Texas has explained in its petition, the Court should grant review in this case despite the United States' opposition and hold that the dormant Commerce Clause does not prohibit States from preserving the reliability of their electrical grids by providing rights of first refusal to incumbent electricity producers.

ARGUMENT

I. The United States' Arguments Against Certiorari Are Premised on a Misunderstanding of the Texas Energy Market.

Unlike many other areas of Commerce Clause regulation, Congress has expressly preserved a role for States in the regulation of electricity markets generally, *e.g.*, *New York v. FERC*, 535 U.S. 1, 5-14 (2002); 16 U.S.C. § 824(b)(1); 42 U.S.C. §§ 7134, 7171, and over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce" specifically, 16 U.S.C. § 824(b)(1). The United States' opposition blurs those carefully reticulated roles based on two fundamental misunderstandings about S.B. 1938 and—more importantly—the market it regulates. In so doing, the United States fails to give full weight to this Court's repeated recognition that the Commerce Clause protects "our interconnected national marketplace," *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023)—not the business models of individual market participants, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978).

First, the United States tries (at 18-19) to downplay the Fifth Circuit's departure from *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020), by mischaracterizing S.B. 1938. Both the Fifth Circuit majority, Pet. App. 28a, and Judge Elrod's partial dissent agreed on one fundamental premise: S.B. 1938 and the Minnesota law in question in *LSP* are "nearly identical," *id.* at 42a. The United States nevertheless asserts (at 18) that there is no circuit split meriting this Court's review because *LSP* was "less obviously discriminatory than S.B. 1938." Specifically, the government insists that Minnesota's law "granted preferential treatment only to

owners of facilities to which a new transmission line would connect" while preserving competition if those owners declined. This is incorrect: like Minnesota's law, S.B. 1938 provides that "[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) (emphasis added). Under certain circumstances, that owner can then transfer that right to another utility in the same region. *Id.* § 37.154(a).

To the extent there is a linguistic distinction, it is one without a constitutional difference. As this Court just reiterated, the Commerce Clause is a doctrine that considers both practical effects of a challenged regulation and the need for States to regulate within their boundaries—even where those regulations might have a nominally extraterritorial effect. *Nat'l Pork Producers*, 598 U.S. at 373. And, the Court cautioned, parties are not to read Commerce Clause precedent in a way that "misses the forest for the trees." *Id.*

Here, the United States' distinction between Texas's and Minnesota's laws does precisely that: much like the law in *LSP*, S.B. 1938 "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." *LSP*, 954 F.3d at 1027 (quoting *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695, 708 (D. Minn. 2018)). And, as a practical matter, incumbent market participants will always or nearly always take advantage of both to build the new line. Pet. 25. Given that the United States does not seem to seriously dispute that Minnesota's law is constitutional under its theory of the

Commerce Clause, to say Texas's law is not "would invite endless litigation and inconsistent results." *Nat'l Pork Producers*, 598 U.S. at 373. This, the Court has refused to do in contexts far less vital to the health or safety of Americans than the provision of reliable electricity. *Id.*

Second, in an apparent attempt to arrogate the State's regulatory authority in favor of FERC, the United States repeatedly conflates (at 3, 6, 17) the market for electricity with the market for the construction of transmission lines. Because the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations," *Exxon*, 437 U.S. at 127-28, the first step in any Commerce Clause analysis is to define the relevant market, *Tracy*, 519 U.S. at 306; *see also, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); Alexandra B. Klass & Shatal Pai, *The Law of Energy Exports*, 109 Calif. L. Rev. 733, 779 (2021) (noting that an appropriate market definition "is increasingly important as a growing number of jurisdictions enact aggressive clean energy standards").

As explained by PUCT in its reply brief (at 2) and by the Intervenor Respondents (SPS at 7-10; Entergy at 11-14), there is no market for transmission-only services in the parts of Texas at issue here because of policy choices made by the State. Tellingly, the United States points to nothing in the record (either on appeal or in the public) to refute this proposition. Instead, the United States suggests (at 16) that the absence of such a market cannot justify S.B. 1938 as "it is because of S.B. 1938 itself, not some independent factor." This assertion blinks historical fact and present reality: as described in the petition (at 3-5), and by Intervenor Respondent Entergy (at 2, 7), S.B. 1938 *preserves* rights of first refusal that have long

existed, both as a matter of FERC's regulations and as a matter of state law.

II. None of the United States' Putative Vehicle Problems Preclude Review.

By petitioners' count, apart from mischaracterizing both the challenged law and the nature of the energy market, the United States identifies at least three different vehicle problems or prudential reasons why this Court should deny certiorari. Notably absent is any claim that the question presented is not important. That omission is damning given the stakes in this case: whether a State can promote the reliable transmission of electricity to each of its nearly 30 million people spread across nearly 270,000 mi^2 through the use of a regulatory tool that FERC blessed for decades.

Even on their own terms, however, the United States' reasons for denying certiorari are unconvincing. *First*, as addressed above (at 3-5), the government tries to downplay a split between the decision below and *LSP* over whether rights of first refusal for electric lines are consistent with the Commerce Clause. Given that even the Fifth Circuit acknowledged that split, the United States' protest should be disregarded.

Second, the United States similarly downplays (at 19-20) any conflict between the decision below and the Fourth Circuit's decision in *Colon Health Centers of America, LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016). According to the United States (at 20), *Colon Health Centers* involved an "incumbency bias" rather than what the government insists amounts to an outright ban of out-of-state interests, and even then, the law created a "facially neutral process for obtaining certificates"—albeit one where the incumbent was far more likely to be successful in obtaining the necessary certificate. This

characterization, however, elides the actual holding of the case: in *Colon Health* the Fourth Circuit unambiguously rejected any *per se* rule against incumbency bias, and it expressly endorsed a place-of-incorporation test for determining in-state status under the dormant Commerce Clause. *Id.* at 154.

Not unlike this Court's subsequent decision in *National Pork Producers*, the Fourth Circuit considered one of the primary benefits of its test to be that it can be "easily applied," *Colon Health Ctrs.*, 813 F.3d at 154, and thus would not "invite endless litigation and inconsistent results," *Nat'l Pork Producers*, 598 U.S. at 375. Moreover, the Fourth Circuit's decision to judge the corporations' local or foreign status based on the place of incorporation makes sense because "[b]y choosing to incorporate within a particular state, a corporation opts to identify itself with both state law and state process in a way that an out-of-state corporation does not." *Colon Health Ctrs.*, 813 F.3d at 154.

By contrast, the panel majority concluded that the dormant-Commerce-Clause doctrine's "concern about in-state interests being able to obtain favorable treatment over out-of-state interests" should depend on "local presence, rather than place of incorporation." Pet. App. 27a. The panel, however, provided no clear guidance on how much presence is required for a State to regulate a private party's activities within its borders. And that rule cannot be reconciled with the Fourth Circuit's rule, or with this Court's subsequent affirmation that "[c]ompanies that choose to [operate] in various States must normally comply with the laws of those various States," *Nat'l Pork Producers*, 598 U.S. at 364, subject only to the rule that the State may not adopt "regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors," *id.* at 369 (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008)). S.B. 1938 does not seek to do so because as the district court found—and the United States nowhere refutes—most of the entities that benefit from S.B. 1938 are from out of state. Pet. App. 59a; *see also* Pet. 9-10.

Third, the United States (at 17-18)—like NextEra (at 15-18)—insists that this Court should deny review now because this case is in an interlocutory posture. Petitioners have acknowledged (Pet. 30-31) that the Court has historically "consider[ed] the interlocutory nature of a judgment or order in determining whether to grant or deny a certiorari petition." Stephen M. Shapiro, SUPREME COURT PRACTICE § 2.2 (11th ed. 2019). But this Court, with increasing regularity, will grant a petition for certiorari when it presents a dispute of substantial concern—especially in the context of a clear circuit split with a purely legal question to resolve. *See, e.g.*, *Murthy v. Missouri*, No. 23-411, 2023 WL 6935337, at *1 (U.S. Oct. 20, 2023); *Devillier v. Texas*, No. 22-913, 2023 WL 6319651, at *1 (U.S. Sept. 29, 2023); *Netchoice, LLC v. Paxton*, No. 22-555, 2023 WL 6319650, at *1 (U.S. Sept. 29, 2023); *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2084 (2022).

This case justifies interlocutory review. When this Court has denied interlocutory review in the past, it has typically been because proper resolution of the question presented required further factual development. *E.g.*, *Mt. Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., respecting the denial of certiorari); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J., respecting the denial of certiorari) (citing *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (Stevens, J., respecting the denial of certiorari)). As discussed in the

petition (at 14, 17-18, 23-24, 27) and reply (at 8), the question presented here is a threshold legal question that either requires no factual development or that will guide any further factual development. The United States makes gestures (at 20-21) that this is untrue, but it never identifies any facts upon which the question presented turns. It cannot. If under *Tracy* the incumbent utilities are not similarly situated to NextEra for constitutional purposes, the inquiry is over. Pet. 14, 17-18. If incumbency-based restrictions are permissible under the dormant Commerce Clause for at least some purposes, the facts that must be developed are fundamentally different than if the lower court is correct that they are always (or nearly always) blatant protectionism. *Compare Davis*, 553 U.S. at 338 (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 99 (1985); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986), *with New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Only this Court can provide those answers.

Indeed, this is a case where interlocutory review is necessary in the light of the harm that will befall the public as a result of delay and uncertainty regarding the State's ability to exercise its core police power to protect the health and safety of Texans through public utility regulations. *See* Shapiro, *supra*, at § 2.3 (collecting cases). As petitioners explained (Pet. 32-33)—and the United States nowhere refutes—building transmission lines is a long-term project requiring stability and predictability. The scale of that need cannot be overstated: in *2008*, "the electric industry was reporting that an estimated $298 billion of investment in new electric transmission facilities would be needed between 2010 and 2030

to maintain current levels of reliable electric service." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 51 (D.C. Cir. 2014) (per curiam). This has only accelerated with the current Administration's push to move the entire country to electric cars, *see, e.g.*, Will Englund, *Plug-in cars are the future, The grid isn't ready.*, The Washington Post (Oct. 16, 2021), https://www.washingtonpost.com/business/2021/10/13/electric-vehicles-grid-upgrade.
Given the long lead time for this type of infrastructure investment, the United States' assurance (at 23) that Texas can obtain relief post judgment is of little comfort. In the interim, rational economic actors will find it even more difficult than normal to make informed decisions on whether to invest in the Texas grid while years of fact discovery is conducted—all with the possibility that the district court will guess wrong on what facts must be discovered.

Fourth, as noted above, the United States argues (at 23) that this Court should wait for FERC to determine whether it wants to implement (or more correctly reimplement) a federal conditional right of first refusal. *See* FERC, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and General Interconnection*, 87 Fed. Reg. 26,504, 26,564-26,570 (May 4, 2022). Speculation about what the federal government may or may not do, however, cannot be the standard for when review is appropriate because an agency can *always* change the law in the future. Assuming that the proposed rule will be finalized and withstand any potential court challenges, that does not change whether there is an important question of law requiring this Court's attention *now*. Such speculation is inappropriate here given that this Court has repeatedly held that whether a state law violates the Commerce Clause turns

on the nature of the state law "regardless of whether *Congress* has spoken." *Nat'l Pork Producers*, 598 U.S. at 369 (citing *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)) (emphasis added). A federal agency action might present *other* questions such as the scope of preemption, but it will not alter that fundamental constitutional inquiry.

CONCLUSION

The Court should reject the United States' recommendation regarding review and grant the petition for writ of certiorari.

Respectfully submitted.

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