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

REPLY BRIEF OF PETITIONERS

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This Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), created a narrow exception to the Court's dormant Commerce Clause jurisprudence: States can provide benefits solely to their in-state utilities, but only in the captive, monopolistic market in which those utilities provide services to ratepayers. In the decision below, the Ninth Circuit expanded *Tracy*'s narrow exception into a quasi-immunity. It blessed Washington's scheme to give its utilities—but not out-of-state competitors—extremely valuable "no cost" allowances, thereby allowing in-state utilities—and only in-state utilities—to mitigate the enormous costs of complying with Washington's Climate Commitment Act ("CCA"). That holding

not only badly misapplies *Tracy*, but also creates an untenable circuit split with the Fifth and Sixth Circuits, which correctly recognize that neither *Tracy* nor the Constitution permits states to protect their incumbent utilities at the expense of free competition.

The State attempts to downplay the consequences of the Ninth Circuit's decision. In the State's view, its efforts to give in-state utilities a leg up over out-of-state competitors are permissible because the no-cost allowances at issue are initially provided in the regulated utility market. As basic economics and Washington's own law make clear, however, financial benefits that Washington provides to in-state utilities in the monopolistic utility market can easily be used to offset costs in the *competitive* power generation market. That the way the State allocates allowances has some connection to the utility market does not lessen the harm to competitors like Petitioners. And it certainly is not dispositive under *Tracy*, which evaluates the market in which the law applies. Here, that is the competitive market, where utilities can use their allowances to their advantage, and at Petitioners' competitive detriment.

This Court should also grant review to resolve confusion among lower courts about how to evaluate dormant Commerce Clause claims following *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). The Ninth Circuit concluded that there was *no factual scenario* in which any such claim could conceivably be alleged even though Petitioners had already alleged the law produced the market-wide harms a majority of Justices agreed are sufficient under *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970). The State primarily argues that no confusion among lower courts exists as to how to apply *Pike*. But the three decisions the State relies on adopt three different interpretations of *Pork Producers*. There can be no

clearer evidence of confusion. Until this Court acts, courts will continue to dismiss meritorious claims.

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

A. The Decision Below Misconstrues *Tracy*.

1. *Tracy* established a framework for how to scrutinize state regulations affecting utilities under the dormant Commerce Clause, recognizing the unique position of utilities as economic actors. *See* 519 U.S. at 303-04. In a particular captive market—the provision of services directly to end ratepayers—utilities are state-sanctioned monopolies. *See id.* at 301-02. However, those same utilities are no different from any other market actor when they participate in markets outside that heartland. *See id.* at 302-03. Under *Tracy*, then, the question that matters is whether the regulation at issue primarily regulates a captive market or a competitive market. *Id.* at 303-04.

Despite agreeing that utilities "compete with [Petitioners] in the noncaptive market of wholesale electricity generation," the Ninth Circuit concluded that the CCA's allocation of no-cost allowances primarily affects the captive market because it had some connection to that market, namely that "the amount of no-cost allowances provided under the [CCA] is tailored to the amount of electricity that a utility supplies to consumers in the captive retail market." Pet.App.4a-5a.

This was error. Under *Tracy*, a court does not inquire whether the challenged law's discrimination is "tailored to" the extent of the services it provides in the captive market. *Tracy* requires a court to determine whether the challenged law primarily affects "the noncaptive market in which" utilities and other actors "compete, or … the noncompetitive, captive market in which the local utilities alone operate[.]" 519 U.S. at 303-04.

2. The State claims that no-cost allowances "do not apply in the power generation market," BIO 15, but it fundamentally misreads its own legislation. Even the Ninth Circuit acknowledged the utilities may "apply their no-cost allowances to cover the compliance obligations of their power plants." Pet.App.4a. And the CCA incentivizes utilities to do so, because they incur substantial compliance obligations from the emissions their power plants produce. Pet. 16. As the State admits, the CCA "target[s] emissions from power generation." BIO 14. The State, however, insists this is "irrelevant," BIO 14, but it is the critical fact for applying *Tracy*. Because the CCA puts a price on the emissions from power generation, no-cost allowances benefit utilities by enabling them to effectively erase the price of emissions for their plants' power-generation activities in the highly competitive power-generation market. Pet.App.43a-44a, 80a-81a. Thus, the State's claim that "[n]o-cost allowances exist solely to regulate the provision of retail power to end consumers in the captive market" is simply wrong. BIO 15.

That utilities receive this competitive boon because they, as utilities, also distribute power in the captive market does not cure the distortive effect the law has on the competitive power-generation market. Nor does it insulate the law from challenge under *Tracy*. The State maintains the Ninth Circuit did not expand *Tracy*, but it merely rehashes the Ninth Circuit's flawed reasoning. That the CCA allocates no-cost allowances "based only on the amount of retail power they provide to consumers," BIO 13, is irrelevant; it says nothing about where the benefits of these no-cost allowances will be felt, which is what matters under *Tracy*.

The State also argues that utilities sell a "bundled product" to their retail customers. BIO 15-16. But that

makes no difference here. In *Tracy*, the Court distinguished between the products of "gas bundled with [certain] services and protections" from "unbundled gas" to distinguish the captive market where bundled gas was sold from the competitive market where unbundled gas was sold. 519 U.S. at 297-98, 303-04. That, however, still left the Court to determine the relevant market for its analysis. *Id.* at 303-04. What matters for that inquiry is that the CCA's allocation of no-cost allowances primarily affects the competitive market. *See supra* p. 4.

B. The Decision Below Splits with the Fifth and Sixth Circuits.

The Ninth Circuit's decision creates a circuit split by construing *Tracy*'s utility carve-out so expansively that any regulation benefiting utilities would escape dormant Commerce Clause scrutiny regardless of the target market. Pet. 16-20.

1. The State admits that the Fifth and Sixth Circuits held that the dormant Commerce Clause prohibits state regulations advantaging utilities in a competitive market, but nevertheless insists that the CCA's preferential treatment only touches the noncompetitive market. BIO 17-18.

But simply saying the CCA only targets the captive retail market does not make it so. *Tracy* cannot rescue the CCA from dormant Commerce Clause scrutiny because it does not primarily regulate a captive market, *see supra* p. 4; for the same reason, the court of appeals decision splits with the Fifth and Sixth Circuits. Contrary to the Ninth Circuit's approach here, those circuits made clear that, when considering whether the utility and private company are similarly situated, the proper question is which market the regulation targets. If the object is a

competitive market, it matters little whether the utility *also* serves a noncompetitive market. *See* Pet. 17-20.

2. The State brushes the split aside by claiming that the CCA's no-cost allowances "relate solely to the non-competitive market that the utilities primarily serve." BIO 18. But that argument does not distinguish *NextEra*. After all, Texas also argued that there was no competitive market at issue. Br. for Appellees 19, *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022) (No. 20-50160), 2020 WL 2119791, *cert. denied*, 144 S. Ct. 485 (2023). The Fifth Circuit rejected that argument, concluding that Texas's law had no application in the noncompetitive market, so *Tracy* did not apply. *NextEra*, 48 F.4th at 320. So too here; *NextEra* would dictate that *Tracy* provides the CCA no protection. The Ninth Circuit created a split when it disagreed.

3. Similarly, the State attempts to distinguish *Energy Michigan* through mischaracterization. Michigan did not "argue that *Tracy* gave it broad immunity even when it came to geographic restrictions on an identical product in a competitive market." BIO 19. Instead, Michigan argued that private suppliers and utilities provide *different products* and do not compete in the same market. Second Br. for Cross Appellant Comm'rs 30-31, *Energy Mich., Inc. v. Mich. Pub. Serv. Comm'n*, 126 F.4th 476 (6th Cir. 2025) (No. 23-1324), 2023 WL 4687592. The Sixth Circuit disagreed. *Energy Mich.*, 126 F.4th at 493-94.

The State makes the same argument here. And, like the Sixth Circuit, the Ninth should have rejected it. Instead, the panel failed to consider the object of disparate treatment or the relevant market, overlooking the fact that the CCA regulates energy production (a competitive market), not energy distribution (a captive market).

Nor does the State successfully distinguish *Energy Michigan* by pointing to Michigan's deregulated energy market. BIO 18-19. That fact did not feature in the Sixth Circuit's rejection of Michigan's reliance on *Tracy*; instead, the court found specifically that the target market impacted by the regulation—energy capacity—was competitive and that the parties were similarly situated within that market. *Energy Mich.*, 126 F.4th at 493-94. Retail regulation (or lack thereof) was not relevant.

4. Lastly, the State attempts to distinguish both decisions by suggesting they turned on "in-state residency requirements" (*NextEra*) and "geographic origins" (*Energy Michigan*). BIO 18-20. Not so. In fact, the Fifth Circuit emphasized that Texas's law was problematic because it granted utilities a benefit based on market incumbency, precluding competition. *NextEra*, 48 F.4th at 325. Those are precisely the circumstances here: the CCA discriminates in effect by preventing competition by non-incumbent electricity generators—those not already affiliated with a utility. *See* Pet.App.85a.

And, although the Sixth Circuit in *Energy Michigan* discussed the "geographic origin" of electricity in evaluating the plaintiff's claim of facial discrimination, its analysis of *Tracy* turned on the fact that electricity providers "regularly buy and sell capacity at wholesale, as their products are interchangeable on a national grid at that part of the stream of commerce." 126 F.4th at 494. So too here, where generators compete for the same business, but only utility-affiliated generators enjoy the benefits of no-cost allowances.

II. The Decision Below Conflicts with the *Pike* Pleading Standard and Deepens Confusion in Lower Courts.

1. In *Pork Producers*, six Justices across four separate writings "affirmatively retain[ed] the longstanding

Pike balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." 598 U.S. at 403 (Kavanaugh, J., concurring in part and dissenting in part). Even so, lower courts remain confused as to the state of *Pike*'s balancing test and the standard for pleading an unconstitutional burden on interstate commerce. Pet. 22-23.

In fact, even the court below continues to express confusion about what *Pork Producers* held. In *Flynt v. Bonta*, which was decided after the decision below, the Ninth Circuit noted that "[t]he Justices in *Pork Producers* … agreed that whether a law imposes a substantial burden on interstate commerce is a threshold inquiry, although given the fractured nature of the Court's decision on the *Pike* question, there is no portion of any opinion on this point that commanded a majority." 131 F.4th 918, 925 (9th Cir. 2025). As a result, courts have applied different understandings of what exactly *Pork Producers* held. Pet. 22-23.

2. The State asserts that these concerns are exaggerated, and, even if confusion exists, the circuits should address it. BIO 24-25. But even the cases from courts of appeals that the State cites reveal the confusion the State denies.

For example, *New Jersey Staffing Alliance v. Fais* acknowledged *Pork Producers* "splintered on how broadly to read *Pike*" but elected not to "consider those disagreements." 110 F.4th 201, 205 n.2 (3d Cir. 2024). And *Just Puppies, Inc. v. Brown* largely approached *Pike* balancing as if *Pork Producers* had changed almost nothing. 123 F.4th 652, 669-70 (4th Cir. 2024). This is a far cry from the conclusion of other courts that *Pork Producers* "imposed important constraints on the *Pike* inquiry," *Truesdell v. Friedlander*, 80 F.4th 762, 774 (6th Cir. 2023), and even further from the district court's determination

below that *Pork Producers* foreclosed *Pike* claims like Petitioners' entirely, Pet.App.25a. That more courts have acknowledged *Pork Producers*' fractured nature, and the lack of a controlling rationale, makes review all the more necessary to clarify the standard.

3. The Ninth Circuit's decision below also deepens confusion surrounding the requirements for pleading an unconstitutional burden under *Pike*. Although the Justices disagreed on this very point in *Pork Producers*, Pet. 23-25, 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." 598 U.S. at 402 (Robert, C.J., concurring in part and dissenting in part).

A majority did so because the petitioners alleged "broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce." *Id.* at 397. They did not merely plead California's regulation "cause[d] some business to shift from one interstate supplier to another," allegations that fall short under *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978).

The Ninth Circuit adopted and the State now defends the same reading of *Exxon* that a majority of the Justices rejected. *See* Pet.App.5a-6a; BIO 22-23. Here, the State claims that Petitioners' complaint did not identify market-wide harms. BIO 22-23. But the Court need not credit the State's blinkered view of Petitioners' allegations. Petitioners alleged the CCA distorted the interstate market for power such that (1) electricity rates would rise for consumers, (2) interstate energy investment in Washington would be shut out, and (3) as a result, incumbent utilities would be insulated from meaningful competition in the power-generation market. Pet. 9-10; Pet.App.75a-79a,

87a-89a. Taken together, these allegations amount to "broader, market-wide *consequences* of compliance" sufficient to state a *Pike* claim. *Pork Producers*, 598 U.S. at 397.

As a fallback, the State asserts the CCA's consequences for consumers and businesses "go[] only to the wisdom of the statute, not unconstitutional burdens on commerce." BIO 23. Here too, the State fails to square the gravamen of Petitioners' allegations with this Court's *Pike* precedents. By distorting the power-generation market in Washington, the CCA ultimately enables local protectionism. Pet.App.78a-79a, 88a. The absence of such discrimination made the law's burden in *Exxon* permissible, *see* 598 U.S. at 378 (citing *Exxon*, 437 U.S. at 127), while here the presence of these protectionist consequences confirms Petitioners have alleged a sufficient burden. Accordingly, rather than lead to a "*per se* ban on state regulations incidentally impacting out-of-state actors and markets," as the State argues, BIO 24, Petitioners' claim reinforces the line that this Court's *Pike* precedents draw: no state may impose market-wide burdens and thereby "insulate" local incumbents "from out-of-state competition," *Pork Producers*, 598 U.S. at 377-78.

4. The State complains about the adequacy of Petitioners' factual allegations. That argument ignores the fact that before the district court Petitioners sought leave to amend and, before the Ninth Circuit, proffered the allegations they could have added to their complaint had the district court provided leave. Pet. 29. In affirming the dismissal without leave to amend, the Ninth Circuit held that Petitioners could not present any "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 State offers no defense of the Ninth Circuit's determination that the CCA's allocation of

no-cost allowances could not produce a substantial burden on interstate commerce.

III. The Questions Presented Are Important, Warranting Review.

The State does not dispute that this case was decided on the pleadings, where all Petitioners' factual allegations must be presumed true. Pet. 28. Nor does the State dispute that the court below held that any amendment would be futile—in other words, that any dormant Commerce Claim on these facts would *necessarily* fail. Pet. 29. That makes this an excellent vehicle to clarify *Tracy* and what standard applies for pleading a *Pike* claim.

The State instead merely contends that this case is a poor vehicle because the court of appeals decision is unpublished and the facts are unique. BIO 25-26. Both contentions are wrong.

1. Whether the decision below is unpublished "carries no weight in [this Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam). In fact, a panel's choice *not* to publish may be "yet another reason to grant review." *Plumley v. Austin*, 574 U.S. 1127, 1131-32 (2015) (Thomas, J., dissenting from denial of certiorari). After all, courts of appeals cannot use nonpublication to insulate decisions from review.

Indeed, this Court regularly grants certiorari to review unpublished decisions. *See, e.g.*, *Riley v. Bondi*, 145 S. Ct. 2190 (2025) (vacating unpublished Fourth Circuit decision); *Martin v. United States*, 145 S. Ct. 1689 (2025) (vacating unpublished Eleventh Circuit decision); *BLOM Bank SAL v. Honickman*, 145 S. Ct. 1612 (2025) (reversing unpublished Second Circuit decision); *Feliciano v. Dep't. of Transp.*, 145 S. Ct. 1284 (2025) (reversing unpublished Federal Circuit decision). Nonpublication is no barrier to this Court's review.

2. Nor is the specific nature of Washington's regulation a factual barrier to review. The potential for misapplication of *Tracy* as the court of appeals did here, *see supra* pp. 3-5, goes well beyond Washington's statutory scheme. States may see an expansion of *Tracy* as an opportunity to prop up vertically integrated utilities at every level. *NextEra*, *Energy Michigan*, and the court of appeals' decision below are three examples of just that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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