No.

In the Supreme Court of the United States

PACIFICORP, PETITIONER,

v.

CASEY SIXKILLER, DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF ECOLOGY

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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QUESTION PRESENTED

In *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997), this Court held that a state-law exemption for in-state businesses did not implicate the dormant Commerce Clause because the favored businesses and the disfavored ones sold "different products" and "serve[d] different markets." *Id.* at 298-299. The Fifth and Sixth Circuits have since confined *Tracy* to laws that distinguish between entities competing in "different retail markets." *NextEra Energy Capital Holdings, Inc.* v. *Lake*, 48 F.4th 306, 319 (5th Cir. 2022); see *Energy Michigan, Inc.* v. *Michigan Public Service Comm'n*, 126 F.4th 476, 493 (6th Cir. 2025).

Below, a divided Ninth Circuit rejected the Fifth and Sixth Circuits' focus on whether the regulated party "produces the same product * * * for in-state and out-of-state consumers." App., *infra*, 11a. The court instead read *Tracy* to immunize Washington's cap-and-trade system, which requires utilities to buy allowances for greenhouse-gas emissions when generating exported electricity but awards free allowances for electricity sold to Washington retail customers—even though retail electricity is "the same product sold across multiple geographic markets." *Id.* at 42a (Bress, J., dissenting). The question presented is:

Whether *Tracy* exempts a State from dormant Commerce Clause scrutiny when state law imposes different burdens on the same product based on whether the product is sold in state or out of state.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioner PacifiCorp was the plaintiff in the district court and the appellant in the court of appeals. Respondent Casey Sixkiller, Director of the Washington State Department of Ecology, was the defendant in the district court and the appellee in the court of appeals. He is sued in his official capacity and was automatically substituted for his predecessor, Laura Watson, under Federal Rule of Appellate Procedure 43(c)(2) while the case was pending in the court of appeals.

2. PacifiCorp, doing business as Rocky Mountain Power and as Pacific Power, is an Oregon corporation. PacifiCorp is a wholly owned subsidiary of PPW Holdings LLC, which is a wholly owned subsidiary of Berkshire Hathaway Energy Company. Berkshire Hathaway Energy Company is a wholly owned subsidiary of Berkshire Hathaway Inc., a publicly traded corporation (NYSE: BRK.A, BRK.B). No other publicly held corporation owns 10 percent or more of PacifiCorp's stock.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

PacifiCorp v. *Watson*,
No. 23-cv-6155 (July 15, 2024)

United States Court of Appeals (9th Cir.):

PacifiCorp v. *Sixkiller*,
No. 24-4803 (Aug. 7, 2026)

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INTRODUCTION

Discrimination against interstate commerce is no small matter. Shortly after the Founding, "state trade barriers" threatened to tear apart a nation still in its infancy. *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 588 U.S. 504, 515 (2019). Those barriers motivated the calling of the Constitutional Convention and, ultimately, the Commerce Clause. *Id.* at 515-516. For more than a century, this Court has held that the Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Id.* at 514.

Washington has recently tested the Constitution's commitment to an interstate market for electricity. In 2021, the State adopted a cap-and-trade system for greenhouse-gas emissions. The law works by limiting emissions (the cap) and then requiring emitters to buy allowances to cover their emissions (the trade). The law imposes massive costs on the energy sector. But Washington was unwilling to force its consumers to bear the costs of its own climate regulations. To externalize those costs onto interstate commerce, the State built in a discriminatory provision through which the Washington State Department of Ecology makes free (called no-cost) allowances available for emissions when electricity is sold to Washington customers but not when electricity is exported to out-of-state customers.

Petitioner PacifiCorp has acutely felt the effects of Washington's discriminatory cap-and-trade system. PacifiCorp owns a power plant in Washington and once allocated just under a quarter of the power that the plant generated to serve Washington customers, directing the rest to PacifiCorp's customers in other States. But PacifiCorp has now spent tens of millions of dollars every year buying allowances for any electricity generated with greenhouse-gas emissions that it exports because Washington law makes no-cost allowances available only when PacifiCorp sells electricity to Washington customers. Predictably, PacifiCorp has now shifted to selling that power entirely in state to avoid the severe costs of exporting electricity.

PacifiCorp's efforts to stop Washington's discrimination hit a dead end in the Ninth Circuit. After the district court dismissed PacifiCorp's claims, a divided panel affirmed, holding that Washington's scheme for no-cost allowances was immune from review under the dormant Commerce Clause. The Ninth Circuit read this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997), to prevent any comparison between in-state sales and out-of-state sales because Washington has imposed different regulations on each. In dissent, Judge Bress forcefully objected to that "novel extension of *Tracy*" to insulate Washington's discrimination against exported electricity from review. App., *infra*, 35a.

The Ninth Circuit profoundly misunderstood *Tracy*, which establishes only that States do not discriminate against interstate commerce when they differentiate between entities that sell "different products" in "different markets." 519 U.S. at 299. In that scenario, "there is no national market for competition for the dormant Commerce Clause to protect." App., *infra*, 35a (Bress, J., dissenting). But *Tracy* nowhere licensed a chief evil that the Clause aims to prevent: discrimination against a single product "by reason of its origin or destination out of State." *C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 390 (1994). Quite the contrary: This Court cautioned in *Tracy* that state utility regulation is not "immune from [the] ordinary Commerce Clause jurisprudence." 519 U.S. at 291 n.8. The Ninth Circuit erred in abandoning the ordinary test in favor of its maximalist reading of *Tracy*.

The Ninth Circuit stands alone in interpreting *Tracy* to immunize discrimination against interstate commerce within a single product market. Both the Fifth and Sixth Circuits have held that *Tracy* applies only when a state law differentiates between different product markets, not when a state law discriminates in favor of in-state interests within a single product market. *Energy Michigan, Inc.* v. *Michigan Public Service Comm'n*, 126 F.4th 476, 493-494 (6th Cir. 2025); *NextEra Energy Capital Holdings, Inc.* v. *Lake*, 48 F.4th 306, 320 (5th Cir. 2022). Because the Commerce Clause's preservation of a free interstate economy depends on uniform precedent across the country, this Court should not allow this conflict to persist.

The decision below will have deeply harmful consequences for free trade in general and the electricity market in particular. As Judge Bress warned in his dissent, the Ninth Circuit's "expansion of *Tracy* would swallow the dormant Commerce Clause altogether." App., *infra*, 24a. All a State needs to do under the Ninth Circuit's standard is impose *some* burdens on in-state sales of a product and then the State can impose *any* burdens on out-of-state sales of that same product. In the Ninth Circuit, California already has a cap-and-trade system, Oregon will soon consider proposals, and both could follow in Washington's footsteps by shifting compliance costs onto electricity exports. Such measures would naturally spur retaliatory countermeasures of the very sort that impelled the Framers to adopt the Commerce Clause more than two centuries ago. This Court need not wait and see how the decision below plays out to know how this story ends.

In extending *Tracy* far beyond where any other court of appeals has gone, the Ninth Circuit has created an escape hatch from constitutional scrutiny for the very sort of "state protectionism" that "the Commerce Clause by its own force restricts." *Tennessee Wine & Spirits*, 588 U.S. at 518. This Court should grant the petition and slam shut that escape hatch.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) will be published in the Federal Reporter and is available at 2026 WL 2277099. The order of the district court granting Ecology's motion to dismiss and denying as moot PacifiCorp's motion for a preliminary injunction (App., *infra*, 47a-74a) is not published in the Federal Supplement but is available at 2024 WL 3415937.

JURISDICTION

The court of appeals entered its judgment on August 7, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced in the appendix. App., *infra*, 101a-106a.

STATEMENT

A. Legal Background

Washington has enacted several measures aimed at requiring utilities that sell electricity to residential customers to reduce their greenhouse-gas emissions significantly.

1. In 2021, the State adopted the Climate Commitment Act, which mandates that in-state greenhouse-gas emission levels dip 45%, 70%, and 95% below their 1990 levels by 2030, 2040, and 2050, respectively. Wash. Rev. Code § 70A.45.020(1)(a). The Climate Commitment Act instructs the Washington State Department of Ecology to achieve these goals through a "cap and invest" (better known as cap-and-trade) program. App., *infra*, 25a.

To administer the program, Ecology establishes an annual, declining "cap" on emissions from "covered entities," defined as any owner or operator of a power plant that emits at least 25,000 metric tons of carbon dioxide equivalent per year. Wash. Rev. Code §§ 70A.65.060(1)-(2), 70A.65.080(1)(a). Ecology then effectuates that cap through the sale of "allowances," each of which authorizes the emission of one metric ton of carbon dioxide equivalent. § 70A.65.010(1). Ecology distributes allowances at quarterly auctions and reduces the number of allowances available for purchase each year, consistent with the Climate Commitment Act's emission-reduction mandates. §§ 70A.65.070(2), 70A.65.100(1).

A covered entity may emit only as much greenhouse gas as its allowances cover. If its emissions exceed that amount, the entity must surrender four "penalty" allowances for every allowance exceeded—and would face fines of up to $10,000 per day per violation until it coughs up the penalty allowances. Wash. Rev. Code § 70A.65.200(2)-(3).

To "mitigate the cost burden" of this cap-and-trade program "on electricity customers," the Climate Commitment Act allows certain retail electric utilities to obtain "no cost allowances" (*i.e.*, free credits) without needing to buy them at auction. Wash. Rev. Code § 70A.65.120. Utilities may transfer their no-cost allowances to the power plants they own, eliminating some or all of those plants' compliance costs. Wash. Admin. Code § 173-446-425.

Washington defrays the cost of the Climate Commitment Act's cap-and-trade system only for in-state consumers of electricity. App., *infra*, 53a. No-cost allowances mitigate the "[c]ost burden" of "the impact on rates or charges to customers of electric utilities *in Washington state* * * * caused by the program." Wash. Rev. Code § 70A.65.010(21) (emphasis added). Ecology's implementing regulations also establish a one-to-one ratio between the award of no-cost allowances and the greenhouse-gas emissions associated with retail electricity consumed in state. Wash. Admin. Code § 173-446-230(2)(f). As a result, utilities may obtain free allowances only "in direct proportion to how much electricity they provide to Washington residents." App., *infra*, 26a (Bress, J., dissenting).

The upshot is that a utility's costs of complying with the Climate Commitment Act turn directly on the destination of its electricity—in particular, on whether its electricity is bound for in-state or out-of-state customers. App., *infra*, 85a. "[I]f a utility in Washington sells 90% of its electricity to out-of-state customers, only 10% of its emissions will be eligible for no-cost allowances under the CCA." *Id.* at 22a (Bress, J., dissenting). But if a Washington utility sells 90% of its electricity to in-state customers, no-cost allowances will be available for 90% of its emissions.

2. Washington enacted the Climate Commitment Act two years after another emissions-reduction mandate, the Clean Energy Transformation Act. That law requires that "all retail sales of electricity to Washington retail electric customers be greenhouse gas neutral by January 1, 2030." Wash. Rev. Code § 19.405.040(1). By 2045, only renewable and non-emitting resources can be used to supply retail electricity sold in state. §§ 19.405.020(27), (33), 19.405.050(1).

The Clean Energy Transformation Act does not require greenhouse-gas-neutral electricity until the mandate takes effect in 2030. See Wash. Rev. Code

§ 19.405.040(1)(a). Before then, utilities must file "clean energy implementation plans" with the Washington Utilities and Transportation Commission every four years describing their progress toward satisfying the neutrality and renewable-only standards. Wash. Admin. Code § 480-100-640(1). Utilities may ultimately satisfy their obligations through a variety of means—switching to non-emitting generation, purchasing renewable energy credits, investing in energy transformation projects, or making alternative compliance payments. Wash. Rev. Code §§ 19.405.040, 19.405.060(3)(a).

B. Factual Background

PacifiCorp is an Oregon corporation that provides retail electricity service to over two million customers across six western States: Washington, Oregon, California, Utah, Wyoming, and Idaho. App., *infra*, 2a. Around 7% (or 140,000) of those customers live in Washington. *Ibid.*

PacifiCorp owns and operates the Chehalis Generation Facility, a natural-gas-fired power plant south of Chehalis, Washington. App., *infra*, 2a. The plant's emissions make PacifiCorp a covered entity under the Climate Commitment Act. *Id.* at 2a-3a. When (and only when) PacifiCorp sells electricity to Washington retail customers, PacifiCorp is eligible for no-cost allowances under the Climate Commitment Act. *Id.* at 3a, 11a n.1. PacifiCorp in 2024 allocated about 23% of the electricity generated at Chehalis to Washington retail customers and the remaining 77% to customers in other States. *Id.* at 79a. With a total compliance burden of nearly $48 million in just 2024, PacifiCorp accordingly received no-cost allowances for only 23% of the plant's emissions and had to buy allowances at auction for the rest (roughly $37 million). *Id.* at 79a, 86a.

The costs of complying with the Climate Commitment Act recurred every year Chehalis operated and generated power that people outside Washington consumed. Those costs fell on out-of-state interests: Either PacifiCorp's out-of-state customers "bear higher power costs" for Chehalis electricity, or PacifiCorp bears them itself "simply because it serves customers in other states." App., *infra*, 3a. Because PacifiCorp is a regulated utility in every State it serves, it may pass costs through to customers only with each State's regulatory approval. *Id.* at 54a. Utility commissions in Idaho, Oregon, and Wyoming have denied PacifiCorp's requests to recover those costs from their States' ratepayers, leaving PacifiCorp to absorb them—to the tune of almost $23 million for just the costs that PacifiCorp sought to recover from Oregon and Wyoming customers in 2024 alone. *Id.* at 54a, 78a; see Pet. C.A. Br. 48 n.8.

Because of the immense costs of serving out-of-state customers with power generated within Washington, PacifiCorp began reallocating all power generated at Chehalis to Washington retail customers in 2026. App., *infra*, 27a. But PacifiCorp continues to owe allowances worth tens of millions of dollars for power generated at the Chehalis plant that served out-of-state customers under the Climate Commitment Act's first compliance period, *id.* at 86a-87a, which spans 2023 through 2026, *id.* at 76a. On November 1, 2027, PacifiCorp must surrender to Ecology its remaining allowances for the first compliance period. Wash. Admin. Code § 173-446-600(4).

C. Proceedings Below

1. In December 2023, PacifiCorp sued the Director of the Washington State Department of Ecology under 42 U.S.C. § 1983, seeking declaratory and injunctive relief. App., *infra*, 54a. PacifiCorp claimed that awarding no-cost allowances under the Climate Commitment Act only for in-state electricity sales facially discriminates against interstate commerce in violation of the Commerce Clause "by increasing the cost of electricity for PacifiCorp's out-of-state customers, compared to PacifiCorp's Washington customers, for electricity produced by the same generation facility." *Id.* at 79a.

PacifiCorp moved for a preliminary injunction that would require Ecology either to issue no-cost allowances for emissions associated with exported electricity or to exempt PacifiCorp from having to purchase allowances for any of its sales to retail customers. App., *infra*, 48a. Ecology opposed PacifiCorp's motion and moved to dismiss the complaint. *Id.* at 55a.

2. The district court dismissed the complaint and denied PacifiCorp's preliminary-injunction motion as moot. App., *infra*, 47a-74a. The court decided that the Washington laws limiting no-cost allowances to power consumed in state were immune from scrutiny under the Commerce Clause because "PacifiCorp's energy produced at Chehalis for in-state versus exported electricity is subject to a different regulatory scheme": the Clean Energy Transformation Act. *Id.* at 66a. In the court's view, the existence of separate regulations for electricity sold within Washington meant that in-state retail power and out-of-state retail power were not "substantially similar" products. *Id.* at 63a (quoting *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 298-299

(1997)). The court refused to consider whether the Climate Commitment Act imposed greater costs on the generation of exported electricity than the Clean Energy Transformation Act imposes on the generation of electricity sold to Washington customers. *Id.* at 67a.

3. A divided panel of the Ninth Circuit affirmed. App., *infra*, 1a-46a.

a. The majority held that the Climate Commitment Act's provision making no-cost allowances available for emissions only when PacifiCorp sells electricity to Washington customers did not implicate the dormant aspect of the Commerce Clause's prohibition on discrimination against interstate commerce. App., *infra*, 1a-21a.

Applying this Court's decision in *Tracy*, the majority held that "PacifiCorp's exported power is not similarly situated to utilities providing in-state power." App., *infra*, 15a (citing *Tracy*, 519 U.S. at 299). The majority framed Washington's "decarbonization regime" as simply "impos[ing] different regulatory requirements" for emissions from electricity generated for in-state consumption (the Clean Energy Transformation Act's decarbonization mandate, coupled with the Climate Commitment Act's bounty of no-cost allowances) and for emissions from electricity generated for export (no decarbonization mandate, coupled with a mandate to buy allowances to cover emissions). *Id.* at 18a. According to the majority, those "regulatory distinctions" dispensed with any need to compare the respective burdens on "in-state electricity and exported electricity." *Id.* at 11a; see *id.* at 19a n.4.

b. Judge Bress dissented. App., *infra*, 22a-46a. He explained that the Climate Commitment Act "facially discriminates against interstate commerce by imposing greater costs on interstate electricity sales through the disallowance of associated no-cost allowances." *Id.* at 22a. He noted that Ecology might seek to rebut that claim of discrimination against out-of-state sales by establishing that the Climate Commitment Act's free allowances for in-state sales "balance out [the Clean Energy Transformation Act's] burdens and place in-state and out-of-state electricity sales on equal footing." *Id.* at 22a-23a. But to prevail on that defense, Ecology would need to prove that the costs of obtaining allowances under the Climate Commitment Act for exported electricity and the costs of complying with the Clean Energy Transformation Act for electricity sold to Washington customers "are 'roughly equivalent' in a way that would justify Washington's otherwise discriminatory treatment of interstate electricity sales." *Id.* at 23a (citing *Oregon Waste Systems, Inc.* v. *Dep't of Environmental Quality of Oregon*, 511 U.S. 93, 103 (1994)). Factual uncertainties about Ecology's ability to prove that the compliance costs offset each other made a pleading-stage decision on the defense "premature." *Id.* at 33a.

Judge Bress objected to the majority's decision to sidestep the question whether the two statutes imposed offsetting compliance costs on the theory that exported electricity and electricity sold in Washington are not "substantially similar" under *Tracy*. App., *infra*, 35a-46a. As he observed, "*Tracy*'s rarely invoked exception" is meant to "prevent application of the dormant Commerce Clause to market participants that do not compete with each other in the same product market." *Id.* at 35a. That rationale has no force here because Washington law discriminates within "the retail electricity product market." *Id.* at 41a. If Judge Bress had his way, he would have placed this case "far outside" *Tracy*'s reach because "Washington is not engaging in the differential treatment of differently situated entities, but rather the differential treatment of a *product*—retail electricity—based on whether it enters interstate commerce." *Id.* at 42a.

Judge Bress warned that the majority's "flawed" and "far-reaching" treatment of *Tracy* lacks any limiting principle. App., *infra*, 44a. States often "apply some sort of regulatory framework to in-state sales of a product." *Id.* at 43a. If the existence of such regulations makes in-state sales substantially different from out-of-state sales, then States could burden out-of-state sales "without limitation." *Ibid.* That approach to *Tracy* would "swallow the dormant Commerce Clause altogether." *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

The decision below opens a giant loophole in this Court's dormant Commerce Clause decisions. The Climate Commitment Act penalizes utilities for emissions attributable to power that leaves the State but forgives the identical emissions for power consumed at home. Judge Bress correctly observed that such facial discrimination against interstate commerce violates the Commerce Clause unless Ecology can establish that Washington law imposes a roughly equivalent burden on in-state sales. But in the Ninth Circuit's view, Washington can escape constitutional scrutiny under *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997), of any burden (no matter how big) on exported electricity so long as it also imposes a burden (no matter how small) on in-state electricity. That conclusion has no foundation in *Tracy*, a narrow decision holding that state laws do not discriminate against interstate commerce by differentiating among different product markets.

That error warrants immediate review. The Ninth Circuit broke with the Fifth and Sixth Circuits, both of which have refused to read *Tracy* to immunize regulations of public utilities from dormant Commerce Clause scrutiny. The scope of *Tracy* also has internally divided both the Ninth and Sixth Circuits, ensuring that the issue has been analyzed from all angles across multiple opinions. The stakes are high because the decision below hands every State a blueprint for burdening exports of electricity—and of anything else for which it regulates in-state sales. And the consequences of the status quo are dire for the interstate electricity market, which could soon be fractured by States with heated policy disagreements about what climate regulations to adopt and who should foot the bill. This case is an ideal vehicle for clearing up confusion about *Tracy*, resolving the circuit conflict, and reining in abuses that are otherwise sure to follow.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS

The Commerce Clause forbids discrimination based on a product's out-of-state destination. The Climate Commitment Act does just that, awarding no-cost allowances for emissions from generating electricity sold to Washington customers but requiring the purchase of pricey allowances for emissions related to exported electricity. But the Ninth Circuit held that Washington can insulate that discrimination from constitutional scrutiny by imposing different regulatory obligations on in-state power sales. Its decision badly misreads this

Court's decision in *Tracy* and along the way subverts the Commerce Clause's antidiscrimination principle.

A. As Judge Bress explained, PacifiCorp alleged a straightforward dormant Commerce Clause claim under this Court's decisions. App., *infra*, 27a-34a. The Climate Commitment Act's hoarding of no-cost allowances for the generation of power sold to in-state customers facially discriminates against interstate commerce.

1. The Commerce Clause vests in Congress the power "[t]o regulate Commerce * * * among the several States." U.S. Const. Art. I, § 8, cl. 3. This Court has long read that grant to contain a "'negative'" command: Even absent congressional action, States may not "adop[t] protectionist measures" that discriminate against or unduly burden interstate commerce. *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 588 U.S. 504, 514 (2019) (citation omitted). This "antidiscrimination principle" is at the "'very core'" of this Court's "dormant Commerce Clause jurisprudence." *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 369 (2023) (quoting *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 (1997)).

The prohibition on discrimination against interstate commerce generally forbids "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Dep't of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994). That rule protects not only out-of-state competitors but also interstate commerce itself: A State may not "give local consumers an advantage over consumers in other States," *Camps Newfound*, 520 U.S. at 578 (citation omitted), "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Comptroller of Treasury of Maryland* v. *Wynne*, 575 U.S. 542, 549 (2015) (citation omitted), or otherwise "discriminate against an article of commerce by reason of its origin or destination out of State," *C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 390 (1994).

This Court has strictly enforced this rule, repeatedly stressing that "[s]tate laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Camps Newfound*, 520 U.S. at 575 (citations omitted). In *Camps Newfound*, the Court held unconstitutional a Maine law denying a property-tax exemption to charities "'operated principally for the benefit of persons who are not residents of Maine'" because the statute "singl[ed] out" entities serving "mostly in-staters" for "beneficial tax treatment" and "penalize[d]" those that "do a principally interstate business." *Id.* at 568, 576 (citation omitted). And in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), the Court decided that a North Carolina law that taxed corporate stock "only to the degree that its issuing corporation participates in interstate commerce" unconstitutionally discriminated against interstate commerce. *Id.* at 333. *Camps Newfound* and *Fulton Corp.* establish that a State may not penalize businesses for the degree to which they engage in out-of-state transactions.

2. Under this Court's decisions, PacifiCorp plausibly alleged a violation of the Commerce Clause. The Climate Commitment Act "discriminat[es] between transactions on the basis of some interstate element." *Wynne*, 575 U.S. at 549 (citation omitted). And Ecology has not demonstrated that the Clean Energy Transformation Act imposes roughly equal burdens on in-state power.

The Climate Commitment Act "'expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market,'" rewarding utilities "'that serve mostly in-staters'" with no-cost allowances while penalizing utilities "'that do a principally interstate business' by foisting the costs" of buying allowances on them. App., *infra*, 30a (Bress, J., dissenting) (quoting *Camps Newfound*, 520 U.S. at 576). Free allowances are available "in direct proportion to how much electricity [utilities] provide to Washington residents" through a one-to-one match with in-state consumption. *Id.* at 26a (citing Wash. Rev. Code § 70A.65.010(21); Wash. Admin. Code § 173-446-230(2)(f)). Just like the discriminatory laws in *Camps Newfound* and *Fulton Corp.*, the Act "impos[es] costs" because an entity does "out-of-state business" and thus "presumptively violates the dormant Commerce Clause" as a form of facial discrimination against interstate commerce. *Id.* at 30a.

Nothing overcomes that presumption here. "In limited circumstances," discrimination "can be justified 'as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.'" App., *infra*, 31a (Bress, J., dissenting) (quoting *Oregon Waste*, 511 U.S. at 102). The "compensatory tax doctrine" upholds a discriminatory tax on interstate commerce if it is "the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce." *Oregon Waste*, 511 U.S. at 102-103 (citation omitted). Such an imposition must "approximate—but not exceed—the amount of the tax on intrastate commerce." *Ibid.*

Ecology cannot establish on the complaint's face that the obligation to buy allowances is "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 516 U.S. at 331 (citation omitted); see App., *infra*, 34a (Bress, J., dissenting). Nor could Ecology make that showing even after factual development: Although the Clean Energy Transformation Act sets prospective limits on the sources of energy sold within Washington, discrimination as to allowances in the Climate Commitment Act imposes an immense here-and-now burden on the export of power generated within Washington. See App., *infra*, 33a-34a (Bress, J., dissenting). Future decarbonization mandates are not a free pass for States to enact cap-and-trade systems that discriminate in the present day.

B. The Ninth Circuit proceeded down "a very different path." App., *infra*, 35a (Bress, J., dissenting). The majority interpreted this Court's decision in *Tracy* to exempt Washington's cap-and-trade system from the baseline prohibition on discrimination against interstate commerce. *Id.* at 13a. In its view, electricity sold to in-state customers is not "substantially similar" to electricity sold to out-of-state customers because the Clean Energy Transformation Act sets prospective requirements to decarbonize power sold within Washington. *Id.* at 13a-14a. The majority refused on that basis even to consider whether the Climate Commitment Act burdens interstate electricity sales more than the Clean Energy Transformation Act burdens intrastate electricity sales. *Id.* at 15a-16a.

1. The Ninth Circuit was wrong to read *Tracy* as a sweeping exemption from the ordinary dormant Commerce Clause framework. *Tracy* is a narrow decision about differential treatment of in-state and out-of-state businesses that are in different markets—not a license

to immunize States from justifying burdens they place on "the same product sold in the same product market." App., *infra*, 35a (Bress, J., dissenting).

In *Tracy*, this Court rejected a dormant Commerce Clause challenge by out-of-state gas sellers to Ohio's exemption of state-regulated public utilities from its general sales and use taxes. 519 U.S. at 282-283. The Court explained that the out-of-state gas sellers subject to the tax and the public utilities were not "similarly situated" because they "provide[d] different products" and "serve[d] different markets." *Id.* at 298-299. Specifically, the Court identified two markets: a "captive" local market for distributing gas "bundled" with other services to end ratepayers, served exclusively by the regulated in-state public utilities, and a separate, "competitive" interstate market for commercial and industrial users who bought gas wholesale unbundled from those services. *Id.* at 301-302. Because the gas sellers did not compete in the "core" captive market, and because there was no evidence that the exemption affected competition in the peripheral competitive market, the Court concluded that the public utilities were "dissimilar" from the gas sellers, which thus could not state a claim of discrimination against interstate commerce. *Id.* at 302-304.

Since *Tracy*, its "exception" from the dormant Commerce Clause has played a very limited role in this Court's decisions. App., *infra*, 38a (Bress, J., dissenting). The Court has relied on *Tracy* to support the modest proposition that "States and municipalities" engaged in waste disposal are not "'substantially similar'" to "private businesses" that haul trash for profit. *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 342 (2007) (quoting *Tracy*, 519 U.S. at 298). Unlike "a law [that] favors in-state business over out-of-state competition," a law that treats state and municipal entities differently from market participants is unlikely to be the "product of 'simple economic protectionism.'" *Id.* at 343 (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 454 (1992)); see also *Dep't of Revenue of Kentucky* v. *Davis*, 553 U.S. 328, 342-343 (2008) (similar).

This case is worlds away from *Tracy* and *United Haulers*. The electricity that PacifiCorp generates at its Chehalis plant, no matter its destination, remains "in the same product market: retail electricity." App., *infra*, 40a (Bress, J., dissenting). Because "'power is fungible,'" "the exact same electricity is dispatched to either Washington consumers or out-of-state consumers," as demonstrated by PacifiCorp's recent decision to shift power generated at Chehalis to serve in-state consumers and thereby maximize eligibility for no-cost allowances. *Id.* at 44a, 46a (citation omitted); see p. 9, *supra*. And Washington law draws distinctions based on the destination of the electricity, not public ownership of the entities. Cf. *United Haulers*, 550 U.S. at 342-343. Despite the Ninth Circuit's attempts to overcomplicate this case, Washington's discriminatory scheme for favoring in-state retail customers by requiring utilities to buy allowances for emissions associated with exported electricity but not with retail electricity sold in state is "simple economic protectionism." *Id.* at 343 (citation omitted).

2. The Ninth Circuit's rationales for stretching *Tracy* into an immunity for laws that disfavor exported power strike at the heart of the antidiscrimination principle in this Court's dormant Commerce Clause decisions.

First, the majority reasoned that "the retail electric market in the United States is already the type of Balkanized system that the Dormant Commerce Clause in competitive markets serves to guard against" because state utility commissions regulate rates in their respective States. App., *infra*, 6a-7a (quoting *id.* at 69a, and citing *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 395 (1983)). But *Arkansas Electric* and *Tracy* both refute that pro-Balkanization stance. In *Arkansas Electric*, this Court held that "state utility regulation" is not a "special province insulated from [the] general Commerce Clause jurisprudence." 461 U.S. at 391. The Court then reiterated in *Tracy* that state utility regulation is "not, as a constitutional matter, immune from" the "ordinary" framework. 519 U.S. at 291 n.8.

Second, the majority relied on the "regulatory distinctions" in Washington's treatment of entities producing in-state and exported electricity. App., *infra*, 11a. But this Court has repeatedly held unconstitutional discriminatory state laws in industries of pervasive state regulation—including energy. *E.g.*, *Wyoming*, 502 U.S. at 454-459 (requirement that in-state utilities burn in-state coal); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 339 (1982) (restriction on exporting hydroelectric power generated within State); *Maryland* v. *Louisiana*, 451 U.S. 725, 756-760 (1981) (first-use tax on natural gas whose exemptions and credits favored in-state consumption); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596-600 (1923) (law requiring pipeline companies to meet in-state demand before serving out-of-state customers); see also *Oregon Waste*, 511 U.S. at 95 (applying compensatory-tax doctrine even though "Oregon comprehensively regulates the disposal of solid wastes within its borders"). Under the Ninth Circuit's contrary approach, States could "insulat[e]" all manner of "facially discriminatory law[s] from any constitutional scrutiny" just by imposing different (even if less onerous) regulations on intrastate commerce. App., *infra*, 46a (Bress, J., dissenting).

Third, the majority held that "exported power is not similarly situated to utilities providing in-state power" because PacifiCorp "'serve[s] different markets'": the Washington retail market and other States' retail markets. App., *infra*, 15a. But *Tracy* could not possibly mean that products cease to be substantially similar when offered in "different *geographic* markets." *Id.* at 42a (Bress, J., dissenting). Allowing States to discriminate based on geography would "contradict the fundamental logic of the dormant Commerce Clause"—that States cannot "regulate the same product differently based on where it is sold or purchased." *Id.* at 43a (citing *C & A Carbone*, 511 U.S. at 390).

In short, *Tracy* represents a narrow exception for laws that distinguish between entities that do not even compete in the same product market. Yet the Ninth Circuit distorted *Tracy* into a blanket immunity from the dormant Commerce Clause for regulations of public utilities that discriminate against power exports, relieving Ecology of its burden to prove under *Oregon Waste* that the costs imposed on in-state electricity under the Clean Energy Transformation Act offset the costs imposed on exported electricity under the Climate Commitment Act. *Tracy* does not "open such an expansive loophole in [this Court's] carefully confined compensatory tax jurisprudence." *Fulton Corp.*, 516 U.S. at 335 (quoting *Oregon Waste*, 511 U.S. at 105 n.8).

II. THE DECISION BELOW CREATES A CIRCUIT CONFLICT

The Ninth Circuit stands alone in its misguided overreading of *Tracy*. The decision below is directly at odds with decisions from the Fifth and Sixth Circuits, which have refused to interpret *Tracy* as broadly immunizing public-utility regulations from Commerce Clause scrutiny. Only this Court's intervention could resolve the conflict.

A. The Fifth and Sixth Circuits correctly limit *Tracy*'s reach to cases involving different products in different markets and treat entities providing similar products as substantially similar even if they are subject to different regulatory schemes.

1. In *NextEra Energy Capital Holdings, Inc.* v. *Lake*, 48 F.4th 306 (5th Cir. 2022), cert. denied, 144 S. Ct. 485 (2023) (No. 22-601), the Fifth Circuit considered a Texas law restricting the building and operation of new electricity transmission lines to entities that already have facilities in the State. *Id.* at 314. The out-of-state competitor advanced a clear-cut dormant Commerce Clause claim that the law facially discriminated against entities without existing "contacts with the local economy." *Id.* at 324 (quoting *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980)). In response, Texas sought to evade scrutiny altogether on the theory that its "regulation of the interstate transmission market enjoys immunity from the Commerce Clause" under *Tracy*. *Id.* at 318.

The Fifth Circuit rejected Texas's "broad reading" of *Tracy*. *NextEra*, 48 F.4th at 320. As it stressed, *Tracy* disavowed any intent to render utilities "immune from ordinary Commerce Clause jurisprudence." *Id.* at

318 (quoting *Tracy*, 519 U.S. at 291 n.8) (alteration omitted). *Tracy* instead dealt with a law that "operated in two different retail markets." *Id.* at 319. Texas's law did not present the same "dilemma": Both the favored entities with in-state presence and the disfavored out-of-state entrants "offer the same services: building, operating, and owning transmission lines." *Ibid.* Because the two groups did not "'provide different products' * * * when it comes to transmission," they were similarly situated. *Id.* at 320 (quoting *Tracy*, 519 U.S. at 298-299).

Both the majority and the dissent in the Fifth Circuit recognized that "Texas has an interest in promoting reliable electricity service, including the power to approve the siting and construction of transmission lines." *NextEra*, 48 F.4th at 320; *id.* at 329 (Elrod, J., concurring in part and dissenting in part). But in the majority's view, Texas could advance that interest only in an attempt to justify the discrimination, not to prevent the court from even "answering the threshold dormant Commerce Clause question" whether the law discriminated against interstate commerce. *Id.* at 320.

2. The Sixth Circuit reached a similar result in *Energy Michigan, Inc.* v. *Michigan Public Service Commission*, 126 F.4th 476 (6th Cir. 2025), which concerned a Michigan requirement that entities providing electricity to end users "procure some amount of [their] capacity" from within the State. *Id.* at 484. The court concluded that the regulations facially discriminated against interstate commerce by "reserv[ing] a segment of [Michigan's] electricity market for Michigan electricity to the exclusion of [electricity] generated in other states." *Id.* at 490.

The Sixth Circuit emphatically rejected Michigan's effort to insulate geographic discrimination from scrutiny under *Tracy*. *Energy Michigan*, 126 F.4th at 492-499. *Tracy* stands for the "more modest proposition that Commerce Clause discrimination presupposes discrimination between two similar entities or articles of commerce." *Id.* at 496. Public utilities and gas resellers were not comparable in Ohio's natural-gas market, which "consisted of two distinct (but related) markets." *Id.* at 493. Like the Fifth Circuit, the Sixth Circuit concluded that "[l]imiting *Tracy* to its unique factual setting makes good sense" to avoid "licens[ing] blatant economic protectionism." *Id.* at 497 (citing *NextEra*, 48 F.4th at 320).

On that understanding, the Sixth Circuit held that *Tracy* was no obstacle to the dormant Commerce Clause challenge. The Michigan law did not distinguish between types of market participants—there, public utilities and alternative energy suppliers. *Energy Michigan*, 126 F.4th at 494. Instead, Michigan law discriminated "on a geographic basis," preferring electricity generated within the State. *Id.* at 493-494. That "factual distinction ma[de] all the difference" under *Tracy*: Because the in-state and out-of-state capacity were "interchangeable on a national grid," they "qualif[ied]" as similarly situated and triggered the dormant Commerce Clause. *Id.* at 494.

Judge Boggs dissented on the ground that Michigan's geographic-preference rule was "exempt from constitutional scrutiny" under *Tracy*. *Energy Michigan*, 126 F.4th at 502. In his view, Michigan law had created "fragmented markets" for retail electricity in which the State could impose its requirement that all suppliers obtain electricity locally. *Id.* at 503-504. He read *Tracy* as a broad license to steer clear of "the intricate area of energy regulation." *Id.* at 505.

3. Others have interpreted *Tracy* the same way as the Fifth and Sixth Circuits. In *American Trucking Associations, Inc.* v. *Rhode Island Turnpike & Bridge Authority*, 123 F.4th 27 (1st Cir. 2024), the First Circuit explained that entities are not similarly situated under *Tracy* when they sell "different products to different consumer markets" and rejected a claim that Rhode Island discriminated against "out-of-state tractor-trailers in favor of in-state single-unit trucks" absent evidence that the two competed with each other. *Id.* at 38. And in *LSP Transmission Holdings II, LLC* v. *Huston*, 131 F.4th 566 (7th Cir. 2025), Judge Scudder agreed that *Tracy* applies only when "companies provide different products in different markets and would continue to do so even if the alleged discriminatory burden on interstate commerce were removed." *Id.* at 593 (dissenting opinion); see *id.* at 576 (majority opinion) (rejecting claim for lack of standing without reaching merits under *Tracy*).

B. The Ninth Circuit's approach to *Tracy* squarely conflicts with *NextEra* and *Energy Michigan*. Both the Fifth and Sixth Circuits understand *Tracy* to create a narrow exception to dormant Commerce Clause principles for laws that distinguish among entities that compete in "distinct (but related) markets." *Energy Michigan*, 126 F.4th at 493; see *NextEra*, 48 F.4th at 319. Judge Bress likewise read *Tracy* to apply only to "market participants that do not compete with each other in the same product market." App., *infra*, 35a (dissenting opinion). But the Ninth Circuit rejected such a focus on "whether PacifiCorp produces the same product, specifically electricity, for in-state and out-of-state consumers." *Id.* at 11a. Its decision is irreconcilable with *NextEra* and *Energy Michigan*.

In the Fifth and Sixth Circuits, PacifiCorp would have stated a claim of facial discrimination against interstate commerce. *Energy Michigan* is an especially good parallel. There, the Sixth Circuit held that Michigan had to satisfy strict scrutiny to justify its discrimination based on the "geographic origins" of electricity by favoring "local electrical capacity" over out-of-state capacity. 126 F.4th at 493. Here, the Ninth Circuit held that Washington could avoid any review of its discrimination based on the geographic *destination* of electricity by awarding no-cost allowances to power that remains within Washington and requiring PacifiCorp to buy allowances for the same power if it leaves Washington. App., *infra*, 14a-15a. Nothing in *Tracy* explains those incompatible conclusions.

Instead of asking whether Washington law discriminated within the same product market or differentiated between different product markets, the Ninth Circuit relied exclusively on the "regulatory distinctions between the treatment of entities that produce in-state electricity and exported electricity." App., *infra*, 11a. That interpretation of *Tracy* would have flipped the result in both *NextEra* and *Energy Michigan*. Entities with an in-state presence would not be similarly situated in the transmission market to new entrants, which are not currently subject to Texas's "local control over what is inherently a local business." *NextEra*, 48 F.4th at 329 (Elrod, J., concurring in part and dissenting in part) (citation omitted). And in-state generation would not be similarly situated to out-of-state generation, which Michigan deemed less reliable in its highly regulated retail electricity market. *Energy Michigan*, 126 F.4th at 504 (Boggs, J., dissenting).

All told, the Ninth Circuit alone holds that discrimination against interstate commerce makes the out-of-state activity no longer similarly situated to the in-state activity. That interpretation of *Tracy* turns the dormant Commerce Clause on its head.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The decision below could "swallow the dormant Commerce Clause altogether." App., *infra*, 24a (Bress, J., dissenting). It clears a path for States to bypass that Clause's antidiscrimination principle while enacting protectionist laws that favor their own consumers at the expense of interstate commerce. That outcome undermines the constitutional design and threatens major destabilizing effects for the interstate economy—particularly in the energy sector. This Court's prompt review is necessary to restore the Commerce Clause's promise of a national economy free from discriminatory state laws.

A. The decision below is a roadmap for States to undercut the "national market for competition undisturbed by preferential advantages conferred by a State upon its residents" that this Court has long understood the Commerce Clause to safeguard. *Tracy*, 519 U.S. at 299. Under the Ninth Circuit's approach, "[a]ll a state must do to escape dormant Commerce Clause scrutiny is apply some sort of regulatory framework to in-state sales of a product," use that regulatory scheme to paint the in-state and out-of-state sales as not similarly situated, and then burden out-of-state sales "without limitation." App., *infra*, 43a (Bress, J., dissenting); accord *Energy Michigan*, 126 F.4th at 498. That green light for discrimination against interstate commerce unsettles the "very structure of the Constitution, which 'was framed upon the theory that the peoples of the several States must sink or swim together.'" *Pork Producers*, 598 U.S. at 370 (brackets and citation omitted).

The implications of the Ninth Circuit's decision are particularly stark for the interstate electricity market. "[A]lmost all electricity" flows through regional grids that make up "'a part of a vast pool of energy that is constantly moving in interstate commerce,' linking producers and users across the country." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (citation omitted). Given that interconnectivity, this Court has observed that "uncontrolled regulation by the States" of energy "can patently interfere with broader national interests." *Arkansas Electric*, 461 U.S. at 377.

Washington will not have the last word with its discriminatory cap-and-trade system. Under the Ninth Circuit's interpretation of *Tracy*, "nothing would stop other states with decarbonization mandates from imposing their own discriminatory taxes on exported electricity without any dormant Commerce Clause review." App., *infra*, 44a (Bress, J., dissenting). The decision below surely will not escape the notice of California, which already has a cap-and-trade program, Cal. Code Regs. tit. 17, § 95800 *et seq.*, and Oregon, which may soon be weighing legislative proposals for one, VanderHart, *'Prosperity Council' Wish List for Gov. Tina Kotek*, Oregon Public Broadcasting (June 25, 2026), tinyurl.com/bd6wfrm5.

The costs of discriminatory provisions that limit free allowances to in-state consumption in cap-and-trade systems must be borne by someone—either by other States' consumers or by energy producers who are penalized for exporting power to out-of-state customers. Attempts by States to externalize the cost of their climate regulations onto other States would destabilize the interstate flow of electricity and potentially trigger precisely the sort of "'economic Balkanization'" and "'retaliatory acts [by] other States'" that this Court has repeatedly intervened to prevent. App., *infra*, 44a (Bress, J., dissenting) (quoting *Camps Newfound*, 520 U.S. at 577). That state of affairs would undermine the Constitution's text and structure, which preserve "[e]ach State's equal dignity and sovereignty" by preventing States from resorting to "traditional diplomatic and military tools," such as measures against imports and exports. *Franchise Tax Board of California* v. *Hyatt*, 587 U.S. 230, 245 (2019).

Recognizing the importance of preserving a national electricity market free of state protectionism, the past two Administrations have objected to attempts to overread *Tracy*. The United States first went on record for a challenge to a Minnesota right-of-first-refusal law that allegedly gave preferential treatment to in-state electric transmission owners. In its amicus brief, the United States rejected the view that *Tracy* "establish[es] a categorical rule shielding all electricity-related regulation from dormant Commerce Clause scrutiny," stressing that *Tracy* must be read against the "background" of this Court's decisions repeatedly "invalidat[ing] state electricity regulations that discriminated against or burdened interstate commerce." U.S. Br. at 11-12, *LSP Transmission Holdings, LLC* v. *Sieben*, 954 F.3d 1018

(8th Cir. 2020) (No. 18-2559). Ultimately, the Eighth Circuit did not "decide whether *Tracy* is applicable" because the state law was not discriminatory under a "full dormant Commerce Clause analysis." 954 F.3d at 1027.

The United States forcefully reiterated its position when this Court called for the views of the Solicitor General three Terms ago after Texas sought certiorari in *NextEra*. The United States endorsed the Fifth Circuit's interpretation of *Tracy*, which dealt with a law "that applie[d] with equal force" to two different markets and "does not insulate" laws that "restric[t] only a single market" from "ordinary Commerce Clause principles." U.S. Br. at 14-16, *NextEra*, *supra* (No. 22-601) (formatting omitted). At the time, "no court of appeals" had "adopted [Texas's] expansive view of *Tracy*." *Id.* at 18. The Ninth Circuit has now taken that very step, misinterpreting *Tracy* and creating a circuit split in the process.

B. This case is an ideal vehicle to resolve whether the Ninth Circuit correctly departed from the Fifth and Sixth Circuits. Last year, Ecology successfully opposed review of a similar question presented on the ground that an earlier decision was "unpublished and ha[d] no precedential value, even within the Ninth Circuit." Br. in Opp. at 25-26, *Invenergy Thermal LLC* v. *Sixkiller*, 146 S. Ct. 94 (2025) (No. 24-1027). Ecology now has a published yet divided opinion in hand that fully ventilates the issues and cements the Ninth Circuit's view that *Tracy* immunizes its discriminatory cap-and-trade system from review under the dormant Commerce Clause. Little could be gained at this point from further percolation.

PacifiCorp's experience under the Climate Commitment Act also vividly illustrates the stakes of the Ninth

Circuit's failure to faithfully apply this Court's dormant Commerce Clause precedents. For 2024 alone, PacifiCorp estimated that its cost of compliance with the Act would nearly reach $48 million before accounting for no-cost allowances, which Ecology made available only to the extent that PacifiCorp sold the electricity within Washington. App., *infra*, 27a (Bress, J., dissenting); see *id.* at 85a-86a. PacifiCorp must spend tens of millions of dollars on allowances to account for each year's out-of-state electricity sales—costs that it to date has been prohibited from passing through to its customers. *Id.* at 54a.

These onerous costs forced PacifiCorp this year to reallocate all the power it generates at the Chehalis plant away from out-of-state customers and toward Washington customers. App., *infra*, 27a (Bress, J., dissenting). That outcome, like none other, reveals the consequences of making no-cost allowances available only for emissions generated by power that is consumed inside Washington. Such discrimination unsettles expectations in past investments in facilities to serve out-of-state customers. And it may deter future investments in generation that could economically serve multiple States but that make no business sense for intrastate commerce alone. As a result, this case perfectly epitomizes why this Court has interpreted the Commerce Clause to prevent States from "discourag[ing]" firms "from plying their trades in interstate commerce." *Fulton Corp.*, 516 U.S. at 333.

This Court's prompt intervention is necessary to stop Washington's discriminatory cap-and-trade system from landing a major blow against interstate commerce. Washington law requires PacifiCorp to surrender its remaining allowances for the first compliance period to Ecology by November 1, 2027. Wash. Admin. Code § 173-446-600(4). Without a decision this Term, PacifiCorp could be forced to hand over allowances worth tens of millions of dollars for emissions related to exported electricity from 2023 to 2026. Sovereign immunity may then shield Ecology from efforts to recoup allowances that the State collected wrongfully through discrimination against PacifiCorp's selling electricity outside of Washington. See *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974). To facilitate this Court's ability to resolve this case before the end of the Term, PacifiCorp has moved expeditiously to file this petition within a month of the Ninth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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