No. 24-1027

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

BRIEF IN OPPOSITION

NICHOLAS W. BROWN
Attorney General

NOAH G. PURCELL
Solicitor General

PETER B. GONICK
Deputy Solicitor General
Counsel of Record

KELLY T. WOOD
Senior Counsel

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
Peter.Gonick@atg.wa.gov

QUESTIONS PRESENTED

This Court has long held that States can regulate separate markets differently without violating the dormant Commerce Clause, and has specifically held that States can regulate gas utilities differently than wholesale gas sellers when they compete in different markets. The Washington law at issue here treats electric utilities and wholesale electricity producers identically when they compete in the same market—wholesale electricity generation, but provides certain benefits only to utilities in the market where only utilities operate—providing electricity to captive ratepayers.

The questions presented are:

1. Whether the court of appeals correctly determined that independent power generators are not similarly situated to electric utilities for purposes of dormant Commerce Clause analysis where: (1) an alleged benefit to electric utilities applies only to those utilities' service of the captive consumer market in which independent power generators do not participate; and (2) in the only market where utilities are in direct competition with independent power generators, they are treated exactly the same.

2. Whether, in the absence of any discriminatory purpose or intent, the Court of Appeals correctly held that alleging only incidental effects of state regulation on the interstate wholesale energy market is insufficient to state a burden on interstate commerce pursuant to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

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INTRODUCTION

For decades, this Court has held that there is no dormant Commerce Clause violation where States apply different rules to companies serving different markets. Most relevant here, in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), the Court held that States are allowed to regulate utilities that sell gas to consumers differently than they regulate companies that sell gas wholesale. The lower courts correctly held that this principle resolves this case, and there is no basis for this Court to grant certiorari.

The Washington law at issue here falls well within what *Tracy* allows. Washington requires companies that emit significant amounts of greenhouse gasses—such as electricity producers—to purchase carbon allowances based on their emission levels. Because electric utilities in Washington are already highly regulated and must comply with a variety of other pollution reduction statutes (including utility-specific requirements for greenhouse gas reductions), Washington gives utilities free carbon allowances *to the extent they produce electricity for sale to their ratepayers*. But utilities must purchase allowances to the extent that they generate electricity to sell wholesale.

Petitioners are owners of an independent natural gas power plant in Washington that is not regulated as a utility and only sells power wholesale. They claim that Washington's law, although facially neutral, discriminates against out-of-state entities in practice by not granting free allowances to all power plants. Both the district court and the court of appeals (in an unpublished decision) rejected Petitioners' arguments. This petition followed.

The petition does not warrant this Court's review. First, Petitioners seek review on a question not presented by this case. Petitioners' primary argument is that the court of appeals' decision endorses some sort of bright-line immunity from Commerce Clause scrutiny for all laws affecting utilities, including those with impacts to "competitive markets." But the decision below did nothing of the sort because the law at issue does not differentiate between actors in any competitive market. Washington provides no-cost allowances to utilities solely for electricity sold to consumers in the *non*-competitive captive market. When utilities sell excess power on the competitive wholesale market, they must purchase carbon allowances to the same extent as Petitioners. The court of appeals' decision, therefore, is limited to a narrow and faithful application of *Tracy*: that utilities and wholesale distributors provide different products in different markets and are, thus, not similarly situated for dormant Commerce Clause purposes.

Second, there is no circuit split. Petitioners claim that the decision below conflicts with the Fifth and Sixth Circuits' emphasis that *Tracy* is limited to cases involving non-competitive markets. But even if *Tracy* is limited in this way, so is the court of appeals' decision below. Petitioners do not contest that when they compete with utilities on the wholesale market, utilities must purchase allowances. As a result, the court of appeals' decision only concerns benefits provided to participants in the non-competitive captive market for power. It would provide no protection to state laws granting disparate benefits to similarly situated actors in competitive markets. Moreover, and unlike the decision below, both cases cited by Petitioners for a circuit split involve laws that differentiated between similarly situated actors competing in the same market. All three cases are in accord with *Tracy*, and Petitioners' claim of a split is simply smoke and mirrors.

Third, the court of appeals properly dismissed Petitioners' *Pike* balancing claim. Petitioners make only threadbare assertions that Washington's law disrupts the energy market, focusing on the alleged impacts of the market for carbon allowances. Petitioners then claim that, under *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023), that is all they need to defeat a motion to dismiss, force discovery, and potentially hold a trial on *Pike*'s balancing factors. But Petitioners do not challenge Washington's creation of a market for carbon allowances. They only challenge the provision of no-cost allowances to utilities, and their sole allegation of harm to interstate commerce in that regard is that it will discourage investment in fossil fuel power plants *in Washington*. Not even the most distorted reading of *National Pork* supports the proposition that state regulation of wholly in-state conduct and merely affecting the cost of doing business in that state pleads a substantial burden on interstate commerce.

Finally, this case is an imperfect vehicle for this Court to take up these issues. The decision below is unpublished and has no precedential value. Only one other state has a similar statutory scheme. Moreover, to the extent the Court seeks to clarify the status of *Pike* claims post *National Pork*, this case is not the case to do so. The court of appeals assumed that *Pike* claims remain viable after *National Pork*, but dismissed on grounds that this Court agreed in *National Pork* do not constitute a substantial burden on interstate commerce: alleged cross-border effects from the regulation of wholly in-state conduct, with no impact to companies operating outside of Washington. The Court should deny certiorari.

STATEMENT OF THE CASE

A. Statutory Background

In response to unprecedented wildfires, flooding, droughts, heat waves, and ocean acidification threatening Washington's aquaculture industry, the Washington Legislature in 2021 adopted the Climate Commitment Act to substantially reduce Washington's contribution to climate change. *See* Wash. Rev. Code § 70A.65.005. Just last year, Washington voters overwhelmingly rejected an initiative that would have repealed the Climate Commitment Act.[1]

The Climate Commitment Act operates to reduce greenhouse gas pollution via a declining cap on aggregate emissions from regulated entities that are responsible for that pollution. Wash. Rev. Code §§ 70A.65.010(23), .010(58), .060-.080. The emissions

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[1] Wash. Sec'y of State, Elections & Voting, *November 5, 2024 General Election Results: Initiative Measure No. 2117*, https://results.vote.wa.gov/results/20241105/initiative-measure-no-2117.html (last visited June 23, 2025).

cap is effectuated by requiring these entities to obtain emissions allowances for each metric ton of greenhouse gas emitted, then reducing the number of allowances made available through auction each year. Wash. Rev. Code §§ 70A.65.010(18), .060, .100, .200(1).

The Legislature in the Climate Commitment Act chose to grant "no-cost" allowances to electric utilities. The Legislature's reason for doing so is clear: a separate statute adopted several years before the Climate Commitment Act (the Washington Clean Energy Transformation Act) already requires Washington utilities to rid their portfolios of fossil fuel power by 2045. Wash. Rev. Code § 19.405.010(2). Because Washington consumers are already paying for the cost of decarbonizing Washington's retail energy sector, the Climate Commitment Act provides that all electric utilities subject to the Clean Energy Transformation Act are eligible for no-cost allowances "in order to mitigate the cost burden of the [Climate Commitment Act] on electricity customers." Wash. Rev. Code § 70A.65.120(1). The amount of allowances utilities receive is based on the amount of power the utility is forecasted to supply to Washington consumers. Wash. Rev. Code § 70A.65.120(2). Utilities do not receive allowances for power they do not provide directly to their retail consumers—i.e., power sold on the wholesale market—and must purchase allowances to cover greenhouse gas emissions associated with those wholesale sales. *Id.*

B. Washington's Electricity Market

As Petitioners acknowledge, "[e]lectric utilities and electricity generating facilities occupy distinct positions in electricity markets." Pet. App. 43a. Electric utilities exist to provide retail power to consumers. In Washington, they come in two forms: consumer-owned and investor-owned. Consumer-owned utilities are non-profit government entities either organized as a Public Utility District, operated directly by a city, or established by a cooperative association. As public entities, consumer-owned utilities are directly accountable to the consumers within their boundaries because they are governed either by elected officials or directly by the ratepayers themselves.

Investor-owned utilities are private corporations, and in Washington there are three: Avista Corporation, PacifiCorp (operating as Pacific Power), and Puget Sound Energy. CA9.SER.35. Investor-owned utilities are governed pursuant to their corporate structures, but they are subject to significant regulation and oversight by the Washington Utilities and Transportation Commission (UTC) pursuant to Chapter 80.28 Wash. Rev. Code. Most significantly, investor-owned utilities are profit-limited by law. They earn a fixed return on infrastructure investments as set by the UTC. But, with regard to retail power, investor-owned utilities, in effect, can only recover their costs. *See* Wash. Rev. Code § 80.28.425(6). This is because Washington's UTC, not the utilities, sets rates that investor-owned utilities can charge for retail power, and any return more than 0.5% above that set rate must be refunded to customers. *Id.* In all cases, Washington law provides that investor-owned utilities must provide power that is "safe, adequate and efficient, and in all respects just and reasonable." Wash. Rev. Code § 80.28.010(2).

Petitioners own the Grays Harbor Energy Center, an independent natural gas power plant that is currently the fourth largest stationary source of greenhouse gas pollution in Washington (behind only a coal-fired power plant slated to close this year and two petroleum refineries). CA9.SER.37. Petitioners' facility does not sell retail power directly to Washington consumers and, thus, is not regulated by the UTC. Instead, Petitioners' facility sells power on the wholesale market to customers all over the country, including utilities. The interstate wholesale market is governed by the Federal Power Act and administered by the Federal Energy Regulatory Commission (FERC). Pursuant to that system, Petitioners in 2007 petitioned for—and received—authorization from FERC to negotiate market-based (instead of cost-based) rates for wholesale electric sales. 72 Fed. Reg. 35,045-01 (June 26, 2007). Petitioners are, therefore, free to set any rates established by agreement with a purchaser. *See id.* Petitioners are not profit-limited in that regard and not beholden or accountable to retail ratepayers or the UTC. When Petitioners believe they can make a profit off of running their facility, it runs; if not, it sits idle. CA9.ER.42, ¶¶ 40-41.

C. Procedural History

Petitioners challenged the Climate Commitment Act in the U.S. District Court for the Western District of Washington. Petitioners' complaint focused narrowly on a single aspect of the Act: the grant of no-cost allowances to electric utilities to offset the cost burden of those utilities' compliance with the Clean Energy Transformation Act. With regard to those allowances, Petitioners alleged violations of the dormant Commerce Clause and the Equal Protection Clause of the United States Constitution.[2] For their Commerce Clause claim, Petitioners' complaint disavowed any facial discrimination, claiming only that the Act's distribution of no-cost allowances discriminated "in effect." Pet. App. 85a. Petitioners also claimed that no-cost allowances constituted an excessive burden on commerce pursuant to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. App. 25a, 87a-89a.

With regard to *Pike*, Petitioners' assertions of burden on interstate commerce were similarly narrow. Despite asserting—without basis—that the Climate Commitment Act "wreaked havoc" on the competitive market for power generation in Washington, Pet. 6, Petitioners' complaint contained only a single allegation of impacts to interstate commerce from no-cost allowances. Specifically, Petitioners claimed that, by not granting no-cost allowances to independent power generation facilities,

[2] Petitioners have now abandoned their equal protection claim.

the Climate Commitment Act discourages Petitioners and other companies from investing in fossil fuel power in Washington. Pet. App. 78a.

While Petitioners also claimed that the Climate Commitment Act made fossil-fuel power produced in Washington generally more expensive, Petitioners failed to tie that alleged increase specifically to the challenged no-cost allowances rather than as a consequence of the Act as a whole. *See* Pet. App. 76a-77a. Also, Petitioners' complaint failed to state what all parties now acknowledge and both courts below held: in the only market in which Petitioners are in direct competition with Washington utilities, the wholesale power market, utilities are regulated in precisely the same manner as Petitioners; i.e., they do not receive no-cost allowances and must fully account for the emissions associated with that power generation under the Climate Commitment Act. *See* Wash. Rev. Code § 70A.65.120(2); Wash. Admin. Code § 173-446-230(2). And, as noted, Petitioners' complaint acknowledged that "[e]lectric utilities and electric generating facilities occupy distinct positions in electricity markets." Pet. App. 43a.

Washington moved to dismiss Petitioners' complaint pursuant to Federal Rule of Civil Procedure 12(c). The district court granted dismissal with prejudice as to all claims. The district court dismissed Petitioners' claim of Commerce Clause discrimination because, as in *Tracy*, it found that utilities and independent power generators are not similarly situated in that they each offer different products in different markets: utilities provide bundled electricity to the captive, non-competitive consumer market, while Petitioners sell unbundled bulk electricity on the competitive wholesale market. Pet. App. 26a-27a. The district court also rejected Petitioners' argument that no-cost allowances benefited utilities on the wholesale market because, just like Petitioners, utilities do not receive no-cost allowances for wholesale sales. Pet. App. 28a. The district court also rejected Petitioners' *Pike* claims, relying on this Court's recent decision in *National Pork*. Pet. App. 25a.

The court of appeals affirmed dismissal. Citing *Tracy*, the court of appeals first acknowledged the basic requirement that discrimination under the Commerce Clause presupposes similarly situated parties. Pet. App. 4a. The court of appeals then found that "Washington utilities are not similarly situated to [Petitioners] because they primarily serve a separate, captive retail market by distributing power to consumers" as opposed to the competitive wholesale market occupied by Petitioners. Pet. App. 4a.

The court of appeals also rejected Petitioners' assertion that no-cost allowances advantaged utilities when selling their excess power on the wholesale market because there is no such benefit: "the amount of no-cost allowances provided [to utilities] is tailored to the amount of electricity that a utility supplies to consumers in the captive retail market . . . [t]hus, any power generated by a utility-owned plant that exceeds this amount—power that can be sold on the wholesale market in which [Petitioners] operate—does not increase the number of no-cost allowances awarded to that utility." Pet. App. 4a-5a. This also nullified Petitioners' reliance on *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022), because the benefit at issue there, a complete blockade on non-incumbent businesses from participating in the market for constructing transmission lines, operated where incumbent and non-incumbent businesses were in direct competition in the very same market. Pet. App. 5a.

As for *Pike*, the court of appeals presumed the ongoing viability of *Pike* claims post *National Pork*. Pet. App. 5a. But the court of appeals agreed that Petitioners failed to state a plausible *Pike* claim. Pet. App. 5a. The court of appeals began by recognizing what a majority of this Court in *National Pork* agreed on: interstate commerce is not subjected to an impermissible burden merely due to a state's regulation of wholly in-state activities in a way that causes entities wishing to transact business within that state to shift their practices or alter their operations. Pet. App. 5a-6a (citing *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 395 (1983); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)). Implicit in this holding is a rejection of Petitioners' assertion that a disincentive to invest in fossil fuel power in Washington, caused by the State's regulation of that activity in a way that makes it more expensive than in other jurisdictions to do so, sufficiently alleges an excessive burden on commerce. *See* Pet. App. 5a-6a.

REASONS FOR DENYING THE PETITION

A. Petitioners Seek Review on a Question Not Presented by This Case

Petitioners' primary argument for this Court to accept review is an assertion that the decision below misread *Tracy* to provide laws affecting utilities with blanket immunity from Commerce Clause scrutiny, even where utilities participate in competitive markets. The decision below does no such thing.

In *Tracy*, this Court upheld an Ohio tax break granted to natural gas utilities but denied to independent natural gas suppliers selling bulk gas on the wholesale market. *Tracy*, 519 U.S. at 281-82. Unlike the case at issue here, the utilities in *Tracy* received the tax benefit both when operating in the captive retail market *and* the competitive wholesale market. Because the tax break applied both when utilities were serving their retail customers and when they were competing with independent suppliers on the wholesale market, the Court first determined which market was the utilities' "primary" market for purposes of establishing whether the two groups were similarly situated. *Id*. at 303-304.

This Court found that, while the utilities served both markets, the tax break at issue was aimed at the utilities' service of Ohio consumers and that this captive market was the utilities' "primary" market. *Id*. Thus, the utilities were not similarly situated to independent suppliers because the markets and products each served in their primary market were dissimilar: bundled services, including provision of gas, in the captive market for the utilities versus unbundled gas in the competitive market for the independent suppliers. Because dormant Commerce Clause discrimination presumes similarly situated entities, the fact that Ohio's utilities and independent suppliers served different markets and products nullified any claim of Commerce Clause discrimination.

As Petitioners point out, *Tracy* does not establish some sort of blanket protection from Commerce Clause challenges brought against regulations implicating utilities. And, because *Tracy* involved Ohio's permissible effort to regulate the utilities' service of the captive market, *Tracy* also did not inoculate state laws attempting to regulate competitive markets.

But neither does the court of appeals' decision below. As in *Tracy*, the court of appeals here was called upon to determine whether a benefit provided to utilities, but not to independent suppliers, violated the dormant Commerce Clause against a backdrop of the state asserting that the two groups were not similarly situated. And, as in *Tracy*, Washington's utilities serve both the captive retail market and the competitive wholesale market. But, unlike *Tracy*, there was no need for the court of appeals to determine Washington utilities' primary market because the challenged benefit (no-cost allowances) applies *only* to the captive market: it was—and remains—undisputed that no-cost allowances are provided to utilities based only on the amount of retail power they provide to consumers. Regardless, the court of appeals noted that, as in *Tracy*, Washington utilities "primarily serve a separate, captive retail market by distributing power to consumers" and, on that basis, found that utilities and Petitioners are not similarly situated. Pet. App. 4a. Following the same logic as this Court in *Tracy*, the court of appeals determined that this fact doomed Petitioners' claim of Commerce Clause discrimination.

Contrary to Petitioners' claims, this is not an expansion of *Tracy*. If anything, because the benefit here applied only to Washington utilities' service of the captive market, the court of appeals' decision is more circumscribed than *Tracy*'s holding. Nor did the court of appeals purport to provide protection to "state laws that seek to advantage utilities in separate, *competitive* markets outside of that final-stage distribution of energy to the ratepaying public." Pet. 14. Indeed, how could the court of appeals' decision be read to bless benefits in a competitive market when the court expressly acknowledged that the advantage—on its face—ends at the *captive* market? Pet. App. 5a.

Seeking to artificially inflate the scope of the court of appeals' limited holding, Petitioners claim that the Ninth Circuit expanded *Tracy* because the Climate Commitment Act is "aim[ed] at the power generation market." Pet. 15.

True enough, the Climate Commitment Act does target emissions from power generation. But that is irrelevant to Petitioners' Commerce Clause claim. Petitioners do not challenge the Act's targeting of emissions from power generation. For example, Petitioners obviously take no issue with the Climate Commitment Act's requirement that Washington utilities purchase allowances to cover emissions associated with power sold in competition with

Petitioners on the wholesale market. Instead, Petitioners challenge only the Climate Commitment Act's grant of no-cost allowances for utilities' provision of power to retail customers. Those allowances do not apply in the power generation market. In fact, and as noted, utilities remain on the hook for emissions associated with power they generate to sell on the wholesale market. No-cost allowances exist solely to regulate the provision of retail power to end consumers in the captive market.[3]

Nor does it matter that, as Petitioners allege, "each megawatt is indistinguishable from every other" such that this Court should focus on Petitioners and utilities both selling the "product" of electricity in the power market writ large. Pet. 6. It is true that electricity is simply electrons and that those electrons are physically indistinguishable regardless of how and in what market they are sold. But, as this Court made clear in *Tracy*, the relevant focus is not the physical nature of the product. The utilities and wholesalers in *Tracy* were all selling the exact same, physically indistinguishable natural gas molecules. *Tracy*, 519 U.S. at 281-82. Instead, the utilities and wholesalers were not similarly situated because the relevant "product" wasn't the natural gas molecules themselves but the way they were sold: bundled in a non-competitive monopoly market to retail consumers or unbundled in a competitive wholesale market. *Id.* at 303. So too here. Washington utilities' "bundled

[3] And, as discussed above, the Climate Commitment Act does this to avoid hitting Washington consumers with what would otherwise be duplicative decarbonization requirements given the Clean Energy Transformation Act's more aggressive phase-out of fossil fuel power in the retail power sector.

product reflects the demand of a market neither susceptible to competition by [Petitioners] nor likely to be served except by the regulated natural monopolies that have historically supplied its needs." *Id.*

In this way, and as Petitioners themselves point out, Washington's electric utilities serve a "unique, monopolistic role" and Washington's efforts to effectively regulate that role aligns with "longstanding precedent upholding the State's power to regulate all direct in-state sales to consumers." Pet. 15 (cleaned up) (quoting *Tracy*, 519 U.S. at 306).

The court of appeals' decision is a narrow and faithful application of this Court's decision in *Tracy*. Neither decision purports to "immunize" state laws from the dormant Commerce Clause "even when those laws affect competitive markets." Pet., Questions Presented. The court of appeals' decision does not implicate the question raised, and this Court should therefore deny the strawman petition.

B. There Is No Circuit Split

Petitioners' mischaracterization of the Ninth Circuit opinion also forms the basis of its alleged circuit split. In reality, the Ninth Circuit opinion creates no circuit split because it faithfully applied this Court's precedents in finding that utilities and independent power generators are not similarly situated when it comes to a benefit granted to utilities based solely on their participation in the noncompetitive "captive" retail market. Petitioners' own thesis—that other circuits have "expressly emphasized that *Tracy*'s holding is limited to noncompetitive markets"—also accurately describes the opinion below, because it also expressly limited its holding to noncompetitive markets. Pet. 16; Pet. App. 4a-5a.

Petitioners first argue that the ruling below conflicts with *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022), *cert. denied*, *Lake v. NextEra Energy Capital Holdings, Inc.*, 144 S. Ct. 485 (2023). There, the Fifth Circuit rejected a Texas law completely barring anyone but Texas's existing utilities from participating in the competitive market for constructing and operating interstate transmission lines. *Id*. at 310.

The primary thrust of *NextEra* relates to so-called in-state "residency requirements," *id*. at 323-24, an issue not presented here given that there are no allegations the Climate Commitment Act does anything to prevent non-local entities from participating in Washington's electricity market.

But *NextEra* also addressed *Tracy* in some detail. The court first explained that the challenged Texas law was very different from the Ohio law at issue in *Tracy*. The Ohio law involved natural gas sales in both the competitive and non-competitive markets, and the court concluded that the "core market" at issue was the captive, non-competitive market. *Id*. at 319. So "the utilities and out-of-state sellers were not similarly situated[.]" *Id*. By contrast, the Texas law applied only to "a single market (transmission) . . . that is undoubtedly competitive[.]" *Id*. at 319-20. Thus, the utilities were similarly situated to other entities (like NextEra) that wanted to build interstate transmission lines. *Id*. at 319.

Texas argued for a broader reading of *Tracy* in which that case would offer "Commerce Clause immunity to any law that grants a preference to a company that has at least one foot in a captive market." *Id.* at 320. The Fifth Circuit rejected that argument because it would essentially create a "'public utilities exception' to the dormant Commerce Clause." *Id.* The Fifth Circuit went on to find the law facially discriminatory under a line of cases invalidating in-state residency requirements. *Id.* at 323-24.

When it comes to *Tracy*, *NextEra* and the court of appeals' decision here are in complete accord: utilities and wholesalers are not similarly situated for Commerce Clause discrimination purposes when the challenged law seeks to regulate the noncompetitive market. Here, the Climate Commitment Act's no-cost allowances relate solely to the noncompetitive market that the utilities primarily serve and does not grant utilities a benefit in the competitive market for wholesale power. Thus, Washington never made the broad claim of immunity under *Tracy* that *NextEra* rejected, and the court of appeals' decision did not grant one. There is no split with the Fifth Circuit.

Nor is there conflict with the Sixth Circuit's decision in *Energy Michigan, Inc. v. Michigan Public Service Commission*, 126 F.4th 476 (6th Cir. 2025), which also dealt solely with regulation of competitive markets.

The law at issue in *Energy Michigan* involved Michigan's attempts to put controls on its deregulated energy market. Unlike Washington and several other regions—in which the consumer market remains purely "captive" with service provided exclusively by vertically integrated utilities—Michigan's retail electric market is competitive, with both utilities and "alternative energy suppliers" competing to service retail consumers. *Id.* at 483. Where Michigan's regulation of this market went wrong, according to the Sixth Circuit, was its attempt to control the *source* of electricity served to Michigan consumers by both utilities and alternative energy suppliers in a way that heavily favored local power producers and disfavored those out-of-state. *Id.* at 488. It accomplished this via capacity requirements mandating a certain percentage of electricity to be sourced from within the region where the power would be consumed. *Id.* The result was to effectively box out from the market any power not produced in Michigan's lower peninsula. As described by the Sixth Circuit, "we can conceptualize [Michigan's source restrictions] in the same way we would think of a law that wholly prohibits the procurement of out-of-state electrical capacity. That leaves perhaps the clearest example of a dormant Commerce Clause violation: 'a law that overtly blocks the flow of interstate commerce at a State's borders.'" *Id.* (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

As in *NextEra*, Michigan attempted to argue that *Tracy* gave it broad immunity even when it came to geographic restrictions on an identical product in a competitive market. *Id.* at 493. And, as in *NextEra*, the court rejected that argument. In doing so, it noted that, while *Tracy* focused on who was doing the selling and which products and markets were involved, Michigan's regulations focused on geographic origins of a singular product (wholesale power) in a singular, competitive market (retail consumers). *Id.* In the Sixth Circuit's view, this made all the difference: where Ohio's disparate treatment in *Tracy* involved dissimilar markets (noncompetitive versus competitive) and products (bundled versus unbundled gas), Michigan's disparate treatment involved in-state versus out-of-state electrical capacity serving the same competitive market. *Id.* at 493-94. This rendered the utilities and alternative energy suppliers similarly situated and *Tracy* distinguishable. *Id.*

As with *NextEra*, *Energy Michigan*'s analysis of *Tracy* is in accord with that of the Ninth Circuit. Again, Washington did not make, and the court of appeals did not bless, any argument that *Tracy* protects laws seeking to regulate similarly situated parties in a competitive market. The court of appeals, in fact, disavowed any such reading when it noted that utilities are treated in exactly the same manner as Petitioners when in competition on the wholesale market; they must purchase allowances to account for their emissions associated with wholesale power. Pet. App. 5a ("[A]ny power generated by a utility-owned plant that exceeds this amount—power that can then be sold on the wholesale market in which Appellants operate—does not increase the number of no-cost allowances awarded to that utility."). To paraphrase the Sixth Circuit, "far from establishing an exception to the dormant Commerce Clause, the [court of appeals] simply clarified what qualifies as discrimination in the unique regulatory setting in which th[e] case arose." *Id.* at 493. Petitioners' claim of a circuit split is purely illusory.[4]

C. The Court of Appeals Properly Dismissed Petitioners' *Pike* Claim

The court of appeals' unremarkable dismissal of Petitioners' claim under *Pike v. Bruce Church* also fails to warrant certiorari here.

In analyzing Petitioners' assertion that no-cost allowances will discourage investment in fossil fuel power in Washington, the court of appeals assumed the ongoing validity of dormant Commerce Clause claims based on "impermissible burden" under *Pike*. Pet. App. 5a. Nevertheless, the court rejected Petitioners' *Pike* claim. In doing so, the court of appeals relied neither on *National Pork* nor, as Petitioners' wrongly suggest, an improper reading of this Court's "nondiscriminatory" dormant Commerce Clause jurisprudence. Instead, the court of appeals applied well-settled features of this Court's prior decisions relating to when facially neutral laws can nonetheless run afoul of the Commerce Clause.

This Court long ago rejected the notion that the Commerce Clause protects any particular "structure or methods of operation" within state markets. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). Thus, states are generally free to burden their own markets, even in ways that impact interstate

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[4] As discussed in Section D. below, Petitioners' claim of a circuit split is further undermined by the fact that the court of appeals decision is unpublished.

actors wishing to conduct business in those markets. *Id.* at 127-28. This is because, except under rare circumstances, any effects on interstate commerce echoing outside of the state are merely incidental, and any in-state impacts, such as increased prices or decreased competition, relate "to the wisdom of the statute, not to its burden on commerce." *Id.* at 128. And, as the court of appeals correctly noted, this Court "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods." Pet. App. 5a (quoting *Exxon*, 437 U.S. at 128). Electric markets—which are balkanized by design—are not among those limited fields: as the court of appeals noted, this Court has "declined to hold that the incidental effect of mere state regulation on the interstate wholesale energy market is, on its own, a substantial burden on interstate commerce." Pet. App. 5a (citing *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 395 (1983)); *see also Ark. Elec.*, 461 U.S. at 395 ("[T]he national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States.").

Against this backdrop, it is hardly controversial that the court of appeals found Petitioners' threadbare accusations of excessive burden on interstate commerce insufficient as a matter of law. While they claim here to have highlighted "market-wide consequences" below, Pet. 25 (quoting *National Pork*, 598 U.S. at 397 (Roberts, C.J., concurring in part and dissenting in part)), they did nothing of the sort. Petitioners' claim of excessive burden under *Pike* is limited to their assertion that granting no-cost allowances to utilities discourages investment in fossil fuel power plants *in Washington*. Pet. App. 78a-79a. They make no assertion—nor could they—of impacts to the broader market or that the impacts go any further than those entities specifically choosing to do business in Washington. And even if Petitioners are correct that no-cost allowances have negative impacts on Washington consumers and businesses that choose to conduct operations here, that goes only to the wisdom of the statute, not unconstitutional burdens on commerce. *See, e.g.*, *Exxon*, 437 U.S. at 128.

This run-of-the-mill application of *Exxon* is fully in line with how a majority of this Court in *National Pork* viewed its decision in *Exxon* and similar precedents. *See National Pork*, 598 U.S. at 383-84; *see also id.* at 392 (Sotomayor, J. concurring in part).

Indeed, no member of this Court in *National Pork* purported to repudiate *Exxon* or do anything that calls the court of appeals' invocation of *Exxon* in this case into question. Even the partial dissent, by Chief Justice Roberts, offered an explanation as to what separated *National Pork* from cases like *Exxon* that involve merely incidental impacts on interstate commerce. As the Chief Justice explained, petitioners in *National Pork* alleged "that the interstate pork market is so interconnected that producers will be 'forced to comply'" with California's law even if they did no business in California. *Id.* at 399-400 (citation omitted). The impacts from California's animal welfare initiative, therefore, did not just amount to an increase in the cost of doing business in California. Rather, in the dissent's view, the pork producers had plausibly alleged economic harms against the entire interstate market for pork products, including for far-flung businesses that had no contact at all with California's market. *Id.* at 401. "It is the difference between mere cross-border effects and broad impact requiring, in this case, compliance *even by producers who do not wish to sell in the regulated market*."[5] *Id.* at 402 (emphasis added).

There is no such broad impact here, and the differences between the allegations of market disturbances between *National Pork* and this case could not be more stark. Unlike the complete reworking of the pork industry nationwide alleged in *National Pork*, there is no such broad impact to the interstate market alleged here. Again, Petitioners claim only that Washington's no-cost allowances for utilities discourage fossil fuel investments in Washington. Pet. App. 78a. This is what makes Petitioners' claim of a substantial burden on interstate commerce so untenable. The arguments put forward by Petitioners here would create just the kind of *per se* ban on state regulations incidentally impacting out-of-state actors and markets that no member of this Court has endorsed.

In any event, Petitioners' claims of the necessity for this Court's clarification of *Pike* following *National Pork* are overblown. All but one of the cases cited by Petitioners as evidence that courts are struggling with *National Pork* are district court cases. Pet. 23. The circuit courts should have the opportunity

[5] Justice Barrett's concurrence in part agreed with this aspect of the dissent. *See Nat'l Pork*, 598 U.S. at 394.

to provide guidance to lower courts. Moreover, Petitioners grossly overstate the alleged "confusion." Pet. 21. To Washington's knowledge, no court—including the court of appeals below and all of the cases cited by Petitioners—has repudiated *Pike* balancing. Courts seem to understand well post-*National Pork* that *Pike* claims remain viable, if narrow. *See, e.g.*, *New Jersey Staffing All. v. Fais*, 110 F.4th 201, 205 (3rd Cir. 2024) (recognizing that *Pike* remains viable but that *National Pork* rejected the argument that the dormant Commerce Clause creates a *per se* rule against "state laws with extraterritorial effect[s]"); *Truesdell v. Friedlander*, 80 F.4th 762, 774 (6th Cir. 2023) (recognizing that *National Pork*'s "controlling plurality" clarified that the *Pike* analysis focuses on interstate burdens, not costs incurred by specific businesses); *Montana v. City of Portland*, No. 3:23-cv-00219-YY, 2024 WL 3326230, at *1 (D. Or. July 5, 2024) (rejecting an argument that *National Pork* eliminated the *Pike* balancing test).

What courts have continued to show is little difficulty in applying the uncontroversial concept that a mere increase in costs or burdens to conduct wholly in-state business "cannot be said to discriminate against interstate commerce." *See, e.g.*, *Just Puppies, Inc. v. Brown*, 123 F.4th 652, 666 (4th Cir. 2024). There is nothing here to clarify.

D. This Case Is an Imperfect Vehicle for the Questions Raised

Finally, this case is not an appropriate vehicle for the questions presented by Petitioners. To begin, the court of appeals' decision is unpublished and has no precedential value, even within the Ninth Circuit. Circuit Rule 36-3. What is more, even if the decision did have precedential value, the factual and regulatory framework at play here is extremely unlikely to be reproduced. Only one other state has a "cap and trade" program similar to the Climate Commitment Act and, even then, that state utilizes a different allocation of allowances for public utilities. *See generally* Cal. Code of Regs. tit. 17, § 95892.

Nor is this case an appropriate vehicle to clarify the status and standards of *Pike* claims post-*National Pork*. As noted, the court of appeals did not rely on *National Pork* in dismissing Petitioners' *Pike* claim and assumed that such claims remain viable. Pet. App. 5a. The court of appeals then dismissed on grounds that all members of this Court apparently would have agreed upon in *National Pork*: regulation of in-state activity with only incidental impacts on the broader market does not justify the extraordinary remedy of federal courts striking down nondiscriminatory regulation by the states. Pet. App. 5a In short, this Court cannot clarify the level of market-wide burdens required to justify *Pike* balancing in a case where market-wide burdens have not been and cannot be alleged.

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

NICHOLAS W. BROWN
Attorney General

NOAH G. PURCELL
Solicitor General

PETER B. GONICK
Deputy Solicitor General
Counsel of Record

KELLY T. WOOD
Senior Counsel

1125 Washington Street SE
Olympia, WA 98504-0100
Peter.Gonick@atg.wa.gov
360-753-6200

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