No. 22-___

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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long recognized that the regulation of utilities is "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). Like most (if not all) States, Texas exercises this power by regulating electric transmission throughout the State, including by setting rates for transmission and distribution services.

For decades, the accepted view across the nation was that system reliability, efficiency, and cost for ratepayers are all best served when new transmission lines are built by the owners of the endpoint facilities to which the new lines would connect. Even when the Federal Energy Regulatory Commission changed course, it expressly preserved States' ability to maintain that policy. *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61,051, para. 313 (July 21, 2011) (final rule) ("Order 1000"). Like other States with large, sparsely populated rural areas, Texas took the federal government up on its offer and gave incumbent utilities a right of first refusal to construct new transmission lines. Tex. 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 (eff. May 16, 2019) (codified at Tex. Util. Code §§ 37.051(a), .053(a), .056, .057, .154(a)) ("S.B. 1938").

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.

PARTIES TO THE PROCEEDING

Petitioners Chairman Peter Lake, Public Utility Commission of Texas, in his official capacity; Commissioner Lori Cobos, Public Utility Commission of Texas, in her official capacity; Commissioner Jimmy Glotfelty, Public Utility Commission of Texas, in his official capacity; Commissioner Kathleen Jackson, Public Utility Commission of Texas, in her official capacity; and Commissioner Will McAdams, Public Utility Commission of Texas, in his official capacity, were defendants-appellees in the court of appeals.

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., were plaintiffs-appellees in the court of appeals.

Respondents Southwestern Public Service Company and Entergy Texas, Incorporated, moved to intervene in the court of appeals after that court issued its judgment so that they could seek review from this Court. The court of appeals granted those motions on December 8, 2022. Per Curiam Order at 2, *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. Dec. 8, 2022) (No. 20-50160) (order granting motions to intervene). As this occurred after the initial time to seek certiorari had lapsed and they were not named in petitioners' application for an extension of time to file this petition, they are currently respondents.

Respondents Public Service Company and Entergy Texas, Incorporated, as well as Oncor Electric Delivery Company, L.L.C., LSP Transmission Holdings II, L.L.C., and East Texas Electric Cooperative, Incorporated were denied intervention in the district court but

were granted leave to intervene in the district court by the Fifth Circuit. *NextEra Energy Capital Holdings, Inc. v. D'Andrea*, No. 20-50168, 2022 WL 17492273 (5th Cir. Dec. 7, 2022) (per curiam). As this occurred after the initial time to seek certiorari had lapsed and they were not named in petitioners' application for an extension of time to file this petition, they are currently respondents.

Ken Paxton, in his official capacity as Attorney General of Texas, was a defendant in the district court. Respondents voluntarily dismissed their claims against him. ROA.978-79, 1028. He thus serves as counsel for petitioners rather than as a respondent.

The United States of America filed a statement of interest in the district court but never sought to become a party so is not a respondent.

A trade association called Texas Industrial Energy Consumers was denied leave to intervene in the district court and did not appeal. Thus, it is also not a respondent.

RELATED PROCEEDINGS

NextEra Energy Capital Holdings, Inc. v. Walker, No. 1:19-cv-626, U.S. District Court for the Western District of Texas. Judgment entered February 26, 2020.

NextEra Energy Capital Holdings, Inc. v. Lake, No. 20-50160, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 30, 2022.

NextEra Energy Capital Holdings, Inc. v. D'Andrea, No. 20-50168, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 7, 2022.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 48 F.4th 306. The opinion of the district court (Pet. App. 46a-63a) is not reported but is available at 2020 WL 3580149.

JURISDICTION

The Fifth Circuit rendered judgment on August 30, 2022. The time to file a petition for a writ of certiorari was extended to December 28, 2022. *Lake v. NextEra Energy Cap. Holdings, Inc.*, No. 22A440 (U.S. Nov. 18, 2022). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, section 8, clause 3 of the U.S. Constitution provides as follows: "The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes . . . ."

Pertinent provisions of Senate Bill 1938, Act of May 7, 2019, 86th Leg., R.S., ch. 44, §§ 1, 2, 4, 5, 7 (eff. May 16, 2019) (codified at Tex. Util. Code §§ 37.051(a), .053(a), .056, .057, .154(a)), are set forth in the appendix to this petition. Pet. App. 66a-70a.

STATEMENT

Providing electricity to consumers proceeds through three steps: generation, transmission-and-distribution, and retail consumption.[1] This case involves whether

[1] *See* U.S. ENERGY INFO. ADMIN., *Electricity Explained: How Electricity is Delivered to Consumers*, https://www.eia.gov/energyexplained/electricity/delivery-to-consumers.php (last visited Dec. 28, 2022); FERC, *Energy Primer: A Handbook for Energy Market Basics* 36-39 (Apr. 2020), tinyurl.com/5d43695y.

States *must* decouple the middle step, or whether they may favor traditional, vertically integrated utilities in the construction of new transmission lines to ensure reliable provision of electricity within their borders.

I. Statutory and Regulatory Background

A. Although the precise balance has shifted over time, it has long been understood that both state governments and the federal government both play roles in regulating the electricity market. *E.g.*, *New York v. FERC*, 535 U.S. 1, 5-14 (2002) (tracing the history of regulation in the electricity market from 1935 to 1997). Under the Federal Power Act, the Federal Energy Regulatory Commission regulates rates and services of interstate transmission of electricity and electricity sale at wholesale. 16 U.S.C. § 824(b)(1); 42 U.S.C. §§ 7134, 7171. With FERC approval, independent system operators and regional transmission organizations (collectively, "ISOs") coordinate and monitor interstate transmission grids. *See* 16 U.S.C. § 824d; Tex. Util. Code § 31.002(9).

States retain jurisdiction over retail sales of electricity and "over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). This includes "control over the siting and approval of transmission facilities." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (per curiam); *see also id.* at 62 (noting that FERC has "expressly and repeatedly disclaim[ed] authority over" "siting and construction . . . matters"); *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 139 FERC ¶ 61,132, para. 48 (May 17, 2012) (final rule). "As a result, the nation's transmission grid is an interconnected patchwork of state-authorized facilities." *Piedmont Env't Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009). State regulation

of the electric industry has long been recognized as a core component of the States' police powers. *See Ark. Elec. Coop.*, 461 U.S. at 377.

B. For decades, to ensure stability in the provision of power, it was federal and state policy across the country to favor incumbent utility companies in the construction of new transmission lines. Like an artery-and-capillary system, transmission lines transport large amounts of electricity at higher voltage over long distances, *see* 16 Tex. Admin. Code § 25.5(141), while distribution services transport electricity over lower-voltage lines from the transmission system to retail consumers, *see id.* § 25.5(31), (33). Because storage is inefficient and electricity must be delivered on demand, electricity must be placed on a grid once it is generated. *See TXU Gen. Co. v. PUCT*, 165 S.W.3d 821, 827-28 (Tex. App.—Austin 2005, pet. denied). Building and maintaining the necessary infrastructure at this middle step—transmission and distribution—is thus critical to the stability and reliability of that grid. *See id.*; *accord New York*, 535 U.S. at 8-10.

Even as the other stages of electricity production have seen a growth in competition, transmission remains characterized by natural monopoly. *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) (plurality op.); *TXU*, 165 S.W.3d at 827. These monopolies were highly regulated at both the state and federal levels through (among other things) rights of first refusal to build new transmission lines. *See generally* Pet. App. 3a-6a.

In 2011, FERC issued Order 1000, requiring ISOs to "eliminate" federal rights of first refusal from "[FERC]-jurisdictional tariffs." Order 1000 at para. 313. FERC adopted this position because it had concluded that—as

a general matter—"the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms." *S.C. Pub. Serv. Auth.*, 762 F.3d at 49. Order 1000, however, recognizes this is not always true and "take[s] great pains to avoid intrusion on the traditional role of the States," explaining that "[e]ven if the Commission's mandate opens up opportunities for nonincumbents, such developers must still comply with state law." *Id.* at 76; *see also MISO Transmission Owners v. FERC*, 819 F.3d 329, 335-37 (7th Cir. 2016). And Order 1000 expressly reaffirms 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." Order 1000 at para. 227.

C. Following Order 1000, while ISOs were instructed to remove federal rights of first refusal from their tariffs, those tariffs still include any state-created rights of first refusal (or their close cousins, certification laws). ROA.41-42. FERC has since approved tariffs that include state rights of first refusal, "conclud[ing] that the Commission should not prohibit" an ISO "from recognizing state and local laws and regulations as a threshold issue." *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127, para. 149 (May 15, 2014); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61,037, para. 25 (Jan. 22, 2015) (denying rehearing). And several States have enacted or retained state rights of first refusal. *See, e.g.*, Minn. Stat. § 216B.246, subd. 2; Neb. Rev. Stat. § 70-1028(1); Okla. Stat. tit. 17, § 292; S.D. Codified Laws § 49-32-20; *see also LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d

1018, 1030-31 (8th Cir. 2020) (discussing the impact of Order 1000 on these laws). Texas is among them.

II. Factual Background

A. Utility regulation in Texas

The Texas electricity regulator is the Public Utilities Commission (PUCT). Tex. Util. Code § 14.001. Consistent with how the energy industry and the regulation thereof developed across the country, *S.C. Pub. Serv. Auth.*, 762 F.3d at 79, Texas recognizes both vertically integrated utilities and transmission-and-distribution utilities as monopolies. *E.g.*, Tex. Util. Code §§ 11.002(b), 31.001(b), 39.001(a). In the monopoly utility market, "[p]ublic agencies regulate utility rates, operations, and services as a substitute for competition" to protect consumers. *Id.* § 11.002(b).

In Texas, electricity services are structured differently depending on region. Most of Texas is served by an intrastate grid overseen by the Electric Reliability Council of Texas ("ERCOT"). Pet. App. 8a. But small parts of the State are served by three interstate grids overseen by the Midcontinent Independent System Operator ("MISO"), the Southwest Power Pool ("SPP"), and the Western Electricity Coordinating Council. *See* Pet. App. 8a-9a. MISO and SPP are the ISOs for the areas of Texas that are at issue here, *see* ROA.56; Pet. App. 8a, and both follow the traditional, vertically integrated utility model. *See Refins. to Horizontal Mkt. Power Analysis for Sellers in Certain Reg'l Transmission Org. & Indep. Sys. Operator Mkts.*, 168 FERC ¶ 61,040, para. 45 (July 18, 2019) (final rule) ("Order 861") (noting that MISO and SPP "mostly consist[] of vertically-integrated utilities"). Texas utilities that are members of MISO and SPP are subject to concurrent PUCT and FERC jurisdiction. ROA.33-34; *see* 16 U.S.C. § 824(b); Tex. Util

Code § 36.001. The PUCT approves utility investments and sets retail rates in these areas—which include the transmission component—and the utilities' costs and revenues are passed through to a captive consumer base in their service areas. *E.g.*, Tex. Util. Code §§ 36.001, 37.051.

Regardless of whether they are part of ERCOT or an ISO, all utilities in Texas must obtain a certificate of convenience and necessity from the PUCT stating that "the public convenience and necessity requires or will require the installation, operation, or extension of the service." *Id.* § 37.051(a). In determining whether to issue such a certificate, the PUCT weighs a variety of factors including the cost to consumers and the adequacy of existing service. *Id.* § 37.056(c). The PUCT considers ISOs' recommendations for new lines, but its certificate process is ultimately independent of the evaluations done by ISOs. *See, e.g.*, Tex. Pub. Util. Comm'n, *Application of Brazos Elec. Power Coop., Inc. to Amend its Certificate of Convenience & Necessity for a 138-KV Transmission Line in Collin Cnty.*, Docket No. 46,429, slip op. at 14 (Jan. 26, 2018), https://interchange.puc.texas.gov/Documents/46429_715_968092.PDF (final order denying certificate of convenience and necessity).

With almost complete uniformity, Texas's practice has always been that owners of existing endpoint facilities build new transmission lines.[2] For members of MISO and SPP, this was effectuated through a federal right of first refusal until 2011. After Order 1000, however, the

[2] The only exception of which petitioners are aware involved the unique buildout of wind-energy transmission in West Texas, which was managed as a joint venture with an infrastructure company based in Canada. WETT, *About WETT*, http://www.windenergyoftexas.com/partners (last visited Dec. 28, 2022).

PUCT issued a controversial declaratory order permitting transmission-only utilities to build lines in non-ERCOT regions. *See* Tex. Pub. Util. Comm'n, *Joint Petition of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order*, Docket No. 46,901, 341 P.U.R.4th 195, 2017 WL 5068379, at *12 (Oct. 26, 2017). While an appeal of the PUCT's declaratory order was pending, *Entergy Tex., Inc. v. PUCT*, No. 03-18-00666-CV, 2019 WL 3519051, at *1 (Tex. App.—Austin Aug. 2, 2019, no pet.) (mem. op.)—and before any such project came to fruition—the Legislature passed S.B. 1938 to reaffirm Texas's longstanding practices and to insure uniformity in energy policy across the State. Pet. App. 66a-70a.

S.B. 1938 amended Texas Utilities Code sections 37.051, 37.056, 37.151, and 37.154 to confirm that across Texas, incumbent owners have effectively a right of first refusal to build transmission lines. Pet. App. 66a-70a. Specifically, section 37.051 now provides that the PUCT will grant a certificate of convenience and necessity for new transmission to the endpoint owners. And section 37.154(a) allows the endpoint owner to transfer its rights to another utility under specified circumstances. Neither provision distinguishes among potential operators based on where they are located.

B. Projects sought by NextEra

NextEra and its affiliates (collectively, "NextEra") are headquartered in Florida and brought this challenge because they seek to participate in two transmission projects in Texas. The first, the focus of this litigation, is the Hartburg-Sabine line. ROA.30. A NextEra subsidiary entered a "Selected Developer Agreement" with MISO to build this line on January 25, 2019. ROA.53. That agreement requires NextEra to secure a certificate of convenience and necessity from the PUCT.

ROA.53. NextEra has never applied for or received such a certificate.[3]

The second project is the potential purchase of the Jacksonville-Overton line, located in the SPP area of Texas. ROA.31. A separate NextEra affiliate applied to the PUCT for a transfer of the certificate-of convenience-and-necessity rights. ROA.31. PUCT staff signed a stipulation in October 2018 recommending approval, but the transfer has not been approved to date and has been questioned by at least two Commissioners. Tex. Pub. Util. Comm'n, *Joint Application of NextEra Energy Transmission Sw., LLC & Rayburn Country Elec. Coop., Inc. to Transfer Certificate Rights to Facilities in Cherokee, Smith, & Rusk Cntys.*, Docket No. 48,071 (Oct. 1, 2018), https://interchange.puc.texas.gov/Documents/48071_80_995044.PDF (stipulation); ROA.1754-56.[4]

III. Procedural Background

A. NextEra sued the PUCT's Commissioners, seeking to facially invalidate Texas Utilities Code sections 37.051, 37.056, 37.057, 37.151, and 37.154, as amended by S.B. 1938 under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. ROA.29, 55-58. In addition

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[3] The Fifth Circuit nonetheless concluded that NextEra's claims are ripe. Pet. App. 13a-15a. Petitioners do not challenge that conclusion.

[4] During the pendency of this litigation, MISO canceled the Hartburg-Sabine Line as no longer necessary. Amanda Durish Cook, *Miso Cancels Hartburg-Sabine Competitive Project*, RTO INSIDER LLC (Aug. 31, 2022), https://tinyurl.com/2dnhzk47. This does not affect NextEra's asserted desire to purchase the Jacksonville-Overton line, and NextEra has continued to pursue this litigation. *See* Appellants' Opposition to Motion to Stay the Mandate, *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022) (No. 20-50160).

to final prospective relief, NextEra sought a preliminary injunction. ROA.73-84.

The Commissioners moved to dismiss NextEra's Commerce Clause claim, ROA.1851-73, which the district court granted. Pet. App. 46a-63a.[5] The court concluded that *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), provided three reasons which required dismissal: (1) this Court's reasoning affords "controlling weight to the monopoly market, which is also the market in Texas"; (2) "Texas is entitled to consider the effect on the consumers that the utilities serve"; and (3) "existing regulated transmission-line providers with a right of first refusal are not similarly situated with unregulated providers such as NextEra." Pet. App. 57a-58a.

The district court further held that the S.B. 1938 did not discriminate against interstate commerce facially, through its purpose, or in effect. Pet. App. 57a-60a. The district court concluded that S.B. 1938 facially drew distinctions based on incumbency, not geography. Pet. App. 57a-58a. Similarly, the district court found no discriminatory effect, noting that most incumbent providers are out-of-state companies themselves and that non-incumbents (either in-state or out-of-state) have the same path to enter the market. Pet. App. 59a. Finally, the district court found that rather than seeking to discriminate against out-of-state entities, the Legislature acted to

[5] Although the Antitrust Division of the U.S. Department of Justice filed a Statement of Interest supporting NextEra in the district court, ROA.2884-906, and also filed an amicus brief and participated in oral argument in the court of appeals, U.S. Amicus Br., *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. Apr. 1, 2020) (No. 20-50160); Order, *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. May 23, 2020) (No. 20-50160), FERC has not participated in this case.

clarify Texas law in the wake of the PUCT's 2017 declaratory order, which was then on appeal. Pet. App. 58a-60a. Because Texas had not discriminated against out-of-state utilities, the district court concluded that any burden imposed by S.B. 1938 was not "clearly excessive in relation to the putative local benefits." Pet. App. 60a-61a (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

B. A divided panel of the Fifth Circuit reversed the dismissal of NextEra's Commerce Clause claim. *See* Pet. App. 40a; Pet. App. 40a-45a (Elrod, J., concurring in part and dissenting in part).

The majority concluded that S.B. 1938 facially discriminated against out-of-state companies because "when it comes to transmission, a vertically integrated utility" such as the incumbents in the Texas transmission market "and a transmission-only company" such as NextEra "are similarly situated." Pet. App. 21a. The majority distinguished *Tracy* because the law in question there "applied primarily to grant utilities a tax preference in a market where they were monopolies. SB 1938 operates at 'the opposite end of the local-to-interstate spectrum,' in a wholly competitive market, and is an outright ban on new entrants." Pet. App. 22a (citation omitted).

Although the panel majority acknowledged that "most of the incumbent transmission-line providers that benefit from SB 1938 are incorporated or headquartered outside Texas," Pet. App. 29a, 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. Then, ignoring that this Court has repeatedly stated that under the dormant Commerce

Clause "[a] discriminatory law is 'virtually *per se* invalid,'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (citation omitted), the panel majority hypothesized that the Commissioners might still be able to show on remand that "Texas has no other means to 'advance[] a legitimate local purpose," Pet. App. 34a-35a (alteration in original) (citation omitted).

Judge Elrod dissented from the panel's holding that S.B. 1938 was facially discriminatory. Pet. App. 40a-45a (Elrod, J., concurring in part and dissenting in part). As Judge Elrod explained, "S.B. 1938 draws a neutral distinction between entities based on *incumbency status*, which does not depend on residency" and that "the majority needs a further inferential step to conclude that S.B. 1938 amounts to discrimination against out-of-state entities." Pet. App. 42a. Such an "inferential step," she concluded, "lands beyond the realm of facial discrimination. If the text does not distinguish between in-state and out-of-state interests—which it does not—S.B. 1938 cannot be facially discriminatory." Pet. App. 43a.

Judge Elrod joined the majority, however, in holding that NextEra had adequately pleaded that S.B. 1938 violates the Commerce Clause because it has a discriminatory purpose or effect and that the burdens S.B. 1938 allegedly imposes on interstate commerce are "clearly excessive in relation to the putative local benefits" of the law. Pet. App. 35a-37a (quoting *Pike*, 397 U.S. at 142). According to the panel, "pleadings-stage dismissal of th[o]se claims was premature" because they "require factual development." Pet. App. 35a; *see also* Pet. App. 35a-37a. This petition followed.

REASONS FOR GRANTING CERTORARI

The Fifth Circuit incorrectly applied this Court's decision in *Tracy* and deepened a well-defined circuit split

regarding how to treat distinctions based on incumbency for the purposes of the dormant Commerce Clause. The court's flawed decision also impacts the provision of electricity to millions in Texas and elsewhere, meriting this Court's review. *See* Sup. Ct. R. 10(a), (c).

I. The Panel Opinion Conflicts with This Court's Precedents.

A. S.B. 1938 does not facially discriminate against interstate commerce.

S.B. 1938 does not discriminate against interstate commerce on its face. Indeed, it does not mention geography at all. Instead, it provides that "[a] certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility . . . may be granted only to the owner of that existing facility." Tex. Util. Code § 37.056(e). The utility authorized to build and operate the transmission line may, instead of building the line itself, also seek to designate another provider that is currently certificated in the power region to build the line, subject to Commission approval. *Id.* § 37.056(g). A certificate of convenience and necessity may be sold, assigned, or leased where "the purchaser, assignee, or lessee is already certificated by the [C]ommission to provide electric service within the same electric power region," or "[a]s part of a transaction subject to Sections 36.262(l)-(o) and 39.915," which govern sales and mergers of incumbent utilities. *Id.* § 37.154(a).

S.B. 1938 thus "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 (citation omitted). It requires that new transmission lines be built by the endpoint owners irrespective of domicile. Texas enacted S.B. 1938 to grant incumbent

transmission companies a right of first refusal to ensure the development and maintenance of electrical systems within the State "in a way that further facilitates reliability" and "protect[s] the integrity of the electric transmission infrastructure." ROA.2153.

This policy decision is consistent with FERC regulations, which permit state right-of-first-refusal laws because "incumbent transmission providers may have unique knowledge of their own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability." Order 1000 at para. 260; *see also id.* (Comm'r Moeller, dissenting in part) (raising concerns about regional cooperation and reliability).

B. The Fifth Circuit's result is irreconcilable with this Court's decision in *Tracy*.

Texas's policy decision is permitted by the Commerce Clause for the reasons this Court articulated in *Tracy*. That case involved a challenge to Ohio's differential tax treatment for sales of natural gas by regulated domestic utilities and interstate gas marketers in the competitive market. 519 U.S. at 304. This Court upheld Ohio's tax exemption that applied only to the state-regulated monopolistic entities and not to independent non-state-regulated marketers. *Id.* at 311-12.

Because Texas's electricity market is analogous, applying the *Tracy* analysis should lead to the same result. The panel's decision that S.B. 1938 nonetheless *did* discriminate against interstate commerce is contrary to this Court's decision in *Tracy* on an "important question of federal law" appropriate for this Court's review. Sup. Ct. R. 10(c).

The panel disregarded *Tracy* altogether because, in the panel's view, S.B. 1938 "governs only a competitive market." Pet. App. 20a. This ignores that much of the point of *Tracy* was to determine whether "allegedly competing entities" are—as a matter of law—"similarly situated for constitutional purposes," which the Court described as a "threshold question" that must be resolved before addressing whether the dormant Commerce Clause has been violated. 519 U.S. at 299. Because, under *Tracy*, the incumbent utilities given a right of first refusal are not "similarly situated" to transmission-only providers like NextEra, the dormant Commerce Clause is inapplicable. *Id.*

1. *Tracy* reached its conclusion in four distinct steps. *First*, the *Tracy* Court determined that the entities sold different products: (1) the local utilities sold natural gas "bundled" with "services and protections" to ensure reliability and stable rates; and (2) the out-of-state marketers sold "unbundled" natural gas. *Id.* at 297-98. *Second*, *Tracy* explained that the local utilities sold their "bundled" product to a "captive" market of (largely residential) customers who cannot readily bear risks related to their supply or costs. *Id.* at 301. The marketers, by contrast, sold their "unbundled" product primarily to a "noncaptive" market of bulk buyers with greater ability to switch sources. *Id.* at 302-03. *Third*, *Tracy* concluded that the difference in products meant that the local utilities and the marketers would continue to "serve different markets" "even if the supposedly discriminatory burden were removed." *Id.* at 299. *Fourth*, *Tracy* held that "a number of reasons support[ed] a decision to give the greater weight to the captive market and the local utilities' singular role in serving it, and hence to treat

[independent] marketers and [utilities] as dissimilar." *Id.* at 304.

2. Applying *Tracy*'s four-step analysis, NextEra's dormant-Commerce-Clause challenge to S.B. 1938 fails. *First*, as in *Tracy*, the incumbents in Texas's MISO and SPP regions are monopolies in their service areas, Order 861 at para. 48, and thus are subject to pervasive state regulation over their retail rates and services, *see, e.g.*, Tex. Util. Code §§ 11.002(b), 31.001(b), 36.051, 38.002. As a result, they provide transmission service as part of a fully "bundled" service to retail customers. *Tracy*, 519 U.S. at 297. By contrast, the service provided by transmission-only entities such as NextEra would be "unbundled" from such obligations.

Second, like the market in *Tracy*, there is a captive market that only the incumbent entities serve in Texas—the retail market. Those traditional, vertically integrated utilities (like the local gas utilities in *Tracy*) are subject to pervasive state regulation, *see, e.g.*, Tex. Util. Code §§ 36.051, 38.002, and have an obligation to serve "every consumer in the utility's certificated area" and "provide continuous and adequate service in that area," *id.* § 37.151. Additionally, even where generation, transmission, and retail are provided by different entities, as in ERCOT, the transmission-and-distribution portion of the market is characterized by monopoly conditions and subjected to traditional rate regulation. *See id.* § 36.001.

Third, unlike in *Tracy*, there is no market in which the entities compete. 519 U.S. at 303. In *Tracy*, a non-captive market existed where sellers of bundled and unbundled products competed for industrial customers whose prices were set by market forces. *Id.* at 302-03, 307. Although NextEra competed with other transmission providers for selection by MISO, as even the panel

recognized, selection by the relevant ISO does not confer the right to build a line; that remains the State's to give. Pet. App. 38a-39a. After a certificate of need is granted, there is no competition analogous to the competition in *Tracy*: amounts paid for transmission service are set by regulators, not by market forces. *See, e.g.*, 16 U.S.C. §§ 824(b)(1), 824d, 824e, 824s; Tex. Util. Code §§ 36.001, .209; 16 Tex. Admin. Code §§ 25.192, .239. Indeed, transmission-only entities in the MISO and SPP regions at issue here have *never* competed with incumbent utilities for the right to build transmission lines, even before S.B. 1938. *Supra* pp. 5-7. Under such circumstances, *Tracy* expressly required caution because forcing state-regulated utilities to compete on a level playing field with interstate marketers could jeopardize the utilities' "ability to continue to serve the captive market where there is no such competition." 519 U.S. at 307.[6]

Fourth, because there were two relevant markets—one competitive and one noncompetitive—the *Tracy* Court considered which market had primary importance. *Id.* at 306-07. That step is not applicable here in the absence of a competitive market. But even if it were, the Court gave primary importance to the captive gas market based on the Court's "traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." *Id.* at 306. This Court has "consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was 'never intended to cut

[6] The same result obtains if one examines with precision who is being sold what: traditional, vertically integrated utilities sell electricity to ratepayers; transmitting that electricity is a cost of providing that good. Entities like NextEra sell transmission services to utilities so that the utilities can sell electricity to ratepayers.

the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect'" interstate commerce. *Id.* (quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960)). Those same concerns apply here.

In sum, as in *Tracy*, Texas's "regulatory response to the needs of the local [electric] market has resulted in a noncompetitive bundled . . . product that distinguishes its regulated sellers from independent" transmission companies. *Id.* at 310. Because NextEra failed to establish its "threshold" burden to show that incumbent utility companies are similarly situated to potential transmission-only providers for constitutional purposes, the lower court should never have reached the issue of whether S.B. 1938 unconstitutionally discriminated between the two. *Id.* at 299.

3. Although *Tracy* involved only a facial challenge to Ohio's law, Pet. App. 19a (citing *Tracy*, 519 U.S. at 298, 310), the conclusion that NextEra is not "similarly situated" to incumbent electric utilities also dooms any other dormant-Commerce-Clause challenge—including under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). As the *Tracy* Court explained, there is "no clear line" between the dormant-Commerce-Clause analyses for discrimination challenges and challenges based on "the so-called *Pike* undue burden test, . . . and several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations." *Tracy*, 519 U.S. at 298 n.12 (collecting cases). And "*any* notion of discrimination assumes a comparison of substantially similar entities." *Id.* at 298 (emphasis added) (footnote omitted). Because the entities that NextEra

seeks to compare are not similarly situated for constitutional purposes, S.B. 1938 cannot unconstitutionally discriminate between them.

C. The Fifth Circuit compounded its error by comparing natural-monopoly utility markets to competitive markets for other goods.

The panel impermissibly departed from *Tracy* when it nonetheless held that the enterprises are "similarly situated" for the purposes of NextEra's challenge under the dormant Commerce Clause. Pet. App. 21a. To do so, the panel emphasized the *Tracy* Court's footnoted aside that public utilities are not "immune from . . . ordinary Commerce Clause jurisprudence." Pet. App. 18a (quoting *Tracy*, 519 U.S. at 291 n.8). This ignores that four members of the *Tracy* majority later observed that *Tracy* "effectively" *did* "create[] what might be called a 'public utilities' exception to the negative Commerce Clause." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting). The panel also applied a definition of competition not contemplated by *Tracy*, compared markets that bear no resemblance to each other, and used an analytical framework that *Tracy* rejected.

1. As an initial matter, the panel held that *Tracy* did not apply because the law at issue in *Tracy* "g[ave] in-state businesses a preference in both captive and non-captive retail markets," but S.B. 1938 "governs only a competitive market"—"the market for transmission of electricity." Pet. App. 20a. But *Tracy* contemplated competition in the market for *customers*. 519 U.S. at 302-03, 307. There is no such competition here because amounts customers pay to Texas transmission providers for their service are set by regulators, not by market forces. *See, e.g.*, 16 U.S.C. §§ 824(b)(1), 824d, 824e, 824s; Tex. Util.

Code §§ 36.001, .209; 16 Tex. Admin. Code §§ 25.192, .239. At *most*, NextEra would compete with incumbent utilities for regulatory approval. *Contra* Pet. App. 20a-21a (suggesting that there was relevant competition in transmission services). And *Tracy* never considered *that* a relevant market for these purposes.

2. The panel majority compounded this error by comparing the allegedly competitive market it improperly identified to the demonstrably competitive markets in consumer goods at issue in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), *Granholm v. Heald*, 544 U.S. 460 (2005), and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). *See* Pet. App. 29a-34a. It then effectively struck down S.B. 1938 because it supposedly had the same impact on the market for electricity transmission that those had on the markets for dairy products and alcohol. This cannot be reconciled with how this Court has applied the dormant Commerce Clause, namely "eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects" with an eye to toward the market structure at issue. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

S.B. 1938 is unlike the statutes in *Tennessee Wine*, *Granholm*, and *Dean Milk*, each of which involved the deliberate creation of barriers to entry into naturally competitive markets for the interstate transport of consumable (and often perishable) goods. The law at issue in *Tennessee Wine* placed a direct durational-residency requirement on anyone seeking to obtain or renew a license to operate a liquor store in Tennessee. 139 S. Ct. at 2457. *Granholm* also involved laws that reflected "obvious" protectionism of establishing preferential licensing and distribution schemes for in-state wineries in New York and Michigan. 544 U.S. at 473-76. And *Dean Milk*

involved a regulation requiring all milk sold in Madison, Wisconsin to be processed at facilities within a certain distance of the city. 340 U.S. at 352. Milk and alcohol are archetypical competitive markets, *see, e.g.*, *W. Lynn Creamery*, 512 U.S. at 189 (noting that there is "substantial competition among [milk] producers in different States"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984) (discussing the impact of a protectionist law on the market for alcohol), and these state laws were prototypical barriers to trade, *Tennessee Wine*, 139 S. Ct. at 2462; *Granholm*, 544 U.S. at 473-76; *Dean Milk*, 340 U.S. at 353-54.

None of these cases dealt with how to regulate a natural monopoly that exists in the provision of a vital public good, such as electricity, that *must* be delivered within a State. Put another way, as Judge Elrod explained, "S.B. 1938's incumbency requirement is meaningfully different than [those] discriminatory in-state presence requirements," which "*add*[*ed*] requirements that discriminate against out-of-state entities" who could otherwise easily compete with local interests. Pet. App. 43a (Elrod, J., concurring in part and dissenting in part). S.B. 1938, by contrast, "merely recognizes a *pre-existing* physical-presence requirement: an electric company cannot provide transmission-and-distribution services without some sort of existing physical presence in the [S]tate." Pet. App. 44a. After all, while a wine producer can ship goods to Texas from California, an electric transmission line *must* be located in Texas to provide electricity in Texas. Pet. App. 44a. And because of the high sunk costs involved, transmission lines have *always* had high barriers to entry—which is why they often operate as natural monopolies. *Supra* pp. 5-7. S.B. 1938, like the law at issue in *Tracy*, addressed how to ensure those high sunk costs

were not imposed on the captive market of local residents who had no ability to either absorb or avoid them. *See Tracy*, 519 U.S. at 301; Pet. App. 69a; ROA.2153.

The majority responded that S.B. 1938 "added a physical-presence requirement to Texas utility law." Pet. App. 33a. But, as Judge Elrod noted, "the mere fact that an entity had a physical presence in Texas before" S.B. 1938 was enacted "says only that the entity was an existing market provider at that time, and nothing more. It says nothing about whether the entity is an in-state or an out-of-state entity, or whether the law favors in-state over out-of-state interests." Pet. App. 44a (Elrod, J., concurring in part and dissenting in part).

In addition, in-state transmission-only companies would face the same hurdles NextEra faces. In-state transmission-only companies may not build transmission in MISO or SPP, any more than out-of-state transmission-only companies. Although section 37.154(a) of the Texas Utilities Code provides that rights under a certificate of convenience and necessity may be assigned only to entities already certificated in the same power region, there are no already-certificated in-state (*or* out-of-state) transmission-only companies in MISO or SPP, so the treatment of the in- and out-of-state entities remains the same. The dormant Commerce Clause does not prohibit distinctions based on business form. *See Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 125 (1978); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163-64 (5th Cir. 2007). Like the certification requirements themselves, Tex. Util. Code § 37.051(a), the statute's designation requirements are likewise based on incumbency, *id.* § 37.051(g).

3. By myopically (1) focusing on the supposedly competitive market in which transmission-only companies allegedly compete with traditional, vertically integrated

utilities, and (2) comparing that non-existent market to truly competitive markets for commodities, Pet. App. 20a-23a—the panel adopted precisely the approach the *Tracy* Court rejected.

The *Tracy* Court recognized that the ability of the local utilities there to compete in the competitive market was impacted by the regulation of their service to the noncompetitive market, and the Court was wary of the potential negative impacts of "judicial intervention" aimed at the noncompetitive market. *Tracy*, 519 U.S. at 303-10. Thus, the problem with the facial-discrimination challenge to the Ohio law in *Tracy* was not, as the panel surmised, that "the utilities and out-of-state sellers were not similarly situated for all, or even most applications, of the statute." Pet. App. 20a. Instead, the facial-discrimination challenge in *Tracy* failed because the Court concluded that—unlike the dairies in *Dean Milk*, the vintners in *Granholm*, or the liquor purveyors in *Tennessee Wine*—the utilities and out-of-state sellers were not similarly situated for any applications of the challenged statute. *Tracy*, 519 U.S. at 310. So too here.

The incumbent transmission companies in the MISO and SPP areas of Texas are traditionally structured to provide generation, transmission-and-distribution, and retail. Those utilities are subject to pervasive state regulation over their retail rates and services, *e.g.*, Tex. Util. Code §§ 36.051, 38.002, and have an obligation to serve "every consumer in the utility's certificated area" and "provide continuous and adequate service in that area," *id.* § 37.151(1)-(2). So even in the transmission market, the traditional, vertically integrated utilities are not "similarly situated" to transmission-only companies like NextEra for dormant-Commerce-Clause purposes. *Tracy*, 519 U.S. at 310.

* * *

In sum, by using the wrong frame of reference to delineate a supposedly competitive market and narrowly focusing on only that non-existent market, the panel disregarded the "extreme caution" the *Tracy* Court instructed courts to use "before making a choice that could strain the capacity of the States to continue to demand . . . regulatory benefits" from public utilities. *Id.* at 307, 310 (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (Black, J., concurring)). In doing so, the panel inflicted regulatory uncertainty on the energy market, which will likely lead to increased costs for Texas ratepayers and which risks damage to the economy of the region and the health of its inhabitants. These far-reaching effects, along with the well-established importance of the States' ability to regulate public utilities more generally, *see infra* Part III; *Ark. Elec. Coop.*, 461 U.S. at 377, justify this Court's intervention. Sup. Ct. R. 10(c).

II. The Fifth Circuit's Decision Deepens an Established Circuit Split Regarding Incumbency-Based Regulations.

The panel's decision also merits this Court's review because it expressly split with the Eighth Circuit regarding how to apply the dormant Commerce Clause in the context of electricity regulation. Pet. App. 28a-29a & n.8 (discussing *LSP*, 954 F.3d at 1027-29). And it deepened an already existing circuit split regarding how to treat incumbency biases in other contexts. Such splits warrant this Court's review. *See* Sup. Ct. R. 10(a), (c).

A. Electricity

As Judge Elrod noted in her partial dissent, the panel decision expressly creates a circuit split with the Eighth

Circuit, which rejected a challenge to a Minnesota law that created "an incumbency preference nearly identical" to S.B. 1938's incumbency preference. Pet. App. 42a (Elrod, J., concurring in part and dissenting in part). Indeed, far from running from the description, the panel majority freely admitted that the "Minnesota law . . . will sound familiar." Pet. App. 28a (majority op.).

1. The panel majority had little choice but to acknowledge the split: the Eighth Circuit explained that "FERC continues to acknowledge 'longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction.' The building of transmission lines inheres in the processes of siting, permitting, and constructing, which are integral to transmission planning and expansion." *LSP*, 954 F.3d at 1028 (quoting Order 1000 at para. 107). The Eighth Circuit thus rejected the premise—which also underlays NextEra's challenge to S.B. 1938—"that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Id.* at 1028-29 (alteration in original) (quoting *Exxon*, 437 U.S. at 127). Because both the Minnesota law and S.B. 1938 "appl[y] evenhandedly to all entities, regardless of whether they are" based in-state "or based elsewhere," *id.* at 1028, the Eighth Circuit's conclusion that the Minnesota law does not facially discriminate against interstate commerce applies with equal force to S.B. 1938.

The Fifth Circuit majority nonetheless rejected the Eighth Circuit's analysis. Pet. App. 28a-30a. The majority first observed that in describing the doctrine known as the dormant Commerce Clause, several of this Court's decisions "did not even mention the place of incorporation" for the companies challenging the relevant laws.

Pet. App. 25a. Based on that observation, the majority inferred that this Court views an entity's place of incorporation as irrelevant when applying this doctrine. *See* Pet. App. 25a-26a. That is a non-sequitur. Courts "rely on the parties to frame the issues for decision" so that they may serve "the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citation omitted). If the question of the parties' place of incorporation—or its headquarters' location—"merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon," anything the Court may have implied about the issue is "not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (citation omitted).

The panel majority also tried to distinguish S.B. 1938, asserting that the Minnesota law "does not go nearly as far as [S.B. 1938] in banning new entrants outright" because Minnesota's right of first refusal is time-limited. Pet. App. 28a. Neither the majority nor NextEra explain why that difference has constitutional significance under the prevailing legal test. Moreover, that "difference is likely only theoretical." Reply Brief for Petitioner at 12 n.3, *LSP Transmission Holdings, LLC v. Sieben*, 141 S. Ct. 1510 (2021) (No. 20-641), 2021 WL 680535. As the challenger to the Minnesota law explained to this Court, "given the nature of the opportunity, few, if any, in-state incumbents will ever decline their right of first refusal" under the Minnesota law. *Id.*

2. Unlike the panel, NextEra has tried to argue that no circuit split exists because the Eighth Circuit declined to decide "whether an entity that has an in-state presence but is headquartered elsewhere is considered an in-state entity for the purpose of dormant Commerce

Clause review." Appellants' Opposition to Motion to Stay the Mandate at 16-17, *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022) (discussing *LSP*, 954 F.3d at 1029 n.7). The Eighth Circuit declined to decide that issue, however, because the Minnesota law—like S.B. 1938—does not raise it. *See LSP*, 954 F.3d at 1029 n.7. The Eighth Circuit noted, however, "that it would be somewhat awkward to label a Minnesota law as discriminatory despite benefitting a company that has an operation in Minnesota but is principally located or headquartered elsewhere." *LSP*, 954 F.3d at 1029 n.7. So too here.

The Minnesota law and S.B. 1938 both "draw[] a neutral distinction between entities based on *incumbency status*, which does not depend on residency." Pet. App. 42a (Elrod, J., concurring in part and dissenting in part); *see LSP*, 954 F.3d at 1028 ("Minnesota's preference is for electric transmission owners who have existing facilities . . . ."). And in both Minnesota and Texas, "almost all of the incumbents with a right-of-first-refusal to build new lines connecting to their own are not controlled by [local] interests" and "[t]hus . . . are appropriately classified as 'out-of-state' entities." ROA.1866; *see* ROA.1903-2040 (public records subject to judicial notice that show the ownership of electric utilities operating in Texas); *LSP*, 954 F.3d at 1028 ("Currently, incumbents in Minnesota include entities headquartered in Iowa, North Dakota, South Dakota, Wisconsin, and Minnesota. Many of these entities also own and operate facilities in states other than Minnesota.").

In short, S.B. 1938's incumbency preference—like the Minnesota law's incumbency preference in *LSP*—does not facially discriminate against out-of-state commerce. By concluding otherwise, the majority split with

the Eighth Circuit, and that split is a prime candidate for this Court's review and reversal. Sup. Ct. R. 10(a), (c).

B. Other incumbency preferences

In addition to expressly splitting with the Eighth Circuit specifically on the issue of regulating electricity transmission, the panel deepened an existing circuit split on how to treat incumbency-related restrictions more generally. Specifically, in splitting from the Eighth Circuit, the majority invoked *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230, 1259 (11th Cir. 2012), and *Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005), Pet. App. 27a, which largely equate incumbency and geography-based restrictions. And the panel sought to distinguish (even dismiss) *Colon Health Centers of America, LLC v. Hazel*, which expressly warned that "[a]llowing incumbency to serve as the proxy for in-state status would be a risky proposition." 813 F.3d 145, 154 (4th Cir. 2016); Pet. App. 32a n.11.

As the Eighth Circuit correctly noted, those decisions "do not consider state regulation of certain matters relevant to transmission planning and expansion." *LSP*, 954 F.3d at 1028 n.6. *Florida Transportation Services* involved a regulation that treated incumbent stevedores differently from new applicants for a limited number of permits. 703 F.3d at 1258. *Walgreen* involved restrictions on the opening of new pharmacies. 405 F.3d at 52. *Hazel* involved requirements to obtain a certificate of need before making capital expenditures to purchase new health-care equipment. 813 F.3d at 149.

Nonetheless, a close examination of the way each court treated incumbency and place of incorporation (or headquarters) under the dormant Commerce Clause doctrine shows that the context is not driving the conclusion. For example, as discussed above, the panel treated

incumbency almost as a synonym for local interests, Pet. App. 27a, and place of incorporation as irrelevant under this Court's case law, Pet. App. 25a-26a. That cannot be reconciled with the Fourth Circuit's view that "[t]he dormant Commerce Clause is exclusively designed to address the 'differential treatment of in-state and out-of-state economic interests'"—not the differential treatment of incumbents and newcomers. *Hazel*, 813 F.3d at 154 (quoting *Granholm*, 544 U.S. at 472). Nor can the panel's approach here be reconciled with the Fourth Circuit's endorsement of a place-of-incorporation test as both "easily applied" and consistent with the notion that "[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." *Id.* (citing James D. Cox & Thomas Lee Hazen, 1 TREATISE ON THE LAW OF CORPORATIONS § 3:2 (2d ed. 2015)). If anything, that the same issue has arisen in such disparate contexts strongly counsels in favor of a need for this Court's guidance on this legal question.

III. This Case Implicates Issues of Great Importance that Should Be Resolved Now.

A. This case presents a question of grave importance to the States and their citizens.

The Court should step in now to provide guidance as the question presented—both specifically as to electricity regulation and generally as to certificate-of-need laws—is of great importance to the States' ability to exercise their traditional police powers to protect the health and safety of their people. State regulation of utilities has long been recognized as a core police power. *New York*, 535 U.S. at 24; *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989); *Ark. Elec. Coop.*, 461 U.S. at 377; *Allco Fin. Ltd.*

v. Klee, 861 F.3d 82, 106-07 (2d Cir. 2017). Indeed, this Court has described it as "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop.*, 461 U.S. at 377.

It was for that reason that *Tracy* expressly instructed federal courts to act with caution—indeed, "extreme caution"—in this space. *Tracy*, 519 U.S. at 310 (quoting *Nw. Airlines*, 322 U.S. at 302 (Black, J., concurring)); *see also id.* at 307. "[T]he importance of traditional regulated service to the captive market," the Court explained, "makes a powerful case against any judicial treatment that might jeopardize [the utilities'] continuing capacity to serve the captive market." *Id.* at 304. Courts, *Tracy* explained, are "institutionally unsuited to gather the facts upon which economic predictions can be made." *Id.* at 308-09; *id.* (stating that the courts were thus "ill qualified to develop Commerce Clause doctrine dependent on . . . predictive judgments" about economic consequences). Instead, legislatures and administrative bodies are "better-situated" to "determine the economic wisdom and the health and safety effects" of a decision about the correct balance between competition and a right of first refusal in the context of building of electric transmission facilities. *See Allco*, 861 F.3d at 107. Both Congress and FERC have allowed States like Texas to adopt a right of first refusal for themselves. *See MISO Transmission Owners*, 819 F.3d at 336. The Fifth Circuit took that option away, fundamentally undermining S.B. 1938's goal of improving reliability. ROA.2153.

That significance is only heightened when the question presented is examined in the general context of incumbency-based restrictions and certificate-of-need requirements. For example, the Fourth Circuit has explained that "[c]ertificate-of-need regimes—in place in

many [S]tates across this country—are designed in the most general sense to prevent overinvestment in and maldistribution" of other types of infrastructure facilities as well. *Hazel*, 813 F.3d at 153 (citing Lauretta H. Wolfson, *State Regulation of Health Facility Planning: The Economic Theory and Political Realities of Certificates of Need*, 4 DEPAUL J. HEALTH CARE L. 261, 262 (2001)). As in the field of electricity regulation, courts are "ill-qualified to develop Commerce Clause doctrine dependent on . . . predictive judgments" about the economic consequences of such regulations. *Tracy*, 519 U.S. at 308-09. Yet, absent this Court's intervention, in at least three Circuits, that is precisely what courts will continue to do.

B. The question presented here is fit for this Court's resolution now.

There is no impediment to—and great need for—this Court's intervention to provide that necessary guidance here. Petitioners acknowledge that "the Court considers 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). However, it may grant such review where further factual development is unnecessary to resolve the legal question presented, *cf. Mount 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. BOP*, 547 U.S. 1106, 1107 (2006) (Stevens, J., respecting the denial of certiorari)), and where delay might cause harm to petitioners or to the larger public, Shapiro, *supra*, at § 2.3 (collecting cases). This is a case where interlocutory review of the threshold legal questions would be appropriate and is needed.

As discussed above (at 14, 17-18, 23-24, 27), the question presented here is a threshold legal question that either requires no factual development or that will guide any further factual development. If under *Tracy* the incumbent utilities are not similarly situated to NextEra for constitutional purposes, the inquiry is over. *Supra* pp. 14, 17-18. If incumbency-based restrictions are permissible under the dormant Commerce Clause for at least some purposes, *supra* pp. 23-24, 27, 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 Pike*, 397 U.S. at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."), *with New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) ("Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."). Only this Court can provide those answers.

If anything, the possibility that factual development will ultimately be helpful for the Court is illusory. Although the Fifth Circuit left open the possibility that petitioners can prove that "Texas has no other means to 'advance[] a legitimate local purpose,'" Pet. App. 34a-35a (alteration in original) (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 94 (1994)), that is of little comfort. The panel majority squarely held that S.B. 1938 discriminates against interstate commerce *on its face*. Pet. App. 34a. And this Court has repeatedly

stated that such restrictions are "virtually per se invalid." *Davis*, 553 U.S. at 338 (quoting *Or. Waste Sys.*, 511 U.S. at 99); *see e.g.*, *Granholm*, 544 U.S. at 476 ("State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))); *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly . . . discriminates against interstate commerce, . . . we have generally struck down the statute without further inquiry."). Thus, if the Court does not step in now, petitioners will be left to overcome a fuzzy but nearly insurmountable evidentiary hurdle.

In the interim, while petitioners and the lower courts try to figure out when a law held to be facially discriminatory may nonetheless pass muster under the ill-defined dormant Commerce Clause, ratepayers in Texas and surrounding States will pay the price. Electricity infrastructure is the archetypal long-term investment. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 82 ("[C]onstructing new transmission facilities requires a significant amount of capital . . . .") (citation omitted)). No rational businessperson will undertake such an investment absent some guarantee of a return—or at least certainty in the legal regime such that he can accurately predict what that return will be. *See S. Calif. Edison Co. v. FERC*, 717 F.3d 177, 179 (D.C. Cir. 2013) ("In order to attract capital investment for construction of transmission facilities, a utility must offer a risk-adjusted expected [return on investment] sufficient to attract investors."). No sooner did the Fifth Circuit issue its ruling than did commentators start raising concerns that the current circuit split upsets that certainty. Keith Goldberg, *Circuit Split Clouds Grid Project Construction Fights*, LAW360 (Aug. 31,

2022), https://tinyurl.com/2zsntkn3. Those are precisely the circumstances under which this Court should overlook its ordinary reticence in reviewing interlocutory orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals Fifth Circuit
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August 30, 2022
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No. 20-50160

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED; NEXTERA ENERGY TRANSMISSION, L.L.C.; NEXTERA ENERGY TRANSMISSION MIDWEST, L.L.C.; LONE STAR TRANSMISSION, L.L.C.; NEXTERA ENERGY TRANSMISSION SOUTHWEST, L.L.C.,

Plaintiffs—Appellants,

versus

CHAIRMAN PETER LAKE, PUBLIC UTILITY COMMISSION OF TEXAS, *in his official capacity*, COMMISSIONER LOIS COBOS, PUBLIC UTILITY COMMISSION OF TEXAS, *in her official capacity*; COMMISSIONER JIMMY GLOTFELTY, PUBLIC UTILITY COMMISSION OF TEXAS, *in his official capacity*; COMMISSIONER KATHLEEN JACKSON, PUBLIC UTILITY COMMISSION OF TEXAS, *in her official capacity*; and COMMISSIONER WILL MCADAMS, PUBLIC UTILITY COMMISSION OF TEXAS, *in his official capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-626

Before DENNIS, ELROD, and COSTA, *Circuit Judges*.
GREGG COSTA, *Circuit Judge*:

Imagine if Texas—a state that prides itself on promoting free enterprise—passed a law saying that only those with existing oil wells in the state could drill new wells. It would be hard to believe. It would also raise significant questions under the dormant Commerce Clause. *Cf. Granholm v. Heald*, 544 U.S. 460, 465–66 (2005) (holding unconstitutional two state laws that allowed only wineries with an in-state physical presence to ship wine to state residents).

Texas recently enacted such a ban on new entrants in a market with a more direct connection to interstate commerce than the drilling of oil wells: the building of transmission lines that are part of multistate electricity grids. A 2019 law says that the ability to build, own, or operate new lines "that directly [connect] with an existing utility facility . . . may be granted only to the owner of that existing facility." TEX. UTIL. CODE § 37.056(e). The law applies not just to transmission lines that are part of Texas's intrastate electricity market, but also to lines that are part of interstate transmission networks. Those lines that carry electricity through multiple states are classic instrumentalities of interstate commerce.

The operator of one such multistate grid awarded Plaintiff NextEra Energy Capital Holdings, Inc. the

right to build new transmission lines in an area of east Texas that is part of an interstate grid. The grid operator determined that NextEra's bid offered an "outstanding combination of low cost and high value" and would produce "substantial benefits to ratepayers over time." But before NextEra obtained the necessary construction certificate from the Public Utilities Commission of Texas, the state enacted the law that bars new entrants from building transmission lines.

NextEra challenges the new law, as it applies to the interstate electricity networks in Texas (but not the intrastate ERCOT network), on dormant Commerce Clause grounds. It also argues that the law violates the Contracts Clause by upsetting its contractual expectation that it would be allowed to build the new lines. Once we wade through the thicket of electricity regulation, the ban's interference with interstate commerce becomes as clear as it is for the oil well hypothetical. We thus conclude that the dormant Commerce Clause claims should proceed past the pleading stage. But the Contracts Clause claim fails as a matter of law under the modern, narrow reading of that provision.

I

A

Powering the modern world is no easy task. An energy source must first generate electricity; that electricity must then travel, often for long distances, over high-voltage wires for distribution; and distributors must deliver electricity to consumers over low-voltage wires. Some providers, known as vertically integrated utilities, perform all of these functions. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49 (D.C. Cir. 2014).

Others—like plaintiff NextEra, a transmission-only company—perform just one. *Id.* at 50.

In the early 1900s, when the power industry was dominated by vertically integrated utilities, electricity providers were subject to only state and local oversight. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265–66 (2016). That changed in 1927, when the Supreme Court held that the Commerce Clause prohibited states from regulating "wholesale [electricity] sales (*i.e.*, sales for resale) across state lines." *Id.* (citing *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927)). While states could continue to oversee local retail markets, only Congress could regulate interstate wholesale transactions. *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 378 (1983).

Congress exercised its new-found authority for the first time as part of the New Deal. In enacting the Federal Power Act of 1935, Congress declared "that federal regulation of interstate electric energy transmission and its sale at wholesale is 'necessary in the public interest.'" *S.C. Pub. Serv. Auth.*, 762 F.3d at 49 (quoting 16 U.S.C. § 824(a)). Congress also established the Federal Power Commission, the precursor to the Federal Energy Regulatory Commission (FERC), and gave it jurisdiction to regulate "all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b)(1); *see also Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020) (noting that the Federal Power Act provides FERC with "exclusive authority over" the wholesale transmission market).

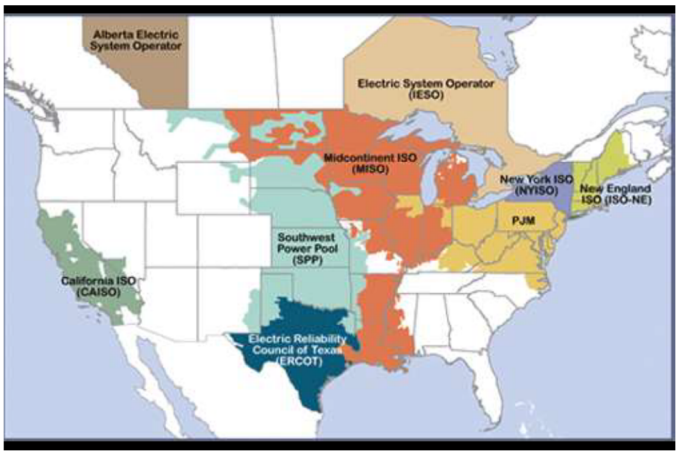
As the power industry evolved, so did the federal regulatory approach. In the decades following passage of the Federal Power Act, federal regulators policed

vertically integrated utilities—most of which were local monopolies—by setting "just and reasonable" wholesale prices. 16 U.S.C. § 824d(a); *Elec. Power*, 577 U.S. at 267. But in the 1970s and 1980s, technological advances encouraged market entrants to challenge vertically integrated utilities. *New York v. FERC*, 535 U.S. 1, 7 (2002). As a result, "[i]ndependent power plants now abound, and almost all electricity flows not through 'the local power networks of the past,' but instead through an interconnected 'grid' of near-nationwide scope." *Elec. Power*, 577 U.S. at 267 (quoting *New York*, 535 U.S. at 7). Adapting to "this new world," FERC shifted away from price setting—the traditional tool "used to prevent monopolistic pricing"—and instead focused on enhancing competition. *Id.*

To that end, FERC encouraged utilities that owned transmission lines to form voluntary associations that would coordinate and "manage wholesale markets on a regional basis." *Id.*; *see also* 16 U.S.C. § 824a(a) ("direct[ing] [FERC] to divide the county into regional districts for the voluntary interconnection and coordination of facilities for the . . . transmission and sale of electric energy"). These associations, called regional transmission organizations (RTOs) and independent system operators (ISOs),[1] now control most of the electrical grid. *Ill. Com. Comm'n v. FERC*, 721 F.3d 764,

[1] RTOs and ISOs are similar umbrella entities that "operate the transmission system independently of wholesale market participants and foster competition for electricity generation." FEDERAL ENERGY REGULATORY COMMISSION, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 39 (April 2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020.pdf.

769 (7th Cir. 2013). This map shows the various RTOs and ISOs:[2]



For years, RTOs and ISOs included rights of first refusal to build transmission lines in their FERC-sanctioned rate agreements. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 332 (7th Cir. 2016). That meant utilities that already owned transmission lines, called "incumbents," would "have a first crack at constructing a[] . . . transmission project." *Id.* at 331–32. In other words, they would have "the opportunity to build it without having to face competition from other firms that might also like to build it." *Id.* at 331.

In 2011, FERC abolished those provisions. The agency reasoned that federal rights of first refusal might "be leading to rates . . . that are unjust and unreasonable," in large part because "it is not in the economic self-interest of incumbent[s] to permit new entrants to develop transmission facilities," even if those facilities "would result in a more efficient or cost-

[2] Image from *RTOs and ISOs*, FERC, https://www.ferc.gov/industriesdata/electric/power-sales-and-markets/rtos-and-isos (last visited August 28, 2022).

effective solution." Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, 136 FERC ¶ 61,051, at ¶ 256 (F.E.R.C. July 21, 2011) (final rule) (Order 1000); *see also id.* at ¶ 253 (explaining that failing to remove federal rights of first refusal might "result in rates . . . that are unjust and unreasonable"). In making its decision, FERC considered—and rejected—the argument "that the reliability of the transmission system is a function of the number of public utility transmission providers of that system." *Id.* at 266. Historical data suggested the opposite, as "public utility transmission providers have . . . connected to the transmission systems of others" "to enhance reliability." *Id.* (noting that "nonincumbent transmission developers[] that successfully develop a transmission project[] . . . must comply with all applicable reliability standards").

Despite its many reforms, Order 1000 took "great pains to avoid intrusion on the traditional role of the States." *S.C. Pub. Serv. Auth.*, 762 F.3d at 76. So even if the prohibition created "opportunities for nonincumbents, such developers must still comply with state law." *Id.*

B

Order 1000 is consistent with the Federal Power Act in leaving room for state regulation. *Elec. Supply Ass'n*, 136 S. Ct. at 780 (observing that the Act "makes federal and state powers 'complementary' and 'comprehensive'"). States may, for example, oversee "facilities used for the generation of electric[ity,] . . . local distribution or only for the transmission of electric[ity] in intrastate commerce." 16 U.S.C. § 824(b)(1). States also have "authority over the location and construction of electrical transmission lines." *Ill. Com. Comm'n*, 721

F.3d at 773; *see also Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electrical transmission facilities."). *But cf. Piedmont*, 558 F.3d at 310 (noting that 16 U.S.C. § 824p "gives FERC the authority in national interest corridors to issue permits for the construction . . . of transmission facilities in certain instances").

In Texas, the Public Utility Commission of Texas (PUCT) regulates electric utilities. TEX. UTIL. CODE § 14.001. To build a new transmission line in the state, a utility must first obtain a certificate of "convenience and necessity" from PUCT. *Id.* § 37.051(a). This process is independent of any approvals that the utility must also obtain from its governing ISO or RTO.

As shown below, an ISO—the Electric Reliability Council of Texas (ERCOT)—covers most of Texas, including the Houston, Dallas-Fort Worth, San Antonio, and Austin areas. Because ERCOT is wholly within Texas, PUCT has exclusive jurisdiction over utilities in its territory. *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 312 (Tex. 2001).

Three other RTOs also operate in Texas, but because they also cover areas outside the state, they are subject to concurrent state and federal jurisdiction. Pertinent here, the Midwest Independent System Operator (MISO) and the Southwest Power Pool (SPP) control territory in East Texas.[3]

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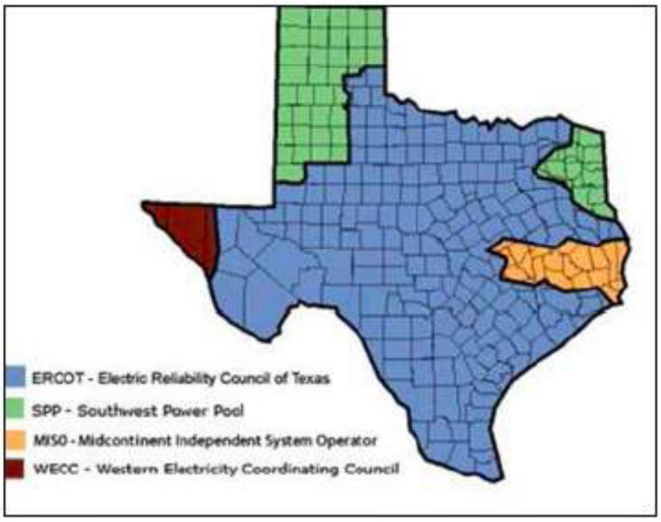
[3] Image from *Electric Maps*, Public Utility Commission of Texas, http://www.puc.texas.gov/industry/maps/maps/ERCOT.pdf (last visited August 28, 2022).



In line with Order 1000, SPP and MISO removed federal rights of first refusal from their agreements and established competitive systems to build transmission lines. Texas followed suit, with the PUCT declaring that utilities without any presence in Texas could construct transmission lines in SPP and MISO territory. Joint Petition of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order, 341 P.U.R. 4th 195, 2017 WL 5068379, at *15 (Oct. 26, 2017). The declaration clarified that transmission-only companies, and not just vertically integrated monopolies, could engage in that work. *Id.*

This regime allowing open competition in the building of transmission lines did not last long. In May 2019, the Texas Legislature overruled PUCT's decision and barred companies from competing in MISO or SPP territory unless they already owned a transmission facility in Texas.[4] Under the new law, Senate Bill (or SB)

[4] A similar restriction applies to ERCOT under its statutorily binding Protocols. TEX. UTIL. CODE § 39.151(j); ERCOT Nodal

1938, a certificate of convenience and necessity to build, operate, or own transmission lines "that directly [connect] with an existing utility facility . . . may be granted *only to the owner of that existing facility*." TEX. UTIL. CODE § 37.056(e) (emphasis added). If that incumbent chooses not to pursue a project, other owners may step into its shoes. But not just any owner—the incumbent utility may only "designate another electric utility that is currently certificated by [PUCT] within the same electric power region," for example, SPP or MISO, "to build . . . a portion or all of" the new lines. *Id.* § 37.056(g). So the only way a company without a Texas presence can build, operate, or own transmission lines is to buy a utility that already owns a power facility in the state. *See id.* § 37.154(a) (requiring that the buyer also convince PUCT that its purchase "will not diminish the retail rate jurisdiction of this state" and will result in continued "adequate service").

Five other states restored incumbent's rights of first refusals after FERC took them away. *See* MINN. STAT. § 216B.246, subdiv. 3; NEB. REV. STAT. § 70-1028; OKLA. STAT. tit. 17 § 292; S.D. CODIFIED LAWS §49-32-20; N.D. CENT. CODE § 49-03-02(2). But none of those laws is as restrictive as Texas's. Only one other (North Dakota) is like Texas in placing no time limit on the incumbent to exercise its right; the others require incumbents to exercise their right of first refusal within 90 days. And no other state completely bars out-of-state entrants or allows an incumbent to designate its replacement if it declines a project.

Protocols § 3.11.4.8 (August 1, 2020), http://www.ercot.com/mktrules/nprotocols/current (last visited August 28, 2022).

C

Against the changing regulatory landscape in Texas, NextEra and two of its subsidiaries sought to enter the state's market. NextEra is a Florida corporation that, together with its affiliates, owns "approximately 7,300 miles of transmission line[s] . . . in multiple states." It does not, however, have a foothold in Texas. After the removal of the federal rights of first refusal, NextEra tried to build and buy high-voltage transmission lines in Texas.

The project that the parties focus on, the Hartburg-Sabine Line, envisioned the construction of five new high-voltage transmission lines and a substation in East Texas. Although the new lines would be built in Texas, they would form part of MISO's interstate grid and, as a result, be paid for by customers across MISO's 15 states. In November 2018, after a competitive bidding process, MISO selected NextEra to build the line, concluding that the company'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." MISO also noted that the proposal would reap "substantial benefits to ratepayers over time."

NextEra and MISO entered into a "Selected Developer Agreement" for the project. But before starting construction, the agreement required NextEra to obtain a certificate of convenience and necessity from PUCT. NextEra "anticipated being able to" get a certificate at the time, but once SB 1938 was enacted it could no longer obtain one.

The Hartburg-Sabine Line was not NextEra's only intended project in Texas. In 2017, NextEra "entered into an asset purchase agreement to acquire 30 miles of

. . . transmission line[s] from" a utility located in SPP's jurisdiction, again in East Texas. This project, called the Jacksonville-Overton Line, required the utility to transfer its certificate of convenience and necessity to NextEra, which needed PUCT's approval. *Id.* § 37.154(a). NextEra applied for the transfer, and although PUCT staff recommended approval in October 2018, the application remains pending. SB 1938 requires that it be denied.

Having been shut out of Texas's power market by SB 1938, NextEra sued PUCT Commissioners in federal court a month after the law was enacted. Citing its two stalled projects, NextEra alleged that the Texas ban violates the Commerce and Contracts Clauses. It asked the district court for declaratory and injunctive relief.

The Commissioners moved to dismiss for failure to state a claim. The district court agreed and dismissed NextEra's complaint with prejudice. Starting with the Commerce Clause allegation, the district court concluded that "SB 1938 does not . . . regulate the transmission of electricity in interstate commerce; it regulates only the construction and operation of transmission lines and facilities within Texas." And rejecting NextEra's argument that SB 1938—in its text, through its purpose, and by its effect—unconstitutionally discriminates against out-of-state providers, the district court determined that:

- the law's text establishes a preference for incumbency, not geography;
- "legislative history indicates that the Texas Legislature disagreed with . . . PUCT's declaratory order and enacted SB 1938 to eliminate any uncertainty in Texas law"; and
- "most incumbent providers in Texas are owned by

out-of-state companies."

The district court also rejected NextEra's argument that, under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the burden imposed by SB 1938 is "clearly excessive in relation to the putative local benefits." It then held that NextEra failed to state a Contracts Clause claim, as the company did not have reasonable contractual expectations that the law could impair.

NextEra appeals.

II

We first consider whether there is a jurisdictional impediment to this case even though the Commissioners do not see one. The claims related to the Hartburg-Sabine Line might seem premature because NextEra never applied for a certificate of convenience and necessity. The Constitution's cases-and-controversies requirement prohibits federal courts from resolving "abstract disagreements." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (explaining that the ripeness doctrine "reflects constitutional considerations that implicate 'Article III limitations on judicial power,' [and] 'prudential reasons for refusing to exercise jurisdiction'" (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). So when a "case is abstract or hypothetical," a court must dismiss it for lack of ripeness. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987). In determining whether a case is ripe, we examine "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Nat'l Park*

Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003).

Generally speaking, a case is ripe if it presents questions of law; "conversely, a case is not ripe if further factual development is required." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *New Orleans*, 833 F.2d at 587). This case presents two constitutional questions: whether SB 1938 violates the dormant Commerce Clause or the Contracts Clause. No further factual development or exercise of agency discretion is required for resolution of those legal questions. It would be futile to require NextEra to obtain agency rejection of its application when SB 1938 makes that a foregone conclusion. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) ("Whe[n] the inevitability of the operation of a statute against certain individuals is patent," a plaintiff need not "await the consummation of threatened injury to obtain preventative relief." (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923))). The Supreme Court recognized as much in another case involving the power industry. Because a state moratorium on the approval of new nuclear power plants left no possibility of agency approval, the utility's suit challenging the law was fit for immediate judicial resolution. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983).

Pacific Gas also recognizes that NextEra would suffer hardship if, before filing suit, it had to spend time and money applying for a certificate all agree would be denied. *Pac. Gas*, 461 U.S. at 201 (finding hardship even though the utilities had not yet applied for certification, as postponing resolution of the case would force them to "proceed in hopes that, when the time for certification

came, either the required findings would be made or the law would be struck down"); *Cooper v. McBeath*, 11 F.3d 547, 552 n.7 (5th Cir. 1994) ("Substantial hardship—the touchstone for determine when review i[s] appropriate—exists whe[n] the enforcement of a statute is assured and the only obstacle to ripeness is merely a delay before the action or proceedings commence.").

We therefore agree with the parties that the claims are ripe for review.

III

The Constitution extends to Congress the "Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. On its face, this provision says nothing about state authority over interstate commerce. But it is settled that because Congress can regulate interstate commerce, the states cannot erect barriers to the free flow of that commerce. "This 'negative' aspect" of that power, known as the dormant Commerce Clause, "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

A

Although this "negative aspect" of the Commerce Clause (especially a judicially enforceable one) remains controversial, *see, e.g.*, *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 571–72 (2015) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting), it has a deep pedigree. During the tumultuous 1780s, fledgling state governments—beset by a collapsing economy and other crises—"began

discriminating against the trade of their neighbors." MICHAEL J. KLARMAN, THE FRAMERS' COUP 23 (2016). Predictably, victims of those "protective laws" retaliated, "rais[ing] costs of importing, shipping, and selling goods." Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 47 (2005); *see also id.* at 72–73 ("States eager to gain commercial advantage and retain the revenue that trade afforded . . . passed laws that palpably affected the commerce of other states."). That harmful patchwork of legislation undermined the Articles of Confederation and helped inspire the Constitutional Convention. *See Tenn. Wine*, 139 S. Ct. at 2460; KLARMAN, *supra*, at 23.

Convention debate about the Commerce Clause Power was limited. Denning, *supra*, at 83. But when the issue came up, it "was uniformly mentioned as a device for preventing obstructive or partial regulations by the states." Albert Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 471 (1941). And although "[t]here was even less commentary at state ratifying conventions," Denning, *supra*, at 83, the Federalist Papers critiqued state protectionism in advocating for national control over interstate commerce, *see* Abel, *supra* at 473 (citing THE FEDERALIST NO. 22 (Alexander Hamilton)). Years later, James Madison remembered that the Commerce Power "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General

Government." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 478 (1911)).

One of the early landmark decisions of the Supreme Court recognized "great force" in the argument that, "as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824). By the end of the nineteenth century, this notion of a dormant or negative Commerce Clause was "firmly established." *Tenn. Wine*, 139 S. Ct. at 2459–60 (citing *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279–80 (1873)). And just last year, the Supreme Court "reiterate[d] that the Commerce Clause by its own force restricts state protectionism." *Id.* at 2461.

As is so often the case, Justice Jackson expressed the principle best:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

B

Like the farmers and craftsmen of old, NextEra seeks "free access" to the interstate transmission market. *Id*. The company contends that although Texas may restrict competition in its intrastate ERCOT market without Commerce Clause scrutiny, excluding nonincumbents from the interstate transmission market violates the Constitution.

The Commissioners respond that even their regulation of the interstate transmission market enjoys immunity from the Commerce Clause. They rely on *General Motors* Corp. *v. Tracy*, 519 U.S. 278 (1997), which rejected a claim that a law discriminated against interstate commerce by granting a tax exemption to local monopoly distributers of natural gas but not to out-of-state bulk gas sellers.

This much is certain: Utilities, despite their history as monopolies and the vestiges of that tradition even in deregulated markets, are not "immune from [] ordinary Commerce Clause jurisprudence." *Tracy*, 519 U.S. at 291 n.8; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 457, 458–59 (1992) (invalidating an Oklahoma law on dormant Commerce Clause grounds because it required in-state "utilities to supply 10% of their needs for fuel from Oklahoma coal"); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (applying the dormant Commerce Clause to invalidate a New Hampshire agency ruling that prohibited a utility "from selling its hydroelectric energy outside the State"); *Pennsylvania*, 262 U.S. at 596–600 (holding unconstitutional a West Virginia law that required pipeline companies to serve in-state customers first).

Harder to decipher is when *Tracy* cuts into the general principle that utilities are subject to the dormant

Commerce Clause. The Ohio local distributors exempt from the state's 5% general tax on goods and services primarily sold natural gas in a "captive market." *Tracy*, 519 U.S. at 282, 303–04, 310. In that market, gas one was one of the "bundled" services over which they enjoyed a monopoly. *Id.* at 297–98. As a regulated monopoly in that local distribution market, the distributors had to serve all customers at restricted rates. *Id.* at 299. But the utilities also competed, "at least at the margins," in a separate market with independent companies that sold "unbundled" gas to bulk industrial customers like General Motors. *Id.* at 297–98, 307. Contending that its out-of-state gas suppliers operated at a disadvantage because they did not enjoy the tax exemption, General Motors sought a refund, on dormant Commerce Clause grounds, of the taxes it paid. *Id.* at 285.

A key to unraveling *Tracy* is the type of claim it considered. As we will discuss further, a dormant Commerce Clause challenge can be based on the text of the law, its effects, or its intent. *Tracy* emphasized that it was just dealing with the first type: a claim that the law discriminated on its face, which if true results in a "virtually *per se* rule of invalidity." *Tracy,* 519 U.S. at 298 (noting that the Court was just considering a challenge to the text of the Ohio law); *id.* at 310 (holding that the "enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause"). The problem with saying that the Ohio tax exemption was discriminatory on its face was that it operated in two different retail markets. There were no legal concerns with giving the tax exemption in the residential market; the utilities had a lawful monopoly there. The problem was that the utilities-only exemption also applied in the competitive gas market for

large industrial users. *Id.* at 303–04. The case thus came down to whether the Court should "accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive captive market in which the local utilities alone operate." *Id.*

The Supreme Court determined that the local, captive market was the utilities' "core market." *Id.* at 301. There was only a "possibility of competition" in the noncaptive market for industrial users. *Id.* at 302. The predominance of the monopoly market prevented classifying the statute as discriminatory on its face. Because the law gave the utilities a tax exemption for all retail sales—those occurring in its primary monopoly market as well as in the incidental competitive one—the utilities and out-of-state sellers were not similarly situated for all, or even most applications, of the statute. Accordingly, the text of the statute did not discriminate against interstate commerce, which would trigger the strong medicine of *per se* invalidity.

The dilemma that the Ohio tax exemption posed—how to treat a law that gives in-state businesses a preference in both captive and noncaptive retail markets—does not exist here. The statute limiting who can build transmission lines governs only a competitive market. In the market for transmission of electricity, vertically integrated utilities and transmission-only companies compete and offer the same services: building, operating, and owning transmission lines. Unlike the congressional decision to give states exclusive authority over retail sales, *Tracy*, 519 U.S. at 310, the Federal Power Act gives general authority over interstate transmission markets to federal regulators. 16 U.S.C. § 824(a). And for the state authority that remains over matters like siting and certification, transmission-

only companies face the same regulatory requirements as vertically integrated utilities. *See Pub. Util. Comm'n of Tex. v. Cities of Harlingen*, 311 S.W.3d 610, 617 (Tex. App.—Austin 2010, no pet.).

Consequently, unlike the *Tracy* tax exemption, SB 1938 has no application in a "noncompetitive, captive market in which the local utilities alone operate." 519 U.S. at 303–04. We would have a *Tracy* issue if the challenged law provided vertically integrated utilities with the same benefit in both the monopolistic distribution market and the competitive transmission market. But as a law addressing a single market (transmission)—one that is undoubtedly competitive—SB 1938 is not immune from Commerce Clause scrutiny. *See Camps Newfound*, 520 U.S. at 582 n.16 (observing that the *Tracy* court "premised its holding that the statute at issue was not facially discriminatory on the view that [the marketers and utilities] were principally competing in different markets"); *Tracy*, 519 U.S. at 298–99 (emphasizing that the utilities and marketers "provide different products"). Put another way, when it comes to transmission, a vertically integrated utility and a transmission-only company are similarly situated.

The Commissioners and their supporting amici read *Tracy* more broadly. They essentially contend that it provides Commerce Clause immunity to any law that grants a preference to a company that has at least one foot in a captive market. To be sure, *Tracy* explained Ohio's rationale for giving the utilities the exemption even in the competitive market: it enhanced their economic viability and thus their ability to meet their public obligation of universal service in the captive market. *Id.* at 307 (explaining that doing away with the exemption in the competitive market would reduce the

utilities' customer base and thus "increase the unit cost of the [regulated] bundled product"). But if that alone were enough, Tracy would not have had to grapple with the Ohio law's application in both captive and noncaptive retail markets and decide which was the utilities' "core" market. *Id.* at 301–02. The Commissioner's broad reading is also irreconcilable with the longstanding principle, reiterated in *Tracy*, that there is no "public utilities exception" to the dormant Commerce Clause. *Tracy*, 519 U.S. at 291 n.8. If a state law's propping up a utility in a noncaptive market to enhance its viability in a captive market created immunity from Commerce Clause scrutiny, then a state could grant in-state utilities the exclusive right to operate coal mines in the state (or, for that matter, the exclusive right to sell ice cream in the state).

Texas has an interest in promoting reliable electricity service, including the power to approve the siting and construction of transmission lines. But as with other police powers a state enjoys, that authority is not immune from Commerce Clause scrutiny when it impacts the interstate market.[5] Tracy prevented classifying a law as textually discriminatory only because it applied primarily to grant utilities a tax preference in a market where they were monopolies. SB 1938 operates at "the opposite end of the local-to-interstate spectrum," LSP Transmission Br. at 21–22, in a wholly competitive market, and is an outright ban on new entrants. The

[5] The Supreme Court's most recent dormant Commerce Clause decision involved the state police power over alcohol that the Constitution expressly recognizes. U.S. Const. Amdt. XXI, § 2; *see Tenn. Wine*, 139 S. Ct. at 2449. Even that police power, the Supreme Court held, is not immune from dormant Commerce Clause scrutiny. *Tenn. Wine,* 139 S. Ct. at 2467–2474.

state's safety interest may end up justifying that differential treatment, but it does not prevent us from answering the threshold dormant Commerce Clause question: whether SB 1938 is discriminatory.

C

Because *Tracy* does not shield SB 1938 from dormant Commerce Clause scrutiny, we must decide whether the law "discriminates against interstate commerce." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). A law can discriminate against interstate commerce by its text (or "face"),[6] effects, or purpose. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). We first address whether the words of the statute discriminate against interstate commerce.

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[6] Despite the overlapping "facial" labels, whether a statute discriminates on its face for dormant Commerce Clause purposes is a different concept from the general notion of a facial challenge to a statute. NextEra is not bringing the latter type of suit. It recognizes that the part of SB 1938 regulating the intrastate ERCOT market is constitutional. As a result, the remedy it seeks—which is what the general concept of "facial challenges" is about, *see Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (noting that, although the difference between "facial" and "as-applied" challenges "is not so well defined," the distinction "goes to the breadth of the remedy employed by the Court")—is not holding the entire law unconstitutional

The facial inquiry for dormant Commerce Clause challenges is just one asking whether the statutory language is discriminatory (as opposed to whether the statute has a discriminatory purpose or effect). That question can be asked of laws, like SB 1938, that apply to both intrastate and interstate markets. *See Dean Milk v. City of Madison*, 340 U.S. 349, 354 n.4 (1945) ("It is immaterial that Wisconsin milk from outside the Madison area is subject to the same proscription as that moving in interstate commerce."). As NextEra concedes here, only the enforceability of the law in the interstate market is at issue.

Supported by the Department of Justice's Antitrust Division, NextEra argues that the reasons the district court cited for rejecting the Commerce Clause challenge are flawed. We agree.

One of the district court's rationales was that SB 1938 does not discriminate against interstate commerce because it "regulates only the construction and operation of transmission lines and facilities within Texas." That is wrong for the areas of Texas that are part of interstate electricity networks. SPP and MISO territory in East Texas is part of an "interconnected 'grid' of near-nationwide scope" that has long been subject to FERC oversight. *Elec. Power*, 577 U.S. at 267; *see also North Dakota v. Heydinger*, 825 F.3d 912, 915 (8th Cir. 2016) ("MISO controls over 49,000 miles of transmission lines, a grid that spans fifteen states . . . and parts of Canada."). New lines in these areas thus are instrumentalities of interstate commerce that carry electricity over a broad swath of the country. That certain lines might run entirely within Texas is irrelevant, as "any electricity that enters the grid immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce." *New York*, 535 U.S. at 7; *cf. Buck v. Kuykendall*, 267 U.S. 307, 316 (1925) (holding that an Oregon law limiting what parties could travel on a stretch of highway within the state was "a regulation, not of the use of [Oregon's] highways, but of interstate commerce"). These transmission lines cannot and do not serve Texas consumers alone.

Indeed, transmission lines that are part of an interstate grid are much closer to the heartland of interstate commerce than the wine stores, dairies, or waste processing facilities that have faced dormant

Commerce Clause scrutiny. *See Tenn. Wine*, 139 S. Ct. at 2462; *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391–92 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 352 (1951). The Supreme Court recognized the interstate character of the electricity market a decade before it recognized that Congress could regulate factories because of their effect on interstate commerce. *Compare Attleboro Steam & Elec. Co.*, 273 U.S. at 90 (1927), *with NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40–41 (1937). Because the electricity grid is on its own an interstate market, state protectionist measures regulating its instrumentalities run a much greater risk of harming out-of-state interests—the ability of companies to compete, the prices consumers pay—than regulations on retail wine stores. *Ark. Elec. Co-op Corp.*, 461 U.S. at 377 ("[T]ransmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulated by the States can patently interfere with broader national interests."); *Old Dominion Elec. Coop. v FERC*, 898 F.3d 1254, 1257 (D.C. Cir. 2018) (discussing FERC order that allocated costs for new transmission lines built in Virginia to numerous utilities locate throughout the states in the interstate grid). The interstate transmission lines SB 1938 regulates are part of interstate commerce.

Nor does it save SB 1938 that most of the in-state incumbents it protects are incorporated outside Texas. In finding dormant Commerce Clause violations, the Supreme 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. *Granholm*, 544 U.S. at 475; *Wyoming*, 502 U.S.

at 457–59; *Dean Milk*, 340 U.S. at 352 (holding unconstitutional an ordinance that discriminated on the basis of where milk pasteurization occurred, not the facility owner's state of incorporation); *see also Healy*, 512 U.S. at 203–04 (holding that law benefitting dairy farms located in Massachusetts violated Commerce Clause without asking whether those farms were owned by Massachusetts citizens or companies). We also do not know the place of incorporation of the company that operated the solid waste transfer station granted an unlawful monopoly by a small New York town. *C&A Carbone, Inc.*, 511 U.S. at 387 (calling the company a "local private contractor").

The Commissioners cite no Supreme Court case holding that a law is nondiscriminatory for Commerce Clause purposes because the local interests it benefits are incorporated or headquartered in another state.[7]

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[7] A state can discriminate based on business form. *See Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 945 F.3d 206 (5th Cir. 2019) (considering a Texas law "ban[ning] all public corporations from obtaining" a permit to sell alcohol), *cert. denied*, 141 S. Ct. 874 (2020); *Exxon Corp. v. Maryland*, 437 U.S. 117, 125 (1978) (rejecting a facial discrimination claim because the law discriminated based on business form, not an entity's local contacts). The district court did not conclude that SB 38 was such a law, but the Commissioners suggest it is. They argue that because most incumbent transmission facilities are owned by vertically integrated utilities, the law is a permissible protection of companies with that business form.

But SB 1938 does not itself make that business-form distinction. It allows incumbent entities other than vertically integrated utilities, namely electric cooperatives, to compete. *See* TEX. UTIL. CODE § 37.056(f). Indeed, NextEra's Jacksonville-Overton project hinges on its ability to buy high-voltage lines from Rayburn Country Electric Cooperative, Inc. And SB 1938 does not allow vertically integrated utilities without a Texas presence to build lines in the state.

Most circuits have rejected the idea that a law survives Commerce Clause scrutiny if many of the favored interests are incorporated elsewhere. As the Eleventh Circuit explained, if "place of incorporation alone" were controlling, "then a state['s] dormant Commerce Clause liability would 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." *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012); accord *Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005). That reasoning strikes at what the Supreme Court has recognized as a primary concern of the dormant Commerce Clause: "when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68 (1945)). 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. Which business is more likely to have the clout to enact protectionist measures: a Delaware corporation that employs thousands of workers in a state, or a company that paid a nominal filing fee to be incorporated in state but has its "principal operations" elsewhere? *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980). Surely the former, as the swift

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SB 1938 conditions a company's ability to compete only on its preexisting operations in Texas, not on its corporate form.

enactment of SB 1938 after the state regulatory agency rejected rights of first refusal may demonstrate.

One circuit has taken the opposite view that place of incorporation controls. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1027–29 (8th Cir. 2020), *cert. denied*, No. 20-641, 2021 WL 769770 (Mar. 1, 2021). The Eighth Circuit case involved a Minnesota law that will sound familiar: it grants incumbent utilities a right-of-first refusal to build new transmission lines, though it does not go nearly as far as the Texas law in banning new entrants outright. *Compare* MINN. STAT. § 216B.246, subdiv. 3 (providing a right of first refusal that allows any entity—even those without a Minnesota transmission facility—to seek to enter the market if the incumbent does not exercise its rights to compete within 90 days), *with* TEX. UTIL. CODE § 37.056. The court concluded that the preference for incumbents was not discriminatory because it "applie[d] evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere." *LSP Transmission Holdings, LLC*, 954 F.3d at 1028.[8] As we have explained, however, a focus on where a company is "based," which could mean either where it is incorporated or headquartered, is irreconcilable with Supreme Court dormant Commerce

[8] *LSP Transmission* seems to equivocate a bit on this point. A footnote says that the court is not deciding "whether an entity that has an in-state presence but is headquartered elsewhere is considered an in-state entity for the purpose of dormant Commerce Clause review." 954 F.3d at 1029 n.7. Yet its rejection of the facial discrimination claim seems to rely on the notion that "incumbents in Minnesota include entities headquartered in Iowa, North Dakota, South Dakota, Wisconsin, and Minnesota" and "[m]any of these entities also own and operate facilities in states other than Minnesota." *Id.* at 1028.

Clause jurisprudence addressing physical-presence requirements. In light of that Supreme Court precedent, the majority view of courts of appeals that where a company is "based" is not controlling, and the underlying concern about local clout leading to protectionist legislation, a law can discriminate against interstate commerce even though most of the incumbent transmission-line providers that benefit from SB 1938 are incorporated or headquartered outside Texas.[9]

What matters instead is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas. A law that "discriminates among affected business entities according to the extent of their contacts with the local economy" may violate the

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[9] The district court also cited SB 1938's allowing a nonincumbent to enter the market by purchasing a Texas incumbent as a reason why the law is not discriminatory. Tex. Util. Code § 37.154(a). But holding that a law complies with the Commerce Clause because an out-of-state firm can obtain the in-state favoritism by acquiring a firm with the required in-state presence would require wiping away a broad swath of dormant Commerce Clause jurisprudence. In many cases, the excluded entity would have had the ability to buy the in-state entity and thus obtain the benefit of protectionism. To take just one example, consider again *Dean Milk*. 340 U.S. at 352. What would have prevented a dairy operating in Illinois from purchasing a pasteurization facility in Madison and then selling milk from that acquired facility to Madisonians?

There is a more fundamental problem with the view that a law's allowing an out-of-state interest to acquire a protected incumbent precludes a finding of discrimination. It ignores that the dormant Commerce "Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon*, 437 U.S. at 127–28. The harm to the market flows from the granting of the exclusive right to in-state interests. That protectionism lessens thus raises prices in the interstate market.

Commerce Clause. *Lewis*, 447 U.S. at 42 (concluding that a Florida statute was discriminatory, as only financial institutions "with principal operations *outside* Florida [we]re prohibited from operating . . . within the State"). In fact, "in-state presence requirement[s]" have been a fertile ground for recent dormant Commerce Clause challenges. *See Granholm,* 544 U.S. at 475. Consider the New York winery case. *Id.* A New York statute was discriminatory because it required out-of-state wineries to establish "a branch factory, office, or storeroom within the state" to make direct sales to consumers. *Id.* at 470 (quoting N.Y. Alco. Bev. Cont. § 3(37)). The law did not define in-state wineries as those incorporated or headquartered in New York. *Swedenburg v. Kelly*, 358 F.3d 223, 228 (2d Cir. 2004), *rev'd by Granholm*, 544 U.S. at 493. All that was required to be "in-state" was a physical presence in the state. *Id.* at 229. The Court equated that presence requirement—for a brick-and-mortar facility in the state—to a residency requirement. *Granholm*, 544 U.S. at 475.

The Supreme Court's most recent dormant Commerce Clause case, one also involving alcohol, readily concluded that a law requiring two-years of residency to own a liquor store "plainly" favored in-state interests. *Tenn. Wine*, 139 S. Ct. at 2462 (addressing law that required individual owners to be residents of Tennessee for at least two years and required officers and owners of corporation to be Tennessee residents for two years). It took a single sentence to note that such a residency requirement would violate the Commerce Clause for the typical business; the tougher issue was whether the authority the Twenty-First Amendment grants States over alcohol regulation changed that result. *Id.* at 2474. An earlier case also found "plain[]"

discrimination when a Madison, Wisconsin ordinance allowed sales of milk only by companies with a pasteurization facility within five miles of the city center. *Dean Milk*, 340 U.S. at 354; *see also Lewis*, 447 U.S. at 38–44 (finding discriminatory a Florida law that prevented banks with their "principal operations" outside the state from owning investment advisory businesses in the state).

What is true for alcohol and milk under the dormant Commerce Clause must be true for electricity transmission.[10] *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 767 (discussing the near century long application of the Clause to the power industry). Requiring boots on the ground discriminates against interstate commerce. *See also Lewis*, 447 U.S. at 42 n.9 (instructing that "discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism we have [cautioned against]"). And SB 1938's defining feature is a local-presence requirement. Only companies that already have transmission lines can build new lines that connect to the existing lines. Only such companies can receive a transfer of rights from another incumbent owner that chooses not to build lines connecting to its existing lines.

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[10] The alcohol and milk cases cannot be distinguished, as the district court thought, on the ground that they involved "the flow of goods in interstate commerce" or "precondition[s] for allowing the flow of goods." The dormant Commerce Clause has long applied to both "goods and services." *Tenn. Wine*, 139 S. Ct. at 2459; *C&A Carbone*, 511 U.S. at 391 ("[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."); *Camps Newfound/Owatonn*, 520 U.S. at 577 n.10 ("We have long noted the applicability of our dormant Commerce Clause jurisprudence to service industries.").

The Commissioners and partial dissent contend that a law limiting competition to incumbents is not subject to dormant Commerce Clause review. But "incumbent" is just another word for an entity that already has a presence. *Incumbent*, Merriam Webster (defining incumbent as "one that occupies a particular position or place"). In fact, an incumbency requirement is a more anticompetitive version of the in-state presence requirements held unconstitutional in cases like *Granholm* or *Dean Milk*. SB 1938 is a local-presence requirement frozen in place. If a company had not built transmission lines in Texas before 2019, it can never build such lines. In contrast, a dairy with facilities in Illinois could still sell milk in Madison if it built a pasteurization facility there. And a winery with California vineyards could sell wine to New Yorkers by establishing a winery in the Empire State. It is hard to see why the more stringent physical-presence requirement of SB 1938 should escape the fate of the physical-presence laws that still allowed ways for those without a local footprint to establish one and compete.[11]

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[11] The Commissioners and partial dissent rely on the Fourth Circuit's comment that "incumbency bias . . . is not a surrogate" for the protectionist impulses the dormant Commerce Clause seeks to prevent. *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016). But the ellipses hide three critical words: "in this context." *Id.* And the context of that case was that it addressed a Virginia law that required all medical service providers—both those with current operations in the commonwealth and those with no history in Virginia—to obtain a certificate of public need before adding operations. *Id.* at 149. As the challenged law had no in-state presence requirement, the plaintiffs did not even argue that it was discriminatory on its face. *Id.* at 152. So the court considered only whether the law was discriminatory in its purpose or effects. *Id.* at 153–60. The court made the statement about "incumbency bias"—far from an incumbency *requirement*—in explaining why an expert

We fail to see the partial dissent's distinction between the laws in *Granholm* and *Dean Milk*, which "*add* requirements that discriminate against out-of-state entities," and SB 1938, which "merely recognizes a *pre-existing* physical-presence requirement." Opinion Concurring in Part and Dissenting in Part 3. *Id.* 4. SB 1938 was not meaningless; it added a physical-presence requirement to Texas utility law. Before SB 1938, NextEra had the right to build the new transmission lines. Indeed, in 2017 the PUCT declared that utilities without any presence in Texas could construct transmission lines in SPP and MISO territory. *Supra* 9–10. In 2018, MISO approved NextEra to build the Hartburg-Sabine Line despite the company's not having a physical presence in Texas. *Supra* 11. And NextEra would be allowed to build new transmission lines for interstate grids in any other state. The vast majority of states would not disfavor NextEra in any way for being a nonincumbent; five states would give incumbents a right-of-first refusal. *Supra* 10–11. Only in Texas do nonincumbents like NextEra face a lifetime ban on building lines for interstate grids that reach into the state. *Id.* Nothing, then, in the natural order of things makes SB 1938 any less of an intrusion on interstate

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report concluding that incumbent medical providers were more successful in the facially neutral process for obtaining certificates did not require a finding of discriminatory purpose or effects. *Id.* at 154. *Colon Health Centers* thus says nothing about a law that restricts economic opportunities to firms that already have a presence in a state.

commerce than the (less onerous) physical-presence requirements in cases like *Granholm*, *Dean Milk*, and *C & A Carbone*. *See also United Haulers*, 550 U.S. at 338 (explaining that "discrimination" under the dormant Commerce Clause "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (citation omitted)).

The Commissioners justify SB 1938's incumbency requirement as a law that promotes the safety and reliability of the electricity grid by ensuring that only those with a track record of building transmission lines in Texas can build new lines. That may end up justifying the discrimination against out-of-state interests, but it does not avoid the conclusion that the law discriminates. Companies 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. That is no different than the oil well hypothetical we posed at the beginning. Limiting competition based on the existence or extent of a business's local foothold is the protectionism that the Commerce Clause guards against. *Granholm*, 544 U.S. at 466; *Lewis*, 447 U.S. at42; *Dean Milk*, 340 U.S. at 352.

We therefore reverse the Rule 12(b)(6) dismissal of the claim that the very terms of SB 1938 discriminate against interstate commerce. On remand, the district court will consider whether the Commissioners can show that Texas has no other means to "advance[] a legitimate

local purpose." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 94 (1994).

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Our conclusion that SB 1938 discriminates on its face may focus the remaining litigation on that aspect of dormant Commerce Clause jurisprudence alone. But NextEra also challenges the dismissal of its claims that SB 1939 has a discriminatory purpose or effect. In addition, it invokes the strand of dormant Commerce Clause caselaw providing that a law having only incidental effects on interstate commerce may nonetheless be unlawful if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Apart from what we have said about general Commerce Clause principles, pleadings-stage dismissal of these claims was premature. Claims that turn on intent and effects typically require factual development. *Healy*, 512 U.S. at 201 (recognizing that Commerce Clause decisions require a "sensitive, case-by-case analysis of purposes and effects); *Wal-Mart*, 945 F.3d at 218 (noting that "discriminatory intent is factual matter"); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (reversing the Rule 12 dismissal of dormant Commerce Clause purpose and effects claims because of the "fact intensive quality of the substantive inquiry"); *Cachia v. Islamorada*, 542 F.3d 839, 840–41 (11th Cir. 2008) (reversing the dismissal of a discriminatory effects claim); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d

316, 334 (4th Cir. 2001) (denying summary judgment because whether the challenged law discriminated in its effects or purpose were "[q]uite obviously . . . questions of fact"). That is the case here.

Start with the discriminatory-purpose claim. It requires us to consider several factors, including "the specific sequence of events leading up to the challenged decision." *Allstate*, 495 F.3d at 160. NextEra's allegation, though far from proven at this stage, supports a plausible inference of discrimination based on the on the timing of SB 1938. It contends that, at incumbents' prodding, the legislature suddenly enacted the law excluding new entrants after MISO selected NextEra's bid to build the Hartburg-Sabine Line. If proven, such a reaction to the entry of a disfavored group could support a finding of discriminatory purpose. *See Lewis*, 447 U.S. at 32 ("There is evidence that the amendment was a direct response to Banker Trust's pending application, and that it had the strong backing of the local financial community."). Other "purpose" factors are likewise fact bound. Indeed, our most recent dormant Commerce Clause "purpose" case had the benefit of a full trial record. *Wal-Mart*, 945 F.3d at 212. Because NextEra has at least raised plausible allegations that SB 1983 had a discriminatory purpose, that claims gets to the discovery stage.

The effects-focused claims are just as, if not more, fact dependent. The *Pike* inquiry requires assessing both the burdens and benefits of the law. In response to the contention that allowing only incumbents to build newlines promotes reliability, NextEra points to FERC's rejection of that notion, MISO's requirements for reliable service, and the successful record of the few

out-of-state transmission companies that have run lines in ERCOT before SB 1938. Given that SB 1938 is a complete ban on new entrants and NextEra has at least plausibly alleged that the claimed local benefit of reliability is "insignificant and illusory," this claim warrants the factual development that effects claims typically receive. *See, e.g., Wal-Mart*, 945 F.3d at 221 (reviewing *Pike* claim after bench trial); *United Transp. Union v. Foster*, 205 F.3d 851, 863 (5th Cir. 2000) (reversing summary judgment on the plaintiffs' *Pike* claim because "of an empty record"); *Colon*, 733 F.3d at 546 (reversing the dismissal of the plaintiffs' *Pike* claim because it "present[ed] issues of fact that cannot be properly resolved on a motion to dismiss"); *Cachia*, 542 F.3d at 841 (reversing the dismissal of a discriminatory-effects claim because the complaint alleged that the challenge ordinance did "not simply raise the costs of operating a [chain] restaurant in Islamorada, but entirely prohibit[ed] such restaurants from opening"); *see also Colon*, 813 F.3d at 153–55 (holding, after reversing Rule 12 dismissal of effects claims, that claim did not survive summary judgment based on record that included expert testimony from both sides).

We reverse the Rule 12(b)(6) dismissals of the purpose, effects, and *Pike* claims.

IV

The district court did not err, however, in dismissing NextEra's claim under the Contracts Clause. One of the original Constitution's only express limitations on state power, it directs that "No State shall . . . pass any . . .

Law impairing the Obligation of Contracts." U.S. CONST. ART. I, § 10. The Contracts Clause was a response to the state laws relieving debtors during the 1780s. JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 1, 8, 15–17 (2016). In the first century or so of the Republic, before the Bill of Rights restricted states, the Contracts Clause was "the primary vehicle for federal review of state legislation." *Id.* at 1. Some of the greatest hits of the antebellum Supreme Court were Contracts Clause cases. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

But unlike the dormant Commerce Clause, the Contracts Clause is not what it once was. *See Sveen v. Melin*, 138 S. Ct. 1815, 1827–28 (2018) (Gorsuch, J., dissenting); ELY, *supra*, at 5–6, 220–23, 245–47. The Supreme Court substantially narrowed its scope during the Great Depression. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934) ("[T]he [Clause's] prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."). Under modern caselaw, states have some leeway to alter parties' contractual relationships "to safeguard the vital interests of [their] people." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Blaisdell*, 290 U.S. at 434).

A related principle that has sapped the Contracts Clause of its earlier force applies here. We now recognize that parties contract with an expectation of possible regulation. *See Energy Reserves Grp.*, 459 U.S. at 413. That is especially true in highly regulated industries like power. That history of regulation put NextEra on notice

that Texas could enact additional regulations affecting its two projects. *Id.* ("Significant here is the fact that the parties are operating in a heavily regulated industry."); ELY, *supra*, at 246 (explaining that *Energy Reserves* recognized that "parties in regulated industries must be deemed to enter contracts with the understanding that further regulations might affect their contractual terms"). After Order 1000, there was substantial uncertainty about how state regulators would respond. *See Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 897 (7th Cir. 1998) (highlighting that the plaintiff "should have known . . . that it did not have a solid right to prevent a dealer from changing the location of the dealership"). Despite PUCT's declaration that transmission-only companies could enter the market, Texas courts never weighed in on the issue. Moreover, the emergence of state rights of first refusal signaled that Texas could enact something similar, if not even more restrictive. *Cf. id.* at 895 (concluding that the challenged law "was in the direct path of the plausible . . . evolution of Wisconsin's program for regulating automobile dealership contracts"). Given all that, SB 1938 did not impair NextEra's reasonable expectations.

At a more basic level, SB 1938 did not interfere with an existing contractual right of NextEra's. Both of NextEra's contracts required it "to secure any necessary" certificates of convenience and necessity to build the Hartburg-Sabine Line or purchase the Jacksonville-Overton Line. Yet PUCT never issued them. Consequently, NextEra did not have a concrete, vested right that the law could impair. *See Colon de Meijas v. Lamont*, 963 F.3d 196, 202–03 (2d Cir. 2020) (rejecting a similar challenge because "no contractual right exist[ed]"); *Lazar v. Kroncke*, 862 F.3d 1186, 1200

(9th Cir. 2017) ("Because Lazar never possessed a vested contractual right, she suffered no contractual impairment."); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1106 (8th Cir. 1986) (affirming the denial of relief because the alleged right was "conditional"). It thus fails at the threshold question for proving a modern Contracts Clause violation. *Energy Reserves Grp.*, 459 U.S. at 413.

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We AFFIRM the dismissal of the Contracts Clause claim. We REVERSE the dismissal of the Commerce Clause claims and remand those for further proceedings consistent with this opinion. We leave it for the district court to determine whether NextEra is entitled to any preliminary injunctive relief.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring in part and dissenting in part: Today's holding about S.B. 1938 applies only "to the interstate electricity networks in Texas (but not the intrastate ERCOT network)." *Ante* at 2. The territory at issue, which is controlled by MISO and SPP, "is part of an 'interconnected "grid" of near-nationwide scope' that has long been subject to FERC oversight." *Ante* at 22. Because the majority opinion specifically excludes the intrastate ERCOT grid, I concur in much of the majority's opinion. But I dissent from its further conclusion that S.B. 1938 discriminates on its face.[*]

The "regulation of utilities is one of the most important of the functions traditionally associated with

[*] As the majority opinion notes, this facial discrimination claim under the dormant Commerce Clause should not be confused with a facial challenge to S.B. 1938, which this claim is not. *Ante* at 21 n.6.

the police power of the States." *Ark. Elec. Co-op Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). And as the majority opinion recognizes, "Texas has an interest in promoting reliable electricity service, including the power to approve the siting and construction of transmission lines." *Ante* at 20. To ensure "a robust, reliable, and well-regulated electric grid," S.B. 1938 ties construction rights to endpoint ownership to determine who can build, own, and operate new transmission facilities. Tex. H. Comm. on State Affs., Bill Analysis, Tex. H.B. 3995, 86th Leg., C.S.H.B. at 1 (2019). As one of the *amici* stresses, S.B. 1938 "is an exercise of local control over what is inherently a local business. This local character is seen especially in the areas of ERCOT served by public power utilities, which are community-owned or managed, vertically integrated monopoly systems." Brief for The Lower Colorado River Authority, as *Amicus Curiae* Supporting Defendants–Appellees, at 9. Although the majority opinion does not disturb ERCOT's grid, which is wholly intrastate and makes up most of Texas's electrical system, the right of first refusal so crucial to ERCOT may also be important to the portion of Texas's grid within FERC's jurisdiction.

As the majority opinion states, a law may discriminate against interstate commerce in three ways: on its face (*i.e.*, by its very text), by its purpose, or in its effect. *Ante* at 21 (citing *Allstate Ins. Co v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007)). And a law having only incidental effects on interstate commerce may nonetheless be unlawful if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). While I agree with the majority that we should reverse the 12(b)(6) dismissals of NextEra's

discriminatory purpose, discriminatory-effect, and *Pike* claims, *ante* at 33, I disagree that "S.B. 1938 discriminates on its face" against interstate commerce, *ante* at 31.

The majority opinion purports to draw a distinction in S.B. 1938 between in-state and out-of-state entities or interests. In reality, it draws a distinction *into* S.B. 1938, because the text does not bear that out. Rather, S.B. 1938 draws a neutral distinction between entities based on *incumbency status*, which does not depend on residency. In *LSP Transmission Holdings, LLC v. Sieben*, the Eighth Circuit considered an incumbency preference nearly identical to this one. 954 F.3d 1018, 1023–24 (8th Cir. 2020). In holding that the law was not facially discriminatory, the court noted that the law's "preference is for electric transmission owners who have existing facilities, and its law applies evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere." *Id.* at 1028. True, "laws that restrain both intrastate and interstate commerce may be discriminatory," but "[t]his is not such an instance." *Id.* The incumbency requirement here, as in *Sieben*, is not an illicit residency requirement. *Cf. Hignell-Stark v. City of New Orleans,* No. 21-30643, 2022 WL 3584037, at *5 (5th Cir. Aug. 22, 2022) (holding that New Orleans's "residency requirement discriminated against interstate commerce").

Similarly, S.B. 1938 draws a neutral distinction based only on incumbency status. Thus, the majority needs a further inferential step to conclude that S.B. 1938 amounts to discrimination against out-of-state entities. Citing three Supreme Court cases, the majority opinion makes that inferential step by saying that "[w]hat is true for alcohol and milk under the dormant Commerce

Clause must be true for electricity transmission. Requiring boots on the ground discriminates against interstate commerce." *Ante* at 28 (citations omitted). But this inferential step lands beyond the realm of facial discrimination. If the text does not distinguish between in-state and out-of-state interests—which it does not—S.B. 1938 cannot be facially discriminatory.

To illustrate, S.B. 1938's incumbency requirement is meaningfully different than discriminatory in-state presence requirements. In each of these three cases, the laws *add* requirements that discriminate against out-of-state entities. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2456–59 (2019); *Granholm v. Heald*, 544 U.S. 460, 465–66 (2005); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350–52 (1951). Without the discriminatory laws in *Granholm* and *Dean Milk*, the goods at issue—wine and milk, respectively—could readily be supplied by providers without any physical presence in the state. Wineries could ship wine directly to consumers in New York and Michigan, and milk producers could send their dairy products into Madison from Chicago. *Granholm*, 544 U.S. at 467–68; *Dean Milk*, 340 U.S. at 352–53. And without the law in *Tennessee Wine & Spirits*, out-of-state entities and individuals could open new liquor stores without residing in Tennessee for any meaningful period of time. 139 S. Ct. at 2458. Under those laws, however, out-of-state producers could no longer ship product into the state or the city, and out-of-state entities could not immediately open liquor stores. Thus, those laws violate the

Commerce Clause because they add requirements that discriminate against out-of-state entities.

In contrast, S.B. 1938 does not add any such requirements. By offering a right of first refusal to owners of incumbent utility facilities, S.B. 1938 merely recognizes a *pre-existing* physical-presence requirement: an electric company cannot provide transmission-and-distribution services without some sort of existing physical presence in the state. Thus, unlike the three cases cited by the majority, S.B. 1938 does not add, either explicitly or implicitly, any in-state presence requirements.

Moreover, the nature of the transmission-and-distribution market means that *all* existing market providers must have some sort of physical presence within the state. Thus, the mere fact that an entity had a physical presence in Texas before 2019 says only that the entity was an existing market provider at that time, and nothing more. It says nothing about whether the entity is an in-state or an out-of-state entity, or whether the law favors instate over out-of-state interests. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016) ("[I]ncumbency bias in this context is not a surrogate for the 'negative[] impact [on] interstate commerce' with which the dormant Commerce Clause is concerned." (alterations in original) (quoting *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013))).

The distinction between incumbents and non-incumbents in S.B. 1938's text, without more, does not constitute facially discriminatory treatment of out-of-state entities. That something more would have to be evidence of discriminatory purpose or discriminatory effect. And as the majority stated, the "pleadings-stage

dismissal of [the discriminatory-purpose, discriminatory-effect, and *Pike*] claims was premature. Claims that turn on intent and effects typically require factual development." *Ante* at 31. On remand, I have no doubt that the able district court will carefully analyze these thorny issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, LLC, AND NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC, PLAINTIFFS,	§	CAUSE NO. 1:19-CV-626-LY
V.	§	
DEANN T. WALKER, CHAIRMAN, PUBLIC UTILITY COMMISSION OF TEXAS; ARTHUR C.	§	

D'ANDREA,	§
COMMISSIONER,	§
PUBLIC UTILITY	§
COMMISSION OF	§
TEXAS; AND SHELLY	§
BOTKIN,	§
COMMISSIONER, EACH	§
IN HIS OR HER	§
OFFICIAL CAPACITY,	§
DEFENDANTS.	§

ORDER ON MOTION TO DISMISS

Before the court are Texas's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) filed August 23, 2019 (Doc. #94); Amended Plaintiffs' Opposition to Defendants' Motion to Dismiss filed September 16, 2019 (Doc. #108); Texas's Reply in Support of Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) filed September 27, 2019 (Doc. #111). Also before the court are the Statement of Interest of the United States of America filed September 20, 2019 (Doc. #110) and Texas's Response to Statement of Interest of the United States filed November 12, 2019 (Doc. #122). The court held a hearing on the motion on December 4, 2019, at which the court entertained argument from counsel for the parties.

As a preliminary matter, however, the court will consider numerous motions by third parties to intervene in this case.[1] Intervention in an existing case is governed

[1] The motions are as follows: Motion to Intervene by LSP Transmission Holdings II, LLC (Doc. #33); Motion to Intervene by Oncor Electric Delivery Company LLC (Doc. #49); Motion to Intervene by Entergy Texas, Inc. (Doc. #50); Southwestern Public Service Company's Partially Opposed Motion to Intervene (Doc. #54); Motion for Leave to Intervene and File

by Rule 24 of the Federal Rules of Civil Procedure. *See* FED. R. Civ. P. 24. A movant may intervene of right if "given an unconditional right to intervene by a federal statute" or "claims an interest in relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. Civ. P. 24(a). No movant satisfies this standard. To the extent that a movant may arguably be impaired or impeded in its ability to protect an alleged interest, the existing parties adequately protect that interest.

Rule 24 also provides for permissive intervention. *See* FED. R. Civ. P. 24(b). "Permissive intervention is wholly discretionary with the [district] court, even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir. 1984). As the existing parties adequately

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Answer by Texas Industrial Energy Consumer (Doc. #68); Partially Opposed Motion to Intervene by East Texas Electric Cooperative, Inc. (Doc. #79); Motion for Leave to File Proposed Motion to Dismiss and Proposed Opposition to Motion for a Preliminary Injunction by Southwestern Public Service Company (Doc. #89); Motion for Leave to File Opposition to Plaintiffs' Motion for a Preliminary Injunction by Oncor Electric Delivery Company LLC (Doc. #90); Motion for Leave to File Rule 12(b)(6) Motion to Dismiss (Doc. #91); Motion for Leave to File Motion to Dismiss by Oncor Electric Delivery Company LLC (Doc. #92); and Motion for Leave to File a Response to Plaintiffs' Motion for a Preliminary Injunction by Texas Industrial Energy Consumers (Doc. #93) (collectively, "the motions to intervene").

protect all asserted interesst and the presence of additional parties will not be of assistance to the court's determination of the issues presented by the existing parties, the court will deny permissive intervention. **IT IS THEREFORE ORDERED** that the motions to intervene are each **DENIED**.

The court now turns to the motion to dismiss.

I. BACKGROUND

This case involves regulation of the transmission of electricity and the electric grids serving the State of Texas. Electricity is transmitted throughout a grid on transmission lines with distribution lines that carry the electricity on to individual end customers. There are three essentially separate electric grids in the continental United States–the eastern grid, the western grid, and the Electric Reliability Council of Texas, Inc. ("ERCOT") grid. Texas includes small parts of both the eastern and western grids and the entire ERCOT grid. In much of the country, transmission planning is overseen by an Independent System Operator ("ISO") or a Regional Transmission Organization ("RTO"). In Texas, three ISOs and RTOs are involved–the Southwest Power Pool ("SPP"), the Midcontinent Independent System Operator ("MISO"), and ERCOT. The ERCOT grid covers about 75% of Texas's land area and about 90% of the electricity used by Texas customers. Because it is located only in Texas and interconnected with other grids to only a very limited extent, the ERCOT grid is not deemed to be involved in interstate transmission, and the ERCOT market is not subject to Federal Energy Regulatory Commission ("FERC") rate jurisdiction.

The parts of Texas that are outside the ERCOT grid and in the SPP or MISO grids each cover several states

and are subject to FERC wholesale-transmission-rate jurisdiction. Thus, their activities within Texas are subject to concurrent federal and state oversight by FERC and the Public Utility Commission of Texas ("PUCT").

In Texas, "[e]lectric utilities are by definition monopolies in many of the services provided and areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not always operate in Texas. Public agencies regulate electric utility rates, operations, and services. . . ." TEX. UTIL. CODE § 31.001(b) (West 2016). The purpose of the Electric Utilities subtitle of the Texas Utilities Code is "to establish a comprehensive and adequate regulatory system for electric utilities to assure rate, operations, and services that are just and reasonable to the consumers and to the electric utilities." *Id.* at § 31.001(a).

The Texas Legislature has delegated oversight of Texas's electric utilities to PUCT. In ERCOT's region, retail sales and generation have been deregulated, but transmission and distribution is still regulated, with these utilities' rates set by the PUCT and passed through to end customers. Areas outside ERCOT are still served by vertically integrated utilities that provide the generation, transmission and distribution, and retail services at PUCT-set rates that reflect these costs.

All utilities–in all three grids-must obtain a certificate of convenience and necessity ("CCN") from the PUCT to provide transmission service to the public. During the CCN process, the PUCT determines if the line is necessary and weighs a variety of factors, including the cost to consumers and the adequacy of

existing service. The PUCT also determines specific line siting and approves technical aspects of facilities.

The utility also must obtain a CCN from the PUCT to build a new line before it may be put into service. The general practice in Texas has been for the existing transmission owners to build new lines. ERCOT's operating rules or "protocols" reflect this longstanding practice. Before 2011, FERC gave incumbent utilities a federal right of first refusal. Under that system, if an ISO such as MISO or SPP approved construction of a new transmission line, the ISO member that distributed electricity in the area where the facility was to be built had a right of first refusal.

In 2011, however, FERC issued Order 1000, which eliminated the federal right of first refusal. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 601051, 2001 WL 2956837 (F.E.R.C. July 21, 2011) ("Order 1000"). Order 1000 is consistent with the effort to manage electric grids on a regional level. *See Reg'l Transmission Orgs.*, 89 FERC ¶ 61285, ¶ 1, 1999 WL 33505505, at *3 (Dec.20, 1999); *see also* 18 C.F.R. § 5.34 (2006). At the same time, however FERC explained that Order 1000 recognizes that states can continue to regulate electric transmission lines, stating that "nothing in [Order 1000] 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 sitting permitting of transmission facilities." Order 1000 ¶ 227.

In accordance with Order 1000, MISO and SPP removed the federal right-of-first-refusal provisions from their tariffs. In May 2019, the Texas Legislature

passed its own right-of-first-refusal law in Senate Bill 1938 ("SB 1938"), amending Section 37.056(e) of the Texas Utilities Code to require the PUCT to grant a CCN for new transmission facilities to the endpoint owners of the existing facilities to which the new line will interconnect. SB 1938 § 4.[2] SB 1938 also amends Section 37.056(g) to add a provision allowing the endpoint owner to transfer its rights to build or own or operate a new or existing line to another certificated utility under certain circumstances. Thus, existing owners of transmission facilities in Texas are given a preference to build, own, and operate the new lines, and if a new transmission line will connect to lines owned by two different providers, the two "incumbent" transmission providers may each build a portion of the new line.

This case involves the Hartburg-Sabine Junction Transmission Project ("the Project"), a new 500 kilovolt transmission line and substation facilities proposed to run within Orange and Newton Counties in East Texas. On February 6, 2018, MISO issued a request for proposals for the construction of the Project. In November 2018, MISO selected Plaintiff NextEra Transmission Midwest, LLC ("NextEra Midwest") to build the line. After being selected for the Project, NextEra Midwest and MISO entered into a "Selected Developer Agreement," dated January 25, 2019, allowing NextEra Midwest to recover its costs in building the designated facilities through the MISO Tariff, subject to

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[2] In response to Order 1000, several other states enacted their own right-of-first-refusal laws. *See, e.g.*, N.D. CENT CODE § 49-03-02.2; S.D. CODIFIED LAWS § 49-32-20; NEB. REV. STAT. § 70-1028; 17 OKLA. STAT. ANN. § 292; MINN. STAT. § 216B.246.

FERC review and the terms and commitments proposed by NextEra Midwest in its bid. The agreement also allows NextEra Midwest to recover a reasonable return on its investment, subject to various cost cap and cost containment commitments once the transmission line is operational. The agreement requires NextEra Midwest to secure any necessary state-law CCNs to complete the Project.

Plaintiffs assert that as a result of the SB 1938 amendments to Texas Utilities Code, NextEra Midwest will be barred from obtaining a CCN form the PUCT for the Project because NextEra Midwest does not already operate in Texas. On June 17, 2019, Plaintiffs filed this lawsuit challenging the constitutionality of SB 1938, currently codified at Sections 37.051, 37.056, 37.057, 37.15 1, and 37.154 of the Texas Utilities Code. Specifically, Plaintiffs allege that SB 1938 facially discriminates against interstate commerce by giving electric utilities that already operate in Texas the sole right to build transmission lines with an end point in Texas, violating both the Commerce Clause and Contracts Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 10. Defendants move to dismiss Plaintiffs' complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. STANDARD OF REVIEW

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." Although a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th

Cir. 2007). A plaintiffs' obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677(2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating a motion to dismiss, the court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2009).

III. ANALYSIS

Plaintiffs' allegations are based on the premise that the Commerce Clause grants Plaintiffs the right to compete to build transmission lines in Texas. Defendants DeAnn T. Walker, Arthur D'Andrea, and Shelly Botkin are the Commissioners of the PUCT.[3] They argue that the Commerce Clause does not preclude Texas's regulatory approach to the construction of new transmission lines. Defendants rely on the United States Supreme Court's opinion in *General Motors Corp. v. Tracy*, which holds that state utility regulation is an important health-and-safety interest supporting regulation that "outright prohibit[s] competition." 519

[3] Because the PUCT oversees Texas's electric utilities, the individual Commissioners of the PUCT are the proper parties in this case. Therefore, the court will collectively refer to the individually-named Commissioners in this order as "Defendants."

U.S. 278, 306 (1997). Defendants further assert that SB 1938 does not treat out-of-state transmission providers differently than in-state providers, noting that under the law all existing incumbent transmission owners, regardless of residency, receive the benefits and burdens of the law over nonincumbents. Thus, Defendants contend that the balancing approach of decisions such as *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which ask whether a state's interest is strong enough to justify an interstate effect, does not apply to Texas's regulation of the right to build new electric-transmission lines. *See Elec. Power Supply Ass'n v. Star,* 904 F.3d 518, 525 (7th Cir. 2018), *cert. denied*, ___ U.S. ___ 139 S. Ct. 1547 (2019). Moreover, Defendants assert SB 1938's amendments in the heavily-regulated industry of electric transmission do not disrupt a party's reasonable expectations or extensively impair a contract that would raise a claim under the Contracts Clause.

In response, Plaintiffs and the United States[4] argue that Plaintiffs adequately allege that by restricting the interstate market to develop electric-transmission facility only to owners of interconnecting local facilities or in-state entities the local owners designate, SB 1938 impermissibly discriminates in favor of in-state interest and forecloses entry by nonlocal and out-of-state competitors, imposing a substantial burden on interstate commerce with no local benefits that could not be achieved with reasonable, alternative policies, thereby

[4] The United States filed a Statement of Interest (Doc. #110) in this case in response to Defendants' motion to dismiss. *See* 28 U.S.C. 517 (authorizing United States Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States").

exceeding the burdens before the United States Supreme Court in *Pike*. As to Plaintiffs' claim under the Contract Clause, Plaintiffs assert that under the terms of the agreement between NextEra Midwest and MISO, gauged against the nature of existing regulation at the time NextEra Midwest and MISO entered into the agreement, there was no expectation of a risk of change in the law regarding the right of first refusal. Thus, Plaintiffs argue, SB 1938 operated as a substantial impairment of the contractual relationship between NextEra Midwest and MISO. *See Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983).

Commerce Clause

"The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). *See also Exxon Corp. v.* Governor *of Maryland*, 437 U.S. 117, 127 (1978) (Commerce Clause does not protect "the particular structure or methods of operation" of a market). State laws are subject to scrutiny under the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The validity of a state law, despite its undoubted effect on interstate commerce, requires a two-part analysis. *See C & A Carbone, Inc. v. Town of Clarkstown, N Y.*, 511 U.S. 383, 389-90 (1994).

First, the court must determine whether the state law discriminates against interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S.617, 624 (1978). If the state law is not overtly discriminatory, the court must determine whether it imposes a burden on

interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Defendants argue that *General Motors Corp. v. Tracy*[5] controls, barring Plaintiffs' claim of discrimination. Plaintiffs argue that *Tracy* does not exempt regulated utilities from Commerce Clause analysis nor does it require the court to defer to the states' justifications for discrimination. Plaintiffs further assert that unlike *Tracy*, SB 1938 does not treat two different products in separate markets differently, but rather it treats two competitors for the same project differently based on whether one is the in-state incumbent. Thus, Plaintiffs argue that this case is not like *Tracy* but rather like *Tenn. Wine & Spirits Retailers Ass 'n v. Thomas*,[6] *Granholm, and C & A Carbone, Inc.*, in which the Supreme Court struck down facially discriminatory laws.

The court does not find SB 1938 analogous to the cases that Plaintiffs cite, all of which involve the flow of goods in interstate commerce or burdensome requirements as a precondition for allowing the flow of goods in interstate commerce. SB 1938 does not purport to regulate the transmission of electricity in interstate commerce; it regulates only the construction and operation of transmission lines and facilities within Texas, which distinguishes it from the cases upon which Plaintiffs rely.

Moreover, under *Tracy*, the Supreme Court grants controlling weight to the monopoly market, which is also the market in Texas. 519 U.S. at 304. Texas is entitled to consider the effect on the consumers that the utilities

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[5] 519 U.S. 278.

[6] ___ U.S. ___, 139 S. Ct. 2449 (2019).

serve; its regulations impose upon incumbent utilities the obligation to serve "every consumer in the utility's certificated area" and to "provide continuous and adequate services in that area." TEX. UTIL. CODE § 37.151. Thus, the reasons cited in support of giving greater weight to the monopoly market in *Tracy* apply to SB 1938 as well-to avoid any jeopardy or disruption to the service of electricity to the state electricity consumers and to allow for the provision of a reliable supply of electricity.

Additionally, SB 1938 does not single out Texas transmission-line providers as the sole beneficiaries of the right of first refusal over out-of-state providers such as NextEra Midwest. The existing regulated transmission-line providers with a right of first refusal are not similarly situated with unregulated providers such as NextEra Midwest. *See Tracy*, 510 U.S. at 298-99. Neither does SB 1938 overtly discriminate by granting incumbent transmission-line providers the right of first refusal because that preference does not discriminate against out-of-state providers. Indeed, most incumbent providers in Texas are owned by out-of-state companies, and SB 1938 allows out-of-state providers a means to enter the Texas market for transmission services by buying a Texas utility. Incumbent providers may "sell, assign, or lease a certificate or a right obtained under a certificate" with PUCT approval, if the transaction will not diminish the retail-rate jurisdiction of Texas. TEX.UTIL. CODE § 37.154(a).

Finally the court concludes that SB 1938 is without a discriminatory purpose. The court applies a "presumption of good faith" in assessing discriminatory purpose. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm 'n*, 935 F.3d 362, 373 (5th Cir. 2019). To

overcome the presumption, Plaintiffs must allege a pattern of discrimination under a multi-factor analysis. *Id.* at 370.[7] First, the court finds that Plaintiffs have not alleged "a history of hostility toward [Plaintiffs] singularly or towards out-of-state companies in general." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). Second, the court finds no evidence of a sudden or dramatic change in state law, as SB 1938 continues the long-term practice in Texas of allowing existing providers to build needed new transmission lines. Third, the court finds SB 1938 followed a standard path from filing to passage, and Plaintiffs do not allege any facts indicating that SB 1938 resulted from a legislative process that departed from "normal procedures." *Allstate*, 495 F.3d at 160-61. Fourth, the court finds no indication in the legislative history of any discriminatory purpose, as the SB 1938 debate was "devoid of discriminatory remarks directed toward out-of-state competition." *Wal-Mart Stores, Inc.*, 935 F.3 d at 372. Although Plaintiffs allege that SB 1938 was a reaction to an ISO' s designation of NextEra Midwest for the Hartburg-Sabine transmission line, the legislative

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[7] The court considers the following non-exhaustive factors: (1) whether the effect of the state action creates a clear pattern of discrimination; (2) the historical background of the action, which may include any history of discrimination by the decision makers; (3) the "specific sequence of events leading up" to the challenged state action, including (4) any "departures from normal procedures [;]" and (5) "the legislative or administrtive history of the state action, including contemporary statements by decision makers." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007).

history reflects to the contrary. The legislative history indicates instead that the Texas Legislature disagreed with the statutory analysis reflected in a 2017 PUCT declaratory order and enacted SB 1938 to eliminate any uncertainty in Texas law. Therefore, the court concludes that Plaintiffs have failed to demonstrate that SB 1938 discriminates against out-of-state transmission-line providers or has a discriminatory purpose or effect.

Pike

Having determined that SB 1938 does not discriminate and is without a discriminatory purpose against out-of-state transmission-line providers in part because it was enacted to avoid jeopardy or disruption to the service of electricity to Texas electricity consumers and to allow for the provision of a reliable supply of electricity to those consumers, along with the additional reasons discussed above, the court concludes that the burden imposed by SB 1938 is also not "clearly excessive in relation to the putative local benefits," and therefore passes the more permissive *Pike* test. *Pike*, 397 U.S. at 142; *see also United Haulers Ass 'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (holding under *Tracy* state law did not discriminate against interstate commerce and law therefore was "properly analyzed under the test set forth in *Pike*").

As the Supreme Court states in *Tracy*,

> We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens," even if that "legislation might indirectly affect the commerce of the country."

519 U.S. at 306-07 (quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960)). Having also determined that under the *Pike* test any burden on interstate commerce is outweighed by the benefits of SB1938, the court concludes that SB 1938 does not violate the Commerce Clause.

Contracts Clause

In its evaluation of whether Plaintiffs have properly pleaded a violation of the Contracts Clause, this court must determine: (1) whether a contract exists as to the specific terms at issue; (2) whether the law has "operated as a substantial impairment of a contractual relationship"; (3) "whether the state law at issue has a legitimate and important public purpose"; and (4) whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992); *see also Powers v. United States*, 783 F.3d 570, 5 77-78 (5th Cir. 2015). An "important consideration in [the] substantial impairment analysis is the extent to which the law upsets the reasonable expectation the parties had at the time of contracting, regarding the specific contractual rights the state's action allegedly impairs." *United Healthcare v. Davis*, 602 F.3d 618, 627 (5th Cir. 2010). "Courts look to the terms of the contract to determine the parties' reasonable expectations, including whether the risk of a change in the law was contemplated at the time of contracting." *Id.* at 628.

In *Energy Reserves Group, Inc.*, the Supreme Court upheld a Kansas statute imposing price controls on natural gas after considering that not only was the natural-gas market heavily regulated at the time the parties entered the contract, but that the contract itself

included terms that adjusted for changes in gas-price regulation so the parties must have known that their "contractual rights were subject to alteration by state price regulation." 459 U.S. at 415-16. Under the terms of the Agreement between MISO and NextEra Midwest, NextEra Midwest's contractual right to build the Hartburg-Sabine line was subject to obtaining the necessary regulatory approvals, including from PUCT.

Further, Texas's regulation of the electric transmission has a long and extensive history. Every aspect of the production, transmission, distribution, and retail sale of electricity is regulated and supervised by the state. *See* TEX. UTIL. CODE §§ 31.00 1-43.152. As the Supreme Court has observed, "{o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). The court finds that to the extent, if any, SB 1938 impairs NextEra Midwest's contractual interests, SB 1938 rests on, and is prompted by, significant and legitimate state interests. *Energy Reserves Group, Inc.*, 459 U.S. at 416-17. Thus, the court concludes that Plaintiffs have failed to plead a claim under the Contracts Clause.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Texas's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) filed August 23, 2019 (Doc. #94) is **GRANTED**. Plaintiffs' complaint is **DISMISSED WITH PREJUDICE**.

Having dismissed Plaintiffs' complaint,

IT IS FURTHER ORDERED that Plaintiffs' Motion for a Preliminary Injunction filed June 17, 2019

(Doc. #7) and Plaintiffs' Motion for a Status Conference filed February 13, 2020 (Doc.. #140) are **DISMISSED**.

A Final Judgment shall be filed subsequently.

SIGNED this /s/26th day of February, 2020.

/s/Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, LLC, AND NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC,	§	
PLAINTIFFS,	§	CAUSE NO. 1:19-CV
	§	-626-LY
V.	§	
	§	
DEANN T. WALKER,	§	

CHAIRMAN, PUBLIC	§
UTILITY COMMISSION	§
OF TEXAS; ARTHUR C.	§
D'ANDREA,	§
COMMISSIONER,	§
PUBLIC UTILITY	§
COMMISSION OF	§
TEXAS; AND SHELLY	§
BOTKIN,	§
COMMISSIONER, EACH	§
IN HIS OR HER	§
OFFICIAL CAPACITY,	§
DEFENDANTS.	§

FINAL JUDGMENT

Before the court is the above entitled cause of action. On this same date, the court rendered an order granting Defendants' motion to dismiss and dismissing Plaintiffs' complaint with prejudice. Accordingly, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS HEREBY ORDERED that Defendants are awarded costs.

IT IS FURTHER ORDERED that the case hereby **CLOSED.**

SIGNED this /s/26th day of February, 2020.

/s/Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX D

Chapter 44

AN ACT

relating to certificates of convenience and necessity for the construction of facilities for the transmission of electricity.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 37.051(a), Utilities Code, is amended to read as follows:

(a) An electric utility [~~or other person~~] may not directly or indirectly provide service to the public under a franchise or permit unless the utility [~~or other person~~] first obtains from the commission a certificate that states that the public convenience and necessity requires or will require the installation, operation, or extension of the service.

SECTION 2. Section 37.053(a), Utilities Code, is amended to read as follows:

(a) An electric utility [~~or other person~~] that wants to obtain or amend a certificate must submit an application to the commission.

SECTION 3. Section 37.055, Utilities Code, is amended to read as follows:

Sec. 37.055. REQUEST FOR PRELIMINARY ORDER. (a) An electric utility [~~or other person~~] that wants to exercise a right or privilege under a franchise or permit that the utility [~~or other person~~] anticipates

obtaining but has not been granted may apply to the commission for a preliminary order under this section.

(b) The commission may issue a preliminary order declaring that the commission, on application and under commission rules, will grant the requested certificate on terms the commission designates, after the electric utility [~~or other person~~] obtains the franchise or permit.

(c) The commission shall grant the certificate on presentation of evidence satisfactory to the commission that the electric utility [~~or other person~~] has obtained the franchise or permit.

SECTION 4. Section 37.056, Utilities Code, is amended by adding Subsections (e), (f), (g), (h), and (i) to read as follows:

(e) 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. If a new transmission facility will directly interconnect with facilities owned by different electric utilities or municipally owned utilities, each entity shall be certificated to build, own, or operate the new facility in separate and discrete equal parts unless they agree otherwise.

(f) Notwithstanding Subsection (e), if a new transmission line, whether single or double circuit, will create the first interconnection between a load-serving station and an existing transmission facility, the entity with a load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility at the load-serving station shall be

certificated to build, own, or operate the new transmission line and the load-serving station. The owner of the existing transmission facility shall be certificated to build, own, or operate the station or tap at the existing transmission facility to provide the interconnection, unless after a reasonable period of time the owner of the existing transmission facility is unwilling to build, and then the entity with the load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility may be certificated to build the interconnection facility.

(g) Notwithstanding any other provision of this section, an electric utility or municipally owned utility that is authorized to build, own, or operate a new transmission facility under Subsection (e) or (f) may designate another electric utility that is currently certificated by the commission within the same electric power region, coordinating council, independent system operator, or power pool or a municipally owned utility to build, own, or operate a portion or all of such new transmission facility, subject to any requirements adopted by the commission by rule.

(h) The division of any required certification of facilities described in this section shall apply unless each entity agrees otherwise. Nothing in this section is intended to require a certificate for facilities that the commission has determined by rule do not require certification to build, own, or operate.

(i) Notwithstanding any other provision of this section, an electric cooperative may be certificated to

build, own, or operate a new facility in place of any other electric cooperative if both cooperatives agree.

SECTION 5. Section 37.057, Utilities Code, is amended to read as follows:

Sec. 37.057. DEADLINE FOR APPLICATION FOR NEW TRANSMISSION FACILITY. [~~The commission may grant a certificate for a new transmission facility to a qualified applicant that meets the requirements of this subchapter.~~] The commission must approve or deny an application for a certificate for a new transmission facility not later than the first anniversary of the date the application is filed. If the commission does not approve or deny the application on or before that date, a party may seek a writ of mandamus in a district court of Travis County to compel the commission to decide on the application.

SECTION 6. Section 37.151, Utilities Code, is amended to read as follows:

Sec. 37.151. PROVISION OF SERVICE. Except as provided by Sections [~~this section, Section~~] 37.152[~~,~~] and [~~Section~~] 37.153, a certificate holder [~~, other than one granted a certificate under Section 37.051(d),~~] shall:

(1) serve every consumer in the utility's certificated area; and

(2) provide continuous and adequate service in that area.

SECTION 7. Section 37.154(a), Utilities Code, is amended to read as follows:

(a) An electric utility or municipally owned utility may sell, assign, or lease a certificate or a right obtained under a certificate if [~~the commission determines that~~]

the purchaser, assignee, or lessee is already certificated by the commission to provide electric service within the same electric power region, coordinating council, independent system operator, or power pool, or if the purchaser, assignee, or lessee is an electric cooperative or municipally owned utility [~~can provide adequate service~~]. As part of a transaction subject to Sections 39.262(l)-(o) and 39.915, the commission may approve a sale, assignment, or lease to an entity that has not been previously certificated if the approval will not diminish the retail rate jurisdiction of this state. Any purchase, assignment, or lease under this section requires that the commission determine that the purchaser, assignee, or lessee can provide adequate service.

SECTION 8. Sections 37.051(d), (e), and (f), Utilities Code, are repealed.

SECTION 9. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2019.

* * * * *