No.

In the Supreme Court of the United States

INVENERGY THERMAL LLC AND GRAYS HARBOR ENERGY LLC, PETITIONERS

v.

CASEY SIXKILLER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF ECOLOGY, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), immunizes State laws affecting utilities from challenge under the dormant Commerce Clause, even when those laws affect competitive markets.

2. Whether alleging interstate and market-wide consequences of a state law, including a protectionist effect, adequately alleges a burden on interstate commerce, as five Justices would have held in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

PARTIES TO THE PROCEEDING

Invenergy Thermal LLC and Grays Harbor Energy LLC were plaintiffs in the trial court and appellants in the court of appeals.

Laura Watson, in her official capacity as the Director of the Washington Department of Ecology, was the defendant in the trial court and appellee in the court of appeals. Since the court of appeals issued its opinion, Casey Sixkiller has been appointed to replace Ms. Watson as the Director of the Department of Ecology, so has been substituted for Laura Watson as the respondent under Federal Rule of Civil Procedure 25(d).

RELATED PROCEEDINGS

Invenergy Thermal LLC v. Watson, 3:22-cv-05967-BHS, Western District of Washington. Judgement entered November 3, 2023.

Invenergy Thermal LLC v. Watson, 23-3857, Ninth Circuit Court of Appeals. Judgement entered December 24, 2024.

CORPORATE DISCLOSURE STATEMENT

Petitioners Invenergy Thermal LLC and Grays Harbor Energy LLC are wholly owned indirect subsidiaries of Invenergy AMPCI Thermal Power LLC.

InfraBridge North America Thermal Power Acquisition LLC has a greater-than-10% ownership stake in Invenergy AMPCI Thermal Power LLC. InfraBridge's ultimate corporate parent is DigitalBridge Group, Inc., which is publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Invenergy Thermal LLC and Grays Harbor Energy LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, Pet.App.1a, is unreported, but is accessible at 2024 WL 5205745. The opinion of the district court, Pet.App.8a, is reported at 701 F. Supp. 3d 1080.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT

In the decision below, the Ninth Circuit contravened well-established precedents prohibiting states from unduly burdening interstate commerce. The Constitution extends to Congress the "Power … [t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. The "negative aspect" of that grant, 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*, 588 U.S. 504, 514 (2019) (citation omitted). A State's economic protectionism need not be explicit. Rather, this Court has for decades recognized that the dormant Commerce Clause forbids such discrimination "whether forthright or ingenious," *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), if it "unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace,'" *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (alteration in original) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)).

Here, the state of Washington's Climate Commitment Act ("CCA") imposes precisely the kind of protectionist impediments the dormant Commerce Clause has long

been understood to bar. The CCA imposes steep compliance costs on power plants in the state, requiring them to purchase "allowances" for millions of dollars to offset their emissions. However, following an intense lobbying effort, Washington's legislators gave incumbent in-state utilities—and in-state utilities alone—an enormous carve-out from the CCA: "no-cost allowances" that allow in-state utilities to mitigate or entirely eliminate the financial burdens of compliance.

Petitioner Invenergy is an out-of-state company that owns an independent power plant in Washington and is not affiliated with Washington's powerful in-state utilities. Although Invenergy's plant, Grays Harbor, competes directly with the in-state utilities' plants to sell power to utilities and onto the Pacific Northwest's interstate power grid, Invenergy and Grays Harbor do not benefit from the CCA's sweetheart deal. Indeed, Invenergy has been forced to spend millions of dollars on carbon credits that it would not have had to purchase if Grays Harbor had been owned by an in-state utility.

The Ninth Circuit nevertheless rejected Invenergy's dormant Commerce Clause challenge. It held that, under this Court's decision in *Tracy*, the utilities' special status as state-regulated entities serving a captive market of ratepayers insulated Washington's law from constitutional challenge—even when the State is giving utilities benefits in separate, competitive markets where utilities go head-to-head against other companies. That reasoning is not only incorrect, but also creates a clear circuit split with the Fifth and Sixth Circuits. As those courts have recognized, *Tracy* does not "immun[ize]" utilities from "ordinary Commerce Clause jurisprudence." *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 318 (5th Cir. 2022) (quoting *Tracy*, 519 U.S. at 291 n.8); *see Energy*

Mich., Inc. v. Mich. Pub. Serv. Comm'n, 126 F.4th 476, 497 (6th Cir. 2025). Only this Court can resolve that split, and this case is an ideal vehicle for doing so.

The Ninth Circuit's outlier decision also deepens the lower courts' confusion over the proper standard for pleading a violation of the dormant Commerce Clause. In *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023), five Justices agreed that market-wide consequences of the sort alleged by Invenergy and Grays Harbor here sufficiently allege a burden on interstate commerce, but no single rationale commanded a majority of the Court. In the wake of that decision, lower courts have struggled to assess allegations like Invenergy's. The decision below fills that gap with a standard that threatens to make dormant Commerce Clause challenges nearly impossible.

Moreover, the Ninth Circuit's decision allows States to enact economic protectionism, preventing new, out-of-state entrants from challenging existing, in-state market incumbents. This standard will have serious ramifications for the free flow of electricity and competition across state lines. Applied more broadly, it will permit other States to further distort other energy markets across the Ninth Circuit and the nation, at a time when the federal government has recognized that "a reliable, diversified, and affordable supply of energy," including adequate generation capacity, is "fundamental" to the nation's prosperity and security.[1]

This Court should grant certiorari to restore uniformity and clarity to the law, and to correct the Ninth

[1] The White House, *Declaring a National Energy Emergency* § 1 (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-energy-emergency/.

Circuit's manifest errors on this exceptionally important issue.

A. Factual Background

1. Providing electricity to consumers involves three steps: generation, transmission-and-distribution, and retail consumption.[2] Electric utilities deliver power to end consumers in the final two steps of this process, but the first step in the process—the generation of electricity—occurs in a highly competitive market. Utilities may generate the electricity they deliver to consumers using power plants they own, or may purchase electricity from independent power plants or from a wholesale market organized by a regional transmission reliability organization.

Invenergy is an independent power producer headquartered in Chicago that owns and operates power plants across the United States. For decades, Invenergy and its affiliates have been committed to investing in projects that deploy cutting-edge technology to make power generation cheaper and more efficient.

One such project is the Grays Harbor Energy Center, a power plant located on the Chehalis River, just south of Olympic National Forest in Washington. Using state-of-the-art technology to produce energy efficiently, Grays Harbor generates more than 650 megawatts of electricity for distribution in Washington and throughout the Pacific Northwest—enough to power more than 100,000 homes.

Grays Harbor sells the power it generates to utilities inside and outside of Washington, who in turn deliver it to

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[2] U.S. Energy Info. Admin., *Electricity Explained: How Electricity is Delivered to Consumers* (Apr. 16, 2024), https://www.eia.gov/energyexplained/electricity/delivery-to-consumers.php.

the ratepaying public. In this capacity, Grays Harbor competes with other power plants in Washington to sell electricity to utilities at the best price.

In the highly competitive market for generating power, a power plant like Grays Harbor lives and dies by its slim profit margins. Many utilities own and operate their own power plants, but they have no obligation to buy from those plants—and, indeed, they will buy power from whatever plant is cheapest, be it their own or Grays Harbor. That is because the energy that Grays Harbor and other plants generate is fungible—each megawatt is indistinguishable from every other. The primary differentiator in the market for power generation is therefore the price at which plants can sell power to utilities.

2. The Washington state legislature wreaked havoc on the competitive market for power generation with the CCA. The CCA purports to impose a compliance cost on greenhouse gas emissions. At the same time, the law effectively exempts power plants affiliated with powerful in-state utilities (the "Local Utilities") from shouldering that burden—leaving millions of dollars of costs to fall only on independent power plants like Grays Harbor, making it virtually impossible to compete, and burdening ratepayers inside and outside Washington with higher energy prices.

After years of failed attempts to enact cap-and-trade legislation or greenhouse-gas taxes, state legislators finally (and hurriedly) enacted the CCA at the end of the 2021 legislative session. The initial bill did not receive a vote in the Senate until seventeen days before end of the session. Representatives then pushed the bill through two committees, adopted significant amendments, and approved the amended bill in the space of twelve days.

The Senate voted to approve the House's amendments on the penultimate day of the legislative session.

The law empowers Washington to cap greenhouse-gas emissions each year. To implement that cap, the CCA relies on "allowances" for emissions. Under the CCA, a covered entity can emit only as many greenhouse gases as it has allowances, or face a steep penalty. In each successive year, Washington will reduce the number of allowances available. For many market participants, these allowances must be purchased at auction, costing many millions of dollars.

Where prior legislative attempts had failed, the hastily designed CCA passed because it was supported by a broad coalition of corporate interests, including Washington's electric utilities. This is no surprise, because Washington legislators wrote into the law distinct advantages for utility-owned power plants in the form of "no-cost allowances," which allow utilities to obtain valuable allowances for free and pass those allowances down to affiliated plants. In fact, the CCA makes the transfer of allowances from a utility to its wholly-owned power plant seamless. At the same time, it erects barriers to transferring any allowances to independent power plants like Grays Harbor, requiring a "Power Purchase Agreement" before any allowances can be transferred. Thus, while utilities face no obstruction to passing allowances to their own power plants, they must enter into long-term agreements to pass allowances to anyone else. Even if utilities wanted to pass their no-cost allowances to independent producers—a doubtful proposition—state legislators erected barriers to doing so.

The result was predictable: power plants affiliated with powerful incumbent utilities received no-cost allowances from utilities, mitigating or entirely

eliminating their compliance burden under the CCA. Grays Harbor, which is owned by out-of-state Invenergy and has no comparable in-state presence, received no such benefit, forcing it to bear the cost of the CCA, to the tune of tens of millions of dollars. The CCA's management of no-cost allowances eliminates competition with utility-owned power plants. Worse still, the CCA has raised prices for consumers both inside and outside of Washington, forcing other states' ratepayers to subsidize Washington's policy preferences. And the law insulates the existing utilities from any new competition, because any new power generator who wants to enter Washington will step onto the same uneven playing field as Grays Harbor and will be severely disadvantaged—unless, of course, they affiliate with an existing local utility.

B. Procedural History

1. Petitioners sued Laura Watson, the Director of Washington State's Department of Ecology ("the State"), invoking the district court's federal-question jurisdiction under 28 U.S.C. § 1331 and alleging that the CCA's allocation of no-cost allowances violated the dormant Commerce Clause and the Equal Protection Clause.[3]

As relevant here, Petitioners alleged that, by providing allowances to Local Utilities but not independent power plants like Grays Harbor, the CCA unconstitutionally discriminated in practical effect against out-of-state natural-gas power-plant owners to the benefit of in-state owners. Pet.App.84a-87a. The in-state plants are owned by power utilities with a substantial in-state presence, employing thousands of Washingtonians and dramatically

[3] Since the proceedings below, Casey Sixkiller has been appointed Ecology's Director, so has been substituted for Ms. Watson as the respondent under Federal Rule of Civil Procedure 25(d).

outspending Invenergy in local politics every year. Pet.App.53a-55a. At the same time, Petitioners alleged that the power market in the Pacific Northwest was highly interconnected. Pet.App.48a-49a. And as Petitioners explained, utilities used their local political power to support the CCA only because it contained a sweetheart deal for no-cost allowances that benefitted them and disadvantaged their competitors operating in the interconnected interstate market. Pet.App.59a-62a. Petitioners alleged that they were similarly situated to utilities in their shared capacity as power-plant owners, because they competed directly with utility-owned power plants to sell power in the competitive interstate market. Pet.App.49a-50a, 71a-76a.

Petitioners also alleged that the CCA's allocation of no-cost allowances unconstitutionally burdened interstate commerce under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), by obstructing the flow of interstate energy investment into Washington without producing local benefits to justify this burden. Pet.App.87a-89a. Inevitably, and by Washington's own admission, the CCA's implementation increased energy costs for ratepayers inside and outside Washington, as well as for any independent producer interested in entering Washington's competitive market. Pet.App.76a-78a. By offering no-cost allowances only to existing utilities, the CCA "in effect, blocks further interstate investment in natural gas power plants" because any new entrants to the power-generation market "would enter the same distorted market that benefits local utilities and burdens their independent competitors." Pet.App.88a. Because the net effect of the CCA's disparate allocation of no-cost allowances would raise electricity prices and increase greenhouse gas emissions, the burden on interstate commerce served no legitimate local interests. Instead, "[b]y disadvantaging independent power

plant owners and thwarting any future investment, the CCA insulates local utilities and their power plants from competition." Pet.App.89a.

2. The State answered the Complaint. But a few weeks later, with discovery underway, it moved for judgment on the pleadings. Several months later, the district court granted the State's motion for judgment on the pleadings and dismissed the Complaint with prejudice, without hearing any oral argument. Pet.App.39a. As relevant here, it held that the CCA did not violate the dormant Commerce Clause "because electric utilities and electricity generating facilities are not substantially similar entities." Pet.App.26a. Despite Petitioners' allegations that they compete against the Local Utilities in their capacity as power-plant owners, the district court concluded that the CCA's "allocation of no-cost allowances applie[d] primarily to grant electric utilities a benefit in the captive market." Pet.App.28a. Relying on its interpretation of *General Motors Corp. v. Tracy*, the district court gave dispositive weight "to the captive market and the … utilities' singular role in serving it." Pet.App.29a (quoting *Tracy*, 519 U.S. at 304).

The district court also acknowledged that in *Pork Producers*, this Court held that *Pike* claims could challenge even "genuinely nondiscriminatory" laws. Pet.App.19a-20a (quoting *Pork Producers*, 598 U.S. at 379 (plurality op.)). However, the district court dismissed Petitioners' *Pike* claim in a single sentence, cryptically asserting that "the Supreme Court recently rejected a similar argument, explaining that it 'overstate[s] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of [its] dormant Commerce Clause jurisprudence.'" Pet.App.25a (quoting *Pork Producers*, 598 U.S. at 377).

3. Petitioners appealed to the Ninth Circuit. On appeal, the State conceded that "generating facilities owned and operated by" Local Utilities "may … directly compete with" Petitioners in the power-generation market. Appellee's Answering Br. 30, *Invenergy Thermal LLC v. Watson*, 2024 WL 5205745 (9th Cir. Dec. 24, 2024) (No. 23-3857) [hereinafter State Br.]. But it argued that—notwithstanding this competition—utilities were "categorically dissimilar" from other market actors under *Tracy*, so Petitioners' dormant Commerce Clause claim failed as a matter of law. State Br. 30. And the State argued that *Pork Producers* limited *Pike* claims to "arter[ies] or instrumentation[s] of commerce, like trucking"—but not to interstate "power markets." State Br. 41, 43.

The Ninth Circuit affirmed the district court as to Petitioners' constitutional claims. Like the State, it acknowledged that utilities' wholly-owned power plants "compete with [Petitioners] in the noncaptive market of wholesale electricity generation." Pet.App.4a. But even so, the Ninth Circuit rejected Petitioners' claim that the CCA discriminated in purpose or effect, fearing that "[t]o modify this scheme 'could subject [utilities] to economic pressure that in turn could threaten the preservation of an adequate customer base to support continued provision of bundled [electricity] services [to] the captive market.'" Pet.App.5a (first two alterations in original) (quoting *Tracy*, 519 U.S. at 309). It therefore held that "*Tracy* … dictates the outcome here." Pet.App.5a. In reaching this result, the Ninth Circuit purported to distinguish a recent Fifth Circuit decision, *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022), which rejected *Tracy*'s application to a competitive energy market. In the Ninth Circuit's view, *NextEra* "did not involve the separate service provided by utilities in a captive market." Pet.App.5a.

The Ninth Circuit also held that Petitioners failed to allege a viable claim under *Pike*, because "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." Pet.App.5a (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)). Framing Petitioners' allegations as mere assertions that they would have to "alter their operations" in response to the CCA, the court of appeals ruled that Petitioners did not state any burden on interstate commerce. Pet.App.6a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a circuit split that threatens to exempt utilities from the dormant Commerce Clause entirely, further imposing an impermissible burden on free market competition critical to power generation in the United States. This Court is also in a position to resolve widespread confusion in lower courts on the standard for alleging a burden on interstate commerce. These issues threaten to sharply curtail viable dormant Commerce Clause claims that this Court's precedents expressly allow to proceed.

In the decision below, the Ninth Circuit wrongly concluded that *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), provides utilities with such protections, and in doing so, created a split with the Fifth and Sixth Circuits. This case presents an ideal opportunity for the Court to clarify that utilities are not exempt from Commerce Clause scrutiny when states engage in gross economic protectionism in competitive markets.

The Ninth Circuit's decision also highlights lower courts' confusion as to the ongoing viability of claims alleging excessive burden under *Pike v. Bruce Church, Inc.*,

397 U.S. 137 (1970), after *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023)—and to clarify what pleading standard applies to such claims. Since the *Pork Producers* decision, lower courts have been dismissing allegations that five Justices in *Pork Producers* confirmed would meet the standard for pleading a viable claim. Only this Court can provide much needed clarity to resolve this important, recurring question and the confusion over *Pike* in the lower courts.

I. The Decision Below Conflicts with This Court's Precedents, and Creates a Circuit Split on *Tracy*'s Scope.

Below, Petitioners asserted that the CCA discriminated against them based on their status as an out-of-state, independent power producer, as compared to Washington's politically powerful in-state utilities. The court of appeals' conclusion that *Tracy* controls the outcome here rests on a faulty interpretation of that decision—namely, that *Tracy* blesses state protectionism for public utilities in *any* market so long as the public utility also serves a captive, non-competitive market. This conclusion creates a clear split with the Fifth and Sixth Circuits by applying a reading of *Tracy* that would insulate electric utilities from *all* dormant Commerce Clause challenges.

A. The Decision Below Is Irreconcilable with *General Motors Corp. v. Tracy*.

Central to the Ninth Circuit's holding was its conclusion that Petitioners were not "similarly situated" to utilities under *General Motors Corp. v. Tracy*. But that conclusion badly misapplies *Tracy*.

1. *General Motors Corp. v. Tracy* dealt with an Ohio sales tax on natural gas, from which regulated public utilities were exempt. 519 U.S. at 282. The plaintiff there

argued that the utility-only tax exemption violated the dormant Commerce Clause. *Id.* at 285. The Court observed that there was no concern with providing utilities a special benefit in the "captive," monopolistic market for distribution of gas to end ratepayers, which was "neither susceptible to competition … nor likely to be served except by the regulated natural monopolies that have historically supplied its needs." *Id.* at 303. It acknowledged that the Ohio law might incidentally affect a separate, competitive market for industrial natural-gas purchasers—but noted that the record "reveals virtually nothing about the details of [the] competitive market." *Id.* at 302. Thus, deciding whether to "accord controlling significance to the noncaptive market … or to the noncompetitive captive market in which the local utilities alone operate," the Court concluded that the captive, monopolistic market of end-user ratepayers was the core market at issue. *Id.* at 303. As such, businesses that participated only in the competitive market were not similarly situated to utilities under the dormant Commerce Clause. *Id.* at 310.

Tracy therefore carves out only a narrow exception to the dormant Commerce Clause, preserving States' abilities to regulate the *captive* market in which utilities provide services to end ratepayers. It provides no protection, however, to state laws that seek to advantage utilities in separate, *competitive* markets outside of that final-stage distribution of energy to the ratepaying public. Indeed, utilities are not "immune from [ ] ordinary Commerce Clause jurisprudence." *Tracy*, 519 U.S. at 291 n.8. On the contrary, many of this Court's cases have invalidated laws under the dormant Commerce Clause that have involved utilities or the energy markets. *See Wyoming v. Oklahoma*, 502 U.S. 437, 457-59 (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 v. West Virginia*, 262 U.S. 553, 596-600 (1923) (holding unconstitutional a West Virginia law that required pipeline companies to serve in-state customers first).

2. *Tracy*'s holding is narrow for good reason. That case only addressed the utility distribution market, where utilities play a unique, monopolistic role and "longstanding" precedent "uph[eld] the States' power to regulate all direct in-state sales to consumers." *Tracy*, 519 U.S. at 306. Although there was a mere "possibility of competition" in a separate market, that possibility was undeveloped in the record and outside the law's "core market." *Id.* at 302.

Here, by contrast, Washington's CCA is not primarily concerned with the monopolistic market for power distribution to end ratepayers. Instead, it takes aim at the power generation market, regulating the emissions from power generation by requiring generators to purchase allowances. It is in this highly competitive market for power generation that Petitioners' power plant competes directly with utilities' wholly-owned power plants. There is no serious dispute over this fact: Petitioners alleged competition, Pet.App.49a, 71a-76a, the State conceded it below, State Br. 30, and the Ninth Circuit agreed that utilities' wholly-owned power plants "compete with [Petitioners] in the noncaptive market of wholesale electricity generation," Pet.App.4a. Under ordinary dormant Commerce Clause principles, that direct competition means

that Petitioners' and the utilities' plants are similarly situated. *See, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984).

Tracy itself compels exactly this conclusion. The "core market" the CCA affects is the competitive market for power generation, not the monopolistic market for distribution. Here, too, there is no real dispute: It is in the generation market that the CCA's compliance burden accrues, and the benefits of no-cost allowances are felt. Utilities themselves do not produce substantial greenhouse-gas emissions in their capacity as utilities—the *power plants* they own produce covered emissions. Pet.App.43a-44a, 80a-81a. Petitioners, who own a power plant but are not affiliated with a utility, get no such allowances to cover their plant's emissions. Pet.App.44a-45a. Even the Ninth Circuit acknowledged as much, explaining that no-cost allowances do nothing more than "cover the compliance obligations of … power plants" owned by utilities. Pet.App.4a.

In sum, Washington might dole out no-cost allowances to utilities directly, but those no-cost allowances are meaningless until passed on to—and cashed in by—a power plant. The Ninth Circuit apparently concluded that, merely because a utility was involved in the process, *Tracy* operated as a get-out-of-court free card for Washington. But *Tracy* cannot sustain the weight of the sweeping exception the Ninth Circuit would place upon it.

B. The Decision Below Creates a Circuit Split with the Fifth and Sixth Circuits.

The Ninth Circuit's expansive reading of *Tracy* creates a circuit split with the Fifth and Sixth Circuits, which have expressly emphasized that *Tracy*'s holding is limited to noncompetitive markets.

1. In *NextEra Energy Capital Holdings, Inc. v. Lake*, the Fifth Circuit considered whether a Texas law prohibiting anyone other than electrical utilities from building electricity transmission lines violated the dormant Commerce Clause. 48 F.4th 306, 310 (5th Cir. 2022). Despite the fact that the regulation was related to the provision of power through the electrical grid and plainly related to the distribution of power to ratepayers, the court concluded that *Tracy* did not immunize Texas's law from dormant Commerce Clause scrutiny. *Id.* at 320.

First, the Fifth Circuit recognized that *Tracy* did not "immun[ize]" utilities from "ordinary Commerce Clause jurisprudence." *Id.* at 318 (quoting *Tracy*, 519 U.S. at 291 n.8). To be sure, *Tracy* "cuts into th[at] general principle," but only when the regulation targets parallel markets, one competitive and one noncompetitive, and the noncompetitive market is the utilities' "core market." *Id.* at 318-19 (citation omitted).

That limited carve-out did not apply to the Texas law because "[t]he statute limiting who can build transmission lines governs only a competitive market." *Id.* at 319. Therefore, "unlike the *Tracy* tax exemption, [Texas's law] has no application in a 'noncompetitive, captive market in which the local utilities alone operate.'" *Id.* (quoting *Tracy*, 519 U.S. at 303-04). Put another way, in the context of the competitive market for constructing power lines, vertically integrated utilities and transmission-only companies were similarly situated, even if the utilities served a captive market in other respects. *Id.* at 320.

Nor did *Tracy* "provide[] Commerce Clause immunity to any law that grants a preference to a company that has at least one foot in a captive market." *Id.* If "one foot" 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.* (citing *Tracy*, 519 U.S. at 301-02). *Tracy* does not permit economic protectionism for utilities in competitive markets to benefit the utility in the captive market it serves. *Id.* Otherwise, "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)." *Id.*

Texas filed a petition for a writ of certiorari with this Court, and this Court called for the view of the United States. The United States supported the Fifth Circuit's decision, emphatically rejecting Texas's overbroad application of *Tracy*. *See* Br. for the U.S., *Lake v. NextEra Energy Cap. Holdings, Inc.*, 144 S. Ct. 485 (2023) (22-601). There, the United States observed that Texas argued that it had "*carte blanche* to protect in-state utility monopolies from out-of-state competitors under this Court's decision in *General Motors Corp. v. Tracy*," but "[t]hat argument … is incorrect." *Id.* at 8.

2. The Ninth Circuit attempted to distinguish *NextEra Energy* in a single sentence by asserting that case "did not involve the separate service provided by utilities in a captive market." Pet.App.5a. But that flies in the face of *NextEra*'s facts, where Texas justified the challenged law because it viewed transmission of power as a "natural monopoly," where the "traditional business structure in the electricity sector is the vertically-integrated utility." Br. for Appellees 4, *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022) (No. 20-50160), 2020 WL 2119791. *NextEra* thus rejected the argument that the state's supposed interest in maintaining the *captive* market allowed it to interfere in the *competitive* market for building transmission lines. The Fifth Circuit concluded that allowing "a state law's propping up a utility in

a noncaptive market to enhance its viability in a captive market" would offend the dormant Commerce Clause. 48 F.4th at 320.

Here, just like the market for constructing transmission lines, the market for power generation is indisputably competitive: the State conceded in the Ninth Circuit that "generating facilities owned and operated by" Washington's utilities "may … directly compete with" Invenergy and Grays Harbor in the power-generation market, State Br. 30, and the Ninth Circuit opinion admits as much, Pet.App.4a. Like Texas in *NextEra*, Washington here attempted to give utilities a benefit in the transmission market by using the captive retail market as justification. *See NextEra Energy*, 48 F.4th at 320. But the Fifth Circuit correctly rejected that protectionist fig leaf, and the Ninth Circuit should have done the same.

3. Shortly after the Ninth Circuit issued the opinion in this case, the Sixth Circuit decided *Energy Michigan, Inc. v. Michigan Public Service Commission*, where it considered whether a Michigan law violated the dormant Commerce Clause by requiring that any entity providing electricity to an end user must "procure some amount of its total capacity from within the confines of Michigan's lower peninsula." 126 F.4th 476, 484 (6th Cir. 2025). The court of appeals reversed the district court's ruling upholding the law, finding that the law violated the dormant Commerce Clause.

Like the Fifth Circuit, the Sixth rejected arguments that *Tracy* immunized Michigan's local capacity requirement from dormant Commerce Clause scrutiny. *Id.* at 479-80. The Sixth Circuit recognized that *Tracy* did not insulate all utility-related laws from constitutional challenge by creating an exception to the dormant Commerce Clause. *Id.* at 493. Rather, it "simply preserved [a

State's] ability to retain its natural monopoly to ensure residential customers continued to obtain needed services," but "it does not bless a state's efforts to aid an artificial monopoly." *Id.* at 495-96.

Most importantly, the Sixth Circuit emphasized that *Tracy* does not authorize protectionist regulations that target competitive markets, even competitive markets in which utilities operate. The Sixth Circuit acknowledged that *Energy Michigan* bore a superficial resemblance to *Tracy* in that "both cases involve hybrid energy markets," one competitive and one not. *Id.* at 493. Yet the mere fact of parallel retail distribution markets did not mean that *Tracy* applied. *See id.* at 494. Instead, after *Tracy*, the Sixth Circuit emphasized that a court must evaluate whether "the '*objects* of the disparate treatment' [are] similarly situated before a law may be deemed to have run afoul of the dormant Commerce Clause." *Id.* (emphasis added) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting)).

Identifying the object of discrimination "makes all the difference." *Id.* Unlike the tax in *Tracy*, Michigan's law did not discriminate between utilities and private providers with respect to distribution. Instead, it discriminated in the competitive market for electrical capacity by disadvantaging other actors in that market. *Id.* So, too, here: Washington's law similarly discriminates against power plants in a competitive market. The mere fact that a utility is involved, or that there may be tangential effects on the captive market, cannot save the law. But by focusing *only* on the downstream effects on the captive market, the Ninth Circuit created an irreconcilable split that this Court should resolve.

II. The Decision Below Conflicts with the Standard for Pleading a Burden on Interstate Commerce Embraced by a Majority of Justices, and Deepens the Confusion in Lower Courts.

In addition to Petitioners' allegations that the CCA discriminated against them, Petitioners separately alleged that the CCA imposes an excessive burden on interstate commerce under *Pike*, 397 U.S. 137. *Pike* and its progeny allow claims brought against even non-discriminatory state laws when "the burden imposed on [interstate] commerce" by the law is "clearly excessive in relation to the putative local benefits." *Id.* at 142.

Recently, in *Pork Producers*, 598 U.S. 356, this Court confirmed that *Pike* "serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose" and "left the courtroom door open to challenges premised on even nondiscriminatory burdens." 598 U.S. at 377, 379 (plurality op.) (citation omitted). Lower courts are deeply confused, however, as to the state of the *Pike* balancing test in the wake of the *Pork Producers* decision, and the standard for alleging a burden on interstate commerce. Some have held that *Pork Producers* foreclosed such claims entirely; others, including the Ninth Circuit here, have suggested nominally that such claims may proceed, but ignored a majority of Justices' guidance on the requirements for pleading a burden on commerce.

Certiorari is separately warranted to provide guidance on these critical issues.

1. In *Pork Producers*, a majority of the Court observed that the petitioners in that case "overstate[d] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of [the Court's] dormant Commerce Clause jurisprudence." *Id.* at 377.

Because petitioners' claim of a nondiscriminatory burden on interstate commerce fell "well outside *Pike*'s heartland," the Court noted it was "not an auspicious start." *Id.* at 379. But the Court acknowledged that "this Court has left the courtroom door open to challenges premised on 'even nondiscriminatory burdens," and some of its cases "have invalidated state laws … that appear to have been genuinely nondiscriminatory." *Id.* (alteration in original) (citations omitted).

Writing for a three-Justice plurality, Justice Gorsuch went on to cast doubt on the validity of *Pike*'s balancing test generally. *Id.* at 380. Nevertheless, across four separate writings, "six Justices of th[e] Court affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *Id.* at 403 (Kavanaugh J., concurring in part and dissenting in part).

Despite the endorsement of six Justices, lower courts are mired in confusion regarding how, if at all, *Pork Producers* affected the validity of *Pike* balancing. This case is a prime example: in its one-sentence holding on the issue, the district court appears to have assumed that *Pork Producers* overruled *Pike* balancing entirely. Pet.App.25a. On appeal, the State acknowledged that was incorrect, but argued that *Pork Producers* limited *Pike* only to "arter[ies] or instrumentation[s] of commerce, like trucking," but not the interstate power grid. State Br. 41, 43. And the Ninth Circuit merely "assum[ed] that a nondiscriminatory *Pike* claim remains viable," citing *Pork Producers*. Pet.App.5a.

Other courts are similarly confused about how, if at all, *Pork Producers* affected the existing *Pike* balancing test. Some courts, like the district court below, have misinter-

preted *Pork Producers* as foreclosing *Pike* balancing entirely. *See Triumph Foods, LLC v. Campbell*, 715 F. Supp. 3d 143, 151 (D. Mass. 2024) (viewing *Pike* balancing as "foreclosed by the recent Supreme Court decision in [*Pork Producers*]" and citing the plurality opinion as binding); *Cal. Trucking Ass'n v. Bonta*, 723 F. Supp. 3d 920, 928 (S.D. Cal. 2024) (stating that *Pork Producers* counsels that courts "are not institutionally well-suited to draw reliable conclusions for applying the *Pike* test"). Other courts believe that *Pike* remains viable, but that *Pork Producers* "recently imposed important constraints on the *Pike* inquiry." *Truesdell v. Friedlander*, 80 F.4th 762, 774 (6th Cir. 2023). Still others recognize that across the Court's various opinions, "six of the justices in that case ultimately decided to 'retain the longstanding *Pike* balancing test.'" *PSMT, LLC v. Government of the Virgin Islands* (*In re Excise Tax Litig.*), 2024 WL 195992, at *4 n.13 (D.V.I. Jan. 18, 2024) (quoting *Pork Producers*, 598 U.S. at 403 (Kavanaugh, J., concurring)).

And some courts have simply thrown up their hands completely, opining that "the United States Supreme Court's recent case addressing the dormant commerce clause—which is comprised of five separate opinions—only adds to the murky state of the law." *Direct Energy Servs., LLC v. Pub. Utils. Regul. Auth.*, 296 A.3d 795, 812 n.10 (Conn. 2023); *see also GenBioPro, Inc. v. Sorsaia*, 2023 WL 5490179, at *12 n.17 (S.D. W. Va. Aug. 24, 2023) (noting "potentially conflicting concurrences in *National Pork*"); *Govatos v. Murphy*, 2024 WL 4224629, at *17 n.20 (D.N.J. Sept. 18, 2024) ("As *National Pork Producers Council* illustrates, there is less agreement about the continued viability of *Pike* balancing.").

2. Even the Justices who agreed in *Pork Producers* that *Pike* remained a viable path for relief disagreed on

what suffices to allege a burden on interstate commerce. A plurality of the *Pork Producers* Court read this Court's decision in *Exxon Corp. v. Governor of Maryland* to foreclose petitioner's allegations of a burden on interstate commerce. But in *Pork Producers*, five Justices rejected that overbroad interpretation of *Exxon*. Despite that, the court of appeals below and other circuits have been disregarding a majority of Justices' cautions against applying *Exxon* to view the burden of challenged laws too narrowly.

In *Pork Producers*, Justice Gorsuch wrote for a four-Justice plurality that the petitioners had not adequately alleged a burden on interstate commerce. 598 U.S. at 383 (plurality op.). The plurality relied on *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which held that a mere increase in cost or a change in market structure did not impose a burden on interstate commerce. *Exxon Corp.*, 437 U.S. at 127-28. According to the *Pork Producers* plurality, allegations that a law might "shift market share from one set of out-of-state firms … to another" or "promise[] some costs" for market actors did not allege a burden on interstate commerce, because "the dormant Commerce Clause does not protect a 'particular structure or method[] of operation.'" 598 U.S. at 384-86 (quoting *Exxon*, 437 U.S. at 127).

Five Justices declined to join Justice Gorsuch's plurality opinion. Together, Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson concluded that petitioners "plausibly alleged a substantial burden against interstate commerce" and expressly rejected the plurality's reliance on *Exxon*. *Id.* at 395, 401 (Roberts, C.J., concurring in part and dissenting in part). As those Justices wrote, the *Pork Producers* complaint alleged "broader, market-wide *consequences* of compliance—economic harms that our

precedents have recognized can amount to a burden on interstate commerce." 598 U.S. at 397 (Roberts, C.J., concurring in part and dissenting in part). In sum, these four Justices concluded that the Court's precedents did not support "reduc[ing] the myriad harms detailed by petitioners in their complaint to so-called 'compliance costs' and wr[iting] them off as independently insufficient to state a claim under *Pike*." *Id.* at 402.

Justice Barrett, although skeptical of *Pike* balancing, would have allowed the claim to proceed. *Id.* at 394 (Barrett, J., concurring in part). Thus, as Chief Justice Roberts observed, "a majority of the Court agrees that—were it possible to balance benefits and burdens in this context—petitioners have plausibly stated a substantial burden against interstate commerce." *Id.* at 402 (Roberts, C.J., concurring in part and dissenting in part).

3. Here, the court of appeals rejected Petitioners' *Pike* claim by relying on the same reading of *Exxon* that five Justices rejected in *Pork Producers*. But Petitioners alleged substantially more than a mere shift in business from one firm to another, and highlighted the "broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce." *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part). In particular, Petitioners alleged that the CCA distorted the interstate market for power in a way that would raise rates and discourage interstate investments, effectively insulating the incumbent utilities from meaningful competition. *Supra*, pp. 9-10. "[T]hese allegations amount to economic harms against the interstate market—not just particular interstate firms,—such that they constitute a substantial burden under *Pike*." *Pork Producers*, 589 U.S. at 401

(Roberts, C.J., concurring in part and dissenting in part) (citation omitted).

In the wake of *Pork Producers*, even courts that acknowledge the validity of *Pike* balancing have applied an overly expansive reading of *Exxon* to bar claims that a majority of Justices in *Pork Producers* would have allowed to proceed. In *Just Puppies, Inc. v. Brown*, for example, the Fourth Circuit acknowledged that a state law could have consequences both for the plaintiff and for the broader market, but applied *Exxon* in affirming dismissal. 123 F.4th 652, 666-68 (4th Cir. 2024). Similarly, the District of New Jersey found that although a state law imposed burdens on interstate commerce, *Exxon* foreclosed the plaintiff's arguments of impermissible burden under *Pike*. *N.J. Staffing All. v. Fais*, 749 F. Supp. 3d 511, 527 (D.N.J. 2023) (denying the application for emergency injunctive relief).

The Court should grant certiorari to reject the court of appeals' overbroad reading of *Exxon* and clarify that *Pike* claims remain viable after *Pork Producers*, to ensure clear guidance about the factual showings that pass muster at the pleading stage, and to confirm that Petitioners here have adequately alleged a burden on interstate commerce that allows their claim to proceed.

III. The Questions Presented Are Important and Warrant Review in This Case.

1. Whether the dormant Commerce Clause permits States to establish protectionist schemes like the CCA is a question of exceptional importance. As this Court has recognized, "the production and transmission 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 regulation by the States can patently interfere with broader national interests."

Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983). The Ninth Circuit's application of *Tracy* paves the way for States to balkanize their energy markets and advantage in-state utilities at the expense of the free market and the national power grid—exactly what the dormant Commerce Clause is meant to prevent.

Taken to its logical end, the Ninth Circuit's view of *Tracy* authorizes economic protectionism for utilities in *any* market. To echo the Sixth Circuit, "if *Tracy* were read as also honoring [Washington]'s approach, states could simply create captive markets, insulate market participants from all interstate competition, and immunize them from any Commerce Clause scrutiny." *Energy Mich.*, 126 F.4th at 498 (citing *NextEra Energy*, 48 F.4th at 320). If Washington can effectively grant utility-owned power plants an exclusive economic benefit in the competitive market of power generation, little stands in the way of a state granting a similar economic benefit in other markets—whether energy related or not.

Consider first the market for energy-related consumer goods. Utilities serving a captive retail market may also participate in competitive markets for other related consumer goods such as light bulbs, thermostats, or gas furnaces. *Tracy*, 519 U.S. at 314 (Stevens, J., dissenting) (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976)). *Tracy*'s narrow exception does not extend to state protections in these other competitive markets, but the Ninth Circuit's approach would bless utility-based favoritism in these markets simply because utilities *also* serve "a separate, captive retail market by distributing power to consumers." Pet.App.4a.

But why stop at energy-related goods? Under the Ninth Circuit's reasoning, so long as the economic benefit

"is tailored to the amount of electricity that a utility supplies to consumers in the captive retail market," Pet.App.4a-5a, that economic benefit evades Commerce Clause scrutiny. As the Fifth Circuit observed in rejecting this absurd result, "[i]f 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)." *NextEra Energy*, 48 F.4th at 320. This Court should curtail this unbounded authority.

2. The proper application of *Pike*'s balancing test is equally deserving of the Court's attention, as the grant of certiorari in *Pork Producers* shows. As explained above, that issue has taken on even greater significance in the wake of *Pork Producers*. Courts have become unwilling to apply a broad analysis of the consequences of the challenged law on the interstate market, and all too happy to reject a challenge as merely involving the costs of compliance. *See supra*, pp. 22-23, 26. The court of appeals here did exactly that when it ignored Petitioners' well-pleaded allegations and applied *Exxon* too broadly in foreclosing Petitioner's claims. "[T]he unusual importance of the underlying [constitutional] issue[s]" merit this Court's attention. *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007).

3. This case presents an excellent vehicle for the Court to address the questions presented.

This case was decided at the pleading stage, and on a straightforward record, where all of Petitioners' well-pleaded factual allegations must be presumed true. As a result, there are no factual disputes that would complicate consideration of the questions presented.

Moreover, the procedural posture presents an excellent vehicle to address the questions presented regarding the pleading standards for dormant Commerce Clause claims. Not only did the district court and court of appeals dismiss on the pleadings, but they denied leave to amend despite Petitioners' requests to do so and proffer of specific factual allegations they could have added to the Complaint if necessary. *See* Appellants' Opening Br. 41, *Invenergy Thermal LLC v. Watson*, 2024 WL 5205745 (9th Cir. Dec. 24, 2024) (No. 23-3857) (ability to allege facts showing the CCA increases the cost of energy for both in-state and out-of-state consumers); *id.* at 57 (ability to allege further facts showing that Grays Harbor is similarly situated to those power plants owned by utilities). In holding that there was "no set of facts [that] can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim," Pet.App.7a (citation omitted), the court of appeals below staked out an astonishingly broad position as a matter of law. This is the perfect vehicle for this Court to address what allegations are necessary to plead a dormant Commerce Clause claim.

Nor are there any legal barriers to reaching and resolving the important questions presented: they were the subject of extensive briefing and are preserved in the record. They were decided cleanly by the court of appeals below. And each is dispositive of one of Petitioners' claims, so any ruling in Petitioners' favor will have an immediate and meaningful effect, and require remand of the case for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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