No. 22-601

In the Supreme Court of the United States

PETER LAKE, CHAIRMAN, PUBLIC UTILITY COMMISSION OF TEXAS, ET AL., PETITIONERS

v.

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a Texas law providing that only incumbent electric utilities with an existing in-state presence may construct new transmission lines for use in the interstate power grid discriminates against out-of-state economic interests for purposes of analysis under the Commerce Clause.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

In 2019, the Texas legislature enacted a law restricting which entities may construct or operate electric transmission lines that connect to the interstate power grid. See Pet. App. 9a-10a. Under that law, only incumbent electric companies with an existing in-state presence may build transmission lines; companies without an existing presence in Texas are not permitted to compete for transmission-line projects. *Ibid.* The district court dismissed a Commerce Clause challenge to the

law, concluding that it does not impermissibly discriminate against interstate commerce. *Id.* at 46a-63a. The court of appeals reversed and remanded for further proceedings, holding that the law's local-presence requirement discriminates against interstate commerce but that further proceedings are necessary to determine, *inter alia*, whether state interests justify that discriminatory treatment. *Id.* at 1a-45a.

1. The electric power system consists of three components: the generation of electricity at power plants and other facilities; the transmission of electricity over long distances on high-voltage lines; and the distribution of electricity to retail users on low-voltage lines. See Office of Enforcement, Federal Energy Regulatory Commission (FERC), Department of Energy, *Energy Primer: A Handbook of Energy Market Basics* 47 (Apr. 2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf. Originally, "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems," *New York* v. *FERC*, 535 U.S. 1, 5 (2002), and the sale of electricity was regulated only by state agencies. This Court held in 1927, however, that the Commerce Clause bars the States from regulating certain interstate electricity transactions, such as a wholesale sale of power (*i.e.*, a sale for resale) across state lines. See *id.* at 6 (citing *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927)).

Congress responded to the *Attleboro* decision by enacting the Federal Power Act (FPA), ch. 687, Tit. II, 49 Stat. 847 (16 U.S.C. 791a *et seq.*). As subsequently amended, the FPA grants FERC jurisdiction over the rates, terms, and conditions of service for the trans-

mission and sale at wholesale of electric energy in interstate commerce. See 16 U.S.C. 824(a)-(b). The FPA also explicitly preserves certain areas of state authority, including "over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1); see 16 U.S.C. 824(c).

"Since the FPA's passage, electricity has increasingly become a competitive interstate business." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (*EPSA*). Today, "almost all electricity flows not through 'the local power networks of the past,' but instead through an interconnected 'grid' of near-nationwide scope." *Ibid.* (citation omitted). In order to "break down regulatory and economic barriers that hinder a free market in wholesale electricity" and "reduce technical inefficiencies caused when different utilities operate different portions of the grid independently," FERC has encouraged the owners of electric generation and transmission facilities to form voluntary non-profit entities that operate non-discriminatory wholesale markets on a regional basis. *Morgan Stanley Capital Group Inc.* v. *Public Utility District No. 1 of Snohomish County*, 554 U.S. 527, 536-537 (2008); see 16 U.S.C. 824a(a). Each operator of a wholesale market "administers a portion of the grid, providing generators with access to transmission lines and ensuring that the network conducts electricity reliably." *EPSA*, 577 U.S. at 268.

2. This case concerns Texas's regulation of the construction, operation, and ownership of transmission facilities in parts of the State covered by two such interstate wholesale-market operators—the Midcontinent Independent System Operator (MISO) and the Southwest Power Pool (SPP). Pet. App. 8a-9a.

In February 2018, MISO proposed building a new 500-kilovolt transmission facility in East Texas that would connect to existing facilities in Texas owned by Entergy Texas, Inc., a vertically integrated utility that participates in MISO's wholesale market. See Compl. ¶¶ 82, 87. Known as the Hartburg-Sabine Junction Transmission Project, the planned line was intended to address congestion on MISO's existing interstate transmission network, and would be paid for by customers across multiple States. Compl. ¶¶ 51-52; see Pet. App. 11a. Following a competitive selection process, MISO chose respondent NextEra to construct and operate the new facility in November 2018, concluding that NextEra's proposal was superior to proposals submitted by other companies, including an Entergy affiliate. Compl. ¶¶ 83, 87.[1] Before it could begin construction, however, NextEra was required to obtain a Certificate of Convenience and Necessity from the Public Utility Commission of Texas (PUCT). Pet. App. 11a; Compl. ¶¶ 20, 84.

Separately, in 2017, NextEra entered into an agreement to acquire 30 miles of transmission-line facilities (the Jackson-Overton Line) in a different area of East Texas that is covered by the SPP. Compl. ¶ 10; see Pet. App. 11a-12a. Like the proposed construction of the Hartburg-Sabine Project, NextEra's proposed acquisition of the Jackson-Overton Line required PUCT approval. Pet. App. 12a.

In 2019, the Texas legislature passed Senate Bill (S.B.) 1938, amending the Texas Utilities Code to provide that a Certificate of Convenience and Necessity to build, operate, or own a transmission line "that directly [connects] with an existing electric utility facility * * *

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[1] For simplicity, this brief treats affiliated plaintiff-respondents as a single entity, and refers to them as NextEra.

may be granted only to the owner of that existing facility." Tex. Util. Code § 37.056(e) (West Supp. 2022); S.B. 1938, 2019 Leg., 86(R) Sess. (Tex. 2019); see Pet. App. 9a-10a. If the owner of the existing facility chooses not to undertake the project, it may "designate another electric utility that is currently certificated by [PUCT] within the same electric power region * * * to build" the new line. Tex. Util. Code § 37.056(g) (West Supp. 2022). But a company that does not currently operate in Texas—and thus has not been certificated by PUCT to operate in the relevant region—cannot receive a Certificate of Convenience and Necessity to build, operate, or acquire a transmission line. See Pet. App. 10a.

Because NextEra is an out-of-state company that lacks an existing physical presence in Texas, S.B. 1938 barred PUCT from granting it the authorization needed to build, operate, or acquire transmission lines in the State, including the Hartburg-Sabine Project and the Jackson-Overton Line. Pet. App. 11a-12a. NextEra therefore brought this suit against petitioners—the PUCT Commissioners—in the United States District Court for the Western District of Texas, contending, *inter alia*, that S.B. 1938 discriminates against interstate commerce in violation of the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. See Pet. App. 12a.

3. The district court dismissed NextEra's claims. Pet. App. 46a-63a. It first concluded that Texas is entitled to give preference to in-state utility monopolies under this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997). Pet. App. 57a-58a. The district court then concluded that, in any event, "granting incumbent transmission-line providers the right of first refusal" with respect to the construction of new transmission lines "does not discriminate against out-of-state

providers" because "most incumbent providers in Texas are owned by out-of-state companies, and SB 1938 allows out-of-state providers a means to enter the Texas market for transmission services by buying a Texas utility." *Id.* at 58a. Finally, the court concluded that under the balancing test that this Court adopted in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), "any burden on interstate commerce is outweighed by the benefits of" S.B. 1938. Pet. App. 61a.[2]

4. The court of appeals reversed in a divided opinion. Pet. App. 1a-45a.

The court of appeals first rejected petitioners' argument that under *Tracy*, Texas is free to impose restrictions on out-of-state entities in order to benefit vertically integrated in-state utilities. See Pet. App. 18a-23a. The court explained that while the law in *Tracy* applied primarily to a non-competitive market for retail sales of natural gas over which Congress had given the States "exclusive authority," S.B. 1938 is directed to competitive "interstate transmission markets" in electricity over which the States do not have exclusive regulatory power. *Id.* at 20a. Accordingly, the court determined that S.B. 1938 "is not immune from Commerce Clause scrutiny." *Id.* at 21a.

Applying ordinary Commerce Clause principles, the court of appeals then determined that S.B. 1938 discriminates on its face against interstate commerce. Pet. App. 23a-35a. The court explained that this Court has repeatedly held unconstitutional local-presence requirements that "[r]equir[e] boots on the ground," *id.*

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[2] The district court also dismissed NextEra's claim under the Contracts Clause, U.S. Const. Art. I, § 10, Cl. 1. See Pet. App. 61a-62a. The court of appeals affirmed that aspect of the district court's decision, see *id.* at 37a-40a, and it is not at issue in this Court.

at 31a, or that "discriminate[] among affected business entities according to the extent of their contacts with the local economy," without regard to whether the in-state entities that the laws protect are incorporated in another State. *Id.* at 29a (quoting *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980)). Accordingly, the court of appeals found it immaterial that "most of the in-state incumbents" that S.B. 1938 "protects are incorporated outside Texas," explaining that "what matters instead is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas." *Id.* at 25a, 29a.

The court of appeals held that it was premature to address petitioners' claim that S.B. 1938 is nevertheless necessary to "promote[] the safety and reliability of the electricity grid." Pet. App. 34a. The court explained that petitioners would be free to present evidence about those justifications at summary judgment or trial, but that the mere proffer of such justifications was not sufficient to warrant dismissal of NextEra's claims at the pleading stage. *Ibid.*

Finally, the court of appeals also held that NextEra is entitled to present evidence showing that S.B. 1938 was adopted for a discriminatory purpose, would lead to discriminatory effects, or would impose burdens on commerce that are "clearly excessive in relation to the putative local benefits." Pet. App. 35a (quoting *Pike*, 397 U.S. at 142). The court explained that such evidence could establish a Commerce Clause violation even if the law did not discriminate against interstate commerce on its face. See *id.* at 35a-37a.

Judge Elrod dissented in part. Pet. App. 40a-45a. She did not accept petitioners' argument that *Tracy*

categorically insulates S.B. 1938 from ordinary Commerce Clause review and agreed with the majority that NextEra is entitled to a remand in order to pursue its discriminatory-purpose, discriminatory-effect, and *Pike* claims. See *id.* at 41a-42a. But Judge Elrod would have rejected the claim that S.B. 1938 discriminates against interstate commerce on its face, instead espousing the view that it "draws a neutral distinction between entities based on incumbency status." *Id.* at 42a (emphasis omitted).

DISCUSSION

The court of appeals correctly determined that S.B. 1938 discriminates against interstate commerce by prohibiting any company without an existing in-state presence from competing in the market for the construction and operation of electric transmission facilities that would be part of the interstate transmission grid. Petitioners briefly argue (Pet. 12-13) that S.B. 1938 is not discriminatory because it also imposes restrictions on some in-state entities, but this Court has repeatedly rejected materially identical arguments. See, *e.g.*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951). Petitioners therefore rely primarily (Pet. 13-23) on a distinct argument that Texas has *carte blanche* to protect in-state utility monopolies from out-of-state competitors under this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997). That argument, too, is incorrect. *Tracy* reflected Congress's longstanding deference to States in the regulation and taxation of retail natural-gas sales. See *id.* at 304-305 & n.13. But Congress has not provided for any such deference in connection with the interstate market for transmission of electricity to wholesale customers or the interstate

market for constructing and operating electric transmission facilities.

Petitioners identify no court of appeals that has applied *Tracy* in the expansive manner that they urge. And while petitioners do identify one appellate decision concluding that a law similar in some respects to S.B. 1938 did not impermissibly discriminate against interstate commerce, any shallow conflict over the validity of such a law does not warrant review at this time. In any event, this case would not be a suitable vehicle for review because the case is presently in an interlocutory posture, is subject to justiciability questions that have not been addressed by the lower courts, and could be affected by rulemaking proceedings currently pending before FERC. The petition for a writ of certiorari should accordingly be denied.

A. The Decision Below Is Correct

The court of appeals correctly determined that S.B. 1938 discriminates on its face against interstate commerce. Petitioners' contrary arguments lack merit.

1. S.B. 1938 discriminates against interstate commerce by imposing a local-presence requirement

a. "Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm* v. *Heald*, 544 U.S. 460, 472 (2005) (citation omitted). "Today, th[at] antidiscrimination principle lies at the 'very core' of [this Court's] dormant Commerce Clause jurisprudence." *National Pork Producers Council* v. *Ross*, 143 S. Ct. 1142, 1153 (2023) (citation omitted). It reflects an understanding "essential to the

foundations of the Union": "The mere fact of nonresidence should not foreclose a [business] in one State from access to markets in other States." *Heald*, 544 U.S. at 472.

S.B. 1938 violates that bedrock rule. As the court of appeals observed, the law "bar[s] companies from competing in MISO or SPP territory unless they already own[] a transmission facility in Texas." Pet. App. 9a. That "restrictive in-state presence requirement * * * discriminates against out-of-state" transmission companies, flouting this Court's consistent "admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Heald*, 544 U.S. at 475 (citation omitted); see, *e.g.*, *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2474 (2019) (observing that a "2-year residency requirement discriminates on its face against nonresidents"); *C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 394 (1994) ("State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities."); *Dean Milk Co.*, 340 U.S. at 354 (holding that a law requiring that any pasteurized milk sold in Madison, Wisconsin, be processed within five miles of the city's center "plainly discriminates against interstate commerce").

b. Petitioners offer several responses, but none has merit.

First, petitioners contend (Pet. 12) that S.B. 1938 does not discriminate against interstate commerce because it "does not mention geography." That is incorrect. The law accords preferential treatment to "the owner of the existing facility" to which a new transmission line would connect or (if that company declines) another

entity that is already "certificated by [PUCT] within the same electric power region." Tex. Util. Code §§ 37.056(e) and (g), 37.154(a) (West Supp. 2022). Both the "existing facility" and the "electric power region" within which it is located have set geographic locations—and those locations are necessarily within Texas's borders. So while S.B. 1938 itself does not speak explicitly in terms of in-state and out-of-state entities, "it just so happens that in order to" satisfy the law's requirements, "a [transmission operator] must have a [pre-existing] physical presence in the State." *Heald*, 544 U.S. at 474. That "discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism" with which this Court's dormant Commerce Clause precedents are concerned. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980).

Second, petitioners argue that S.B. 1938 "draws a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state." Pet. 12 (quoting *LSP Transmission Holdings, LLC* v. *Sieben*, 954 F.3d 1018, 1027 (8th Cir. 2020), cert. denied, 141 S. Ct. 1510 (2021)). That ignores the fact that S.B. 1938 gives preferential treatment to *all* in-state utilities already "certificated by [PUCT] within the same electric power region," Tex. Util. Code §§ 37.056(g), 37.154(a) (West Supp. 2022), not just the owner of the facility to which a proposed transmission facility would connect. And in any event, this Court has repeatedly held that a state or local government's discrimination against out-of-state entities remains objectionable even when it discriminates against some disfavored in-state interests, too. See, *e.g.*, *C & A Carbone, Inc.*, 511 U.S. at 391 (holding that a law that "allows only

the favored operator to process waste * * * is no less discriminatory because in-state or in-town processors are also covered by the prohibition"); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources*, 504 U.S. 353, 361 (1992) (A State "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."); *Dean Milk Co.*, 340 U.S. at 354 n.4 (observing that in determining whether a local-presence requirement violated the Commerce Clause, "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce").

Petitioners cannot avoid that precedent by characterizing S.B. 1938 as an "incumbency preference." Pet. 26; see Pet. 12, 21, 23-24, 26-28. To be sure, not all restrictions that have the effect of favoring incumbents violate the Commerce Clause. When a State allows businesses to apply for exclusive multi-year licenses, certifications, or contracts, for example, the fact that the winner will hold legal privileges as an incumbent does not raise Commerce Clause concerns so long as "in-state and out-of-state bidders are allowed to compete freely on a level playing field" for the initial award. *Houlton Citizens' Coalition* v. *Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999); cf. *Harvey & Harvey, Inc.* v. *County of Chester*, 68 F.3d 788, 798 (3d Cir. 1995) ("[T]he one-time selection of an in-state interest does not by itself establish a discriminatory effect unless the selection confers an unreasonably long-term benefit."), cert. denied, 516 U.S. 1173 (1996), overruled in part on other grounds as recognized in *Lebanon Farms*

Disposal, Inc. v. *County of Lebanon*, 538 F.3d 241 (3d Cir. 2008).

Here, however, Texas did not allow firms to compete on equal footing for the exclusive rights that S.B. 1938 provides. On the contrary, Texas adopted S.B. 1938 only after "a competitive bidding process" resulted in the selection of a company with no in-state presence—NextEra—to construct a new facility in the State. Pet. App. 11a. Prohibiting competition by an out-of-state entity in that fashion, without first affording it an even-handed opportunity to compete for the "incumbency preference[s]" that petitioners say S.B. 1938 affords, Pet. 26, is just "a more anticompetitive version of the in-state presence requirements held unconstitutional in cases like *Granholm* or *Dean Milk*," Pet. App. 32a.

Third, petitioners contend (Pet. 21) that Texas is free to discriminate against "transmission-only companies" like NextEra because "[t]he dormant Commerce Clause does not prohibit distinctions based on business form." But S.B. 1938 "does not itself make [a] business-form distinction," as "[i]t allows incumbent entities other than vertically integrated utilities, namely electric co-operatives, to compete." Pet. App. 26a n.7. If NextEra already had transmission facilities in the State, its status as a transmission-only company would not have prevented it from undertaking new transmission projects after S.B. 1938's passage; it is only because NextEra lacks such an existing in-state presence that it is unable to build, acquire, or operate transmission facilities in Texas.

Accordingly, the court of appeals correctly determined that NextEra should be able to pursue its claim "that the very terms of SB 1938 discriminate against

interstate commerce" in violation of well-established Commerce Clause principles. Pet. App. 34a.

2. This Court's decision in* Tracy *does not insulate S.B. 1938's local-presence requirement from ordinary Commerce Clause principles

Petitioners separately argue (Pet. 13-23) that under this Court's decision in *Tracy*, *supra*, Texas is free to protect in-state utility monopolies from out-of-state competitors. That argument, too, is incorrect.

a. *Tracy* involved Ohio's differential taxation of certain sales of natural gas. 519 U.S. at 282-283. Under the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, Congress has granted "jurisdiction over companies engaged in the distribution of natural gas exclusively [to] the States." *Tracy*, 519 U.S. at 293 (citation and internal quotation marks omitted); see 15 U.S.C. 717(c). Consistent with that authority, Ohio had long given local utility companies regional monopolies that covered all distribution of natural gas to residential customers in the utilities' respective regions. See *Tracy*, 519 U.S. at 293-297. To control prices, Ohio barred the utilities from charging more than a state-determined "just and reasonable" rate in any of their retail sales, *id.* at 296 (citation omitted), and also exempted their sales from the State's generally applicable sales tax, *id.* at 282. Eventually, Ohio also introduced limited competition by permitting industrial customers to purchase natural gas from either the local utility or an independent, out-of-state gas marketer. *Id.* at 284-285. Out-of-state gas marketers could not sell to residential customers, however, and their sales were not covered by either the State's "just and reasonable" rate regulation or the sales-tax exemption.

General Motors, which had opted to buy natural gas from independent marketers, challenged that arrangement under the Commerce Clause. *Tracy*, 519 U.S. at 287-288. It argued that Ohio's tax law discriminated on its face against interstate competition by exempting sales by local utilities, but not sales by out-of-state marketers. *Ibid.*

This Court rejected the challenge. *Tracy*, 519 U.S. at 297-310. Because the tax exemption for local utilities applied equally in the "captive" market for residential sales and the competitive market for other sales, the Court found it necessary to choose which market to "accord controlling significance." *Id.* at 303. If the "captive" residential market controlled, there was no Commerce Clause violation because the out-of-state marketers did not compete in that market. But if the nonresidential market controlled, the Court might find a violation, because both the utilities and the out-of-state marketers competed in that market, and only the utilities benefited from the exemption. See *ibid.* Concluding that "there [wa]s no *a priori* answer" to that question, the Court decided that on the facts there it was appropriate to "give the greater weight to the captive market and the local utilities' singular role in serving it." *Id.* at 304. Among other things, that choice reflected Congress's traditional deference to the States in the "regulation of retail sales of natural gas," *ibid.*, as well as the significantly larger "size of the captive market," *id.* at 307.

b. As the court of appeals here correctly recognized (Pet. App. 18a-23a), *Tracy* does not exempt S.B. 1938 from ordinary Commerce Clause scrutiny. S.B. 1938 is not a law that applies with equal force to a captive and non-captive market. Instead, as applied in the context

of this case, S.B. 1938 restricts only a single market—the competitive, non-captive market for who can build or operate transmission facilities for the portion of the interstate grid located in Texas. *Id.* at 20a. Thus, whereas in *Tracy* the Court held that the local utilities and out-of-state marketers were not "similarly situated for constitutional purposes" because the utilities had a lawful monopoly in the core market of residential customers, 519 U.S. at 299, here the in-state and out-of-state companies are situated exactly the same with respect to what S.B. 1938 covers: the single market for building and operating interstate electric transmission facilities in Texas.

The contrary arguments offered by petitioners and their supporting intervenor-respondents are unpersuasive. First, petitioners argue (Pet. 15) that as "in *Tracy*, there is a captive market that only the incumbent entities serve in Texas—the retail market." But S.B. 1938 does not regulate the retail market, only the transmission market, and petitioners identify no reason to give controlling significance in the Commerce Clause analysis to a market that S.B. 1938 does not even regulate.

Second, petitioners claim (Pet. 15) that "there is no market in which [the utilities and out-of-state transmission companies] compete." But to the extent that is true, it is because of S.B. 1938 itself, not some independent factor: Prior to the law's passage, for example, NextEra competed (successfully) with Entergy for the opportunity to build the Hartburg-Sabine Project in the region covered by MISO. See Compl. ¶¶ 83, 87. And the fact that S.B. 1938 eliminates out-of-state competition is a reason for striking it down, not for upholding it. See pp. 9-14, *supra*.

Finally, intervenor-respondents—Texas utilities that benefit from S.B. 1938—make a related argument that under *Tracy*, States assertedly are free to establish monopolies for local utilities and thereby exclude all competition. See Southwest Public Service Co. Br. 7-10; Entergy Br. 11-15; see also Reply Br. 2. But *Tracy* stands for no such broad principle. Instead, *Tracy* simply recognized that Congress had given the States authority to create monopolies in the specific context at issue there—retail sales of natural gas. See, *e.g.*, 519 U.S. at 291 (explaining that through the NGA, Congress "clearly recognized the value of such state-regulated monopoly arrangements *for the sale and distribution of natural gas directly to local consumers*") (emphasis added); *id.* at 292 (NGA was intended to "leave[] undisturbed the recognized power of the States to regulate all in-state gas sales *directly to consumers*") (emphasis added); see also 15 U.S.C. 717(c). This case, however, involves the interstate transmission of electricity, and "[u]nlike the congressional decision to give states exclusive authority over retail sales [of natural gas], the Federal Power Act gives general authority over interstate transmission markets to federal regulators." Pet. App. 20a (citation omitted); see 16 U.S.C. 824(a). States thus have no authority to grant monopolies in the interstate electric transmission markets comparable to their authority to grant monopolies in the market for retail distribution of natural gas.

B. The Decision Below Does Not Warrant This Court's Review

The court of appeals' interlocutory decision does not warrant this Court's review.

1. Although petitioners rely primarily on this Court's decision in *Tracy* to argue that the decision

below is incorrect, see Pet. 13-23, they identify no court of appeals that has adopted their expansive view of *Tracy*. Indeed, not even the judge who dissented in part below suggested that *Tracy* insulates S.B. 1938 from ordinary Commerce Clause scrutiny, agreeing that NextEra's claims based on the discriminatory purpose and discriminatory effect of the law should be allowed to proceed. See Pet. App. 41a-42a (Elrod, J., concurring in part and dissenting in part).

Petitioners' assertion of a conflict instead rests (Pet. 23-27) on the Eighth Circuit's decision in *LSP*, *supra*, which upheld a law similar in some respects to S.B. 1938 while declining to "decide whether *Tracy* is applicable," 954 F.3d at 1027. The Minnesota law at issue in *LSP* was less obviously discriminatory than S.B. 1938, however, because it granted preferential treatment only to the owner of the facility to which a new transmission line would connect (not other utilities with in-state operations), and allowed companies with no in-state presence to compete for the project if the existing facility owner declined to build it. See *LSP*, 954 F.3d at 1024; Pet. App. 28a. The Eighth Circuit emphasized that more limited preference in its decision, finding the law permissible because it distinguished "between existing electric transmission owners *whose facilities will connect to a new line* and all other entities, regardless of whether they are in-state or out-of-state." *LSP*, 954 F.3d at 1027 (citation omitted and emphasis added). It is thus possible that the Eighth Circuit would find that S.B. 1938, with its broader preference for other entities with an in-state presence, is impermissibly discriminatory. See pp. 11-12, *supra* (explaining that S.B. 1938 discriminates in favor of all entities with existing electricity operations in the relevant parts of Texas).

Moreover, while the court of appeals here disagreed with some aspects of the Eighth Circuit's reasoning, see Pet. App. 28a-31a, that difference in analytical approach does not warrant this Court's review. Petitioners observe (Reply Br. 6) that a handful of other States have adopted right-of-first-refusal laws in recent years, but they identify no cases other than this one and *LSP* in which courts have evaluated the permissibility of such laws under the Commerce Clause. Even if the constitutionality of such a law might someday warrant this Court's review, further percolation in the lower courts is warranted before this Court intervenes.

2. Petitioners also briefly contend (Pet. 27-28) that the decision below conflicts with the Fourth Circuit's decision in *Colon Health Centers of America, LLC* v. *Hazel*, 813 F.3d 145 (2016). That contention is incorrect.

Colon Health Centers involved a challenge to a Virginia law requiring all medical providers to obtain a certificate of need (CON) before building or expanding operations in the State. 813 F.3d at 149. The parties were "in agreement that Virginia's CON law is not facially discriminatory," *id.* at 152, but the challengers presented statistical evidence purporting to show that "entities that have previously completed projects in the state" were granted approval at a higher rate, *id.* at 154 (citation and internal quotation marks omitted). See Appellants' Br. at 55-56, *Colon Health Centers*, *supra* (No. 14-2283). The Fourth Circuit found that evidence insufficient to establish that Virginia was discriminating against out-of-state entities, explaining that "incumbency bias *in this context* is not a surrogate for the 'negative impact on interstate commerce' with which the dormant Commerce Clause is concerned." 813 F.3d at 154 (emphasis added; brackets and citation omitted).

As the court of appeals recognized in this case, Pet. App. 32a n.11, *Colon Health Centers* does not support petitioners' claim. The Fourth Circuit made its statement about "'incumbency bias'" in the course of "explaining why an expert report concluding that incumbent medical providers were more successful in the facially neutral process for obtaining certificates" did not establish that the law discriminated against interstate commerce in its purpose or effects. *Ibid.* Here, in contrast, S.B. 1938 by its terms bars entities that lack an existing presence in Texas from constructing, operating, or owning transmission facilities in the State. NextEra's claim is thus not that, as a practical matter, out-of-state entities are selected less often than experienced incumbents, but that, as a legal matter, out-of-state entities cannot be selected at all.

3. In any event, even if the question presented otherwise warranted the Court's attention, this petition presents a poor vehicle for review.

a. To start, the interlocutory posture of the case "furnishe[s] sufficient ground for the denial" of certiorari here. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to the district court "is not yet ripe for review by this Court"). Even the partial dissent below agreed that NextEra should have the opportunity to present "evidence of discriminatory purpose or discriminatory effect" as well as evidence supporting its claim under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), and that remand was therefore warranted at least for that purpose. Pet. App. 44a (Elrod, J., concurring in part and dissenting in part); see *id.* at

35a-36a (majority opinion). If the evidence at summary judgment or trial establishes a violation of the Commerce Clause under one of those other theories, the question whether S.B. 1938 "discriminate[s] against interstate commerce on its face" (Pet. 12) may become irrelevant. And if it does not, petitioners would be free to seek this Court's review of the facial discrimination claim after final judgment, at which point this Court would have the advantage of a full evidentiary record. See *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting denial of certiorari) (explaining that immediate review was not warranted where a "discriminatory purpose claim" raised in the case "[wa]s in an interlocutory posture, having been remanded for further consideration").

b. Remand proceedings will also give the lower courts an opportunity to address whether this case continues to present a justiciable controversy in light of intervening developments.

As the parties have acknowledged, both undertakings proposed by NextEra that originally gave rise to this case have since been cancelled. See Pet. 8 n.4; Br. in Opp. 14 n.4. NextEra terminated the purchase agreement for the Jackson-Overton Line in 2020, after being unable to obtain the necessary PUCT certification. See Order Granting Withdrawal and Dismissing Application 1-2, PUCT Docket No. 48071, Item No. 104 (July 31, 2020).[3] And in January 2023, several months after the court of appeals' decision, MISO filed a notice with FERC seeking cancellation of the agreement under which NextEra had been selected to construct the Hartburg-Sabine Project, based on delays caused by S.B.

[3] https://interchange.puc.texas.gov/Documents/48071_104_1078348.PDF.

1938. See *Midcontinent Independent System Operator, Inc.*, 182 FERC ¶ 61,175, at 4 (2023) ("[E]ven if [S.B. 1938] is eventually struck down, modified, or repealed, NextEra will not be able to meet the * * * June 2023 in-service date for Hartburg-Sabine."), modified on reh'g, 184 FERC ¶ 61,020 (2023). Over NextEra's objection, FERC approved the MISO-requested cancellation in March 2023. *Id.* at 1, 26-31.

Those developments have not rendered the case clearly moot, but they do raise justiciability questions that would be best addressed by the lower courts in the first instance. First, NextEra has filed a petition for review of FERC's order approving cancellation of the Hartburg-Sabine Project. *NextEra Energy Transmission Midwest, LLC* v. *FERC*, No. 23-1180 (D.C. Cir.) (filed July 14, 2023); see 8/22/2023 Order, *NextEra Energy Transmission Midwest, LLC*, *supra* (No. 23-1180) (holding case in abeyance pending resolution of the present certiorari petition). On remand, the lower courts will be able to evaluate whether that challenge means that the dispute over S.B. 1938's application to the project remains live. And second, NextEra has suggested that even if there is no longer a live dispute about application of S.B. 1938 to an existing project, NextEra's challenge to S.B. 1938 is not moot because the company "intends to pursue other projects in Texas." Br. in Opp. 14 n.4 (citing Compl. ¶¶ 6-10). Apart from cursory statements about NextEra's future intent in its brief and complaint, however, the present record does not appear to contain any evidence indicating that such projects are actually forthcoming. The remand proceedings will give NextEra an opportunity to provide, and the lower courts to evaluate, such evidence.

c. Finally, granting interlocutory review at this time would also be unwarranted in light of a pending FERC rulemaking proceeding. Last year, FERC issued a notice of proposed rulemaking that would, *inter alia*, allow federal rights of first refusal for incumbent transmission providers under certain conditions. See FERC, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and General Interconnection*, 87 Fed. Reg. 26,504, 26,564-26,570 (May 4, 2022). The comment period closed in August 2022. See *id.* at 26,504.

The conditional federal right of first refusal contemplated in the proposed rule differs in significant ways from the preferences that S.B. 1938 affords to incumbent utilities in Texas. See 87 Fed. Reg. at 26,565. Nevertheless, if FERC were to adopt the proposed rule (or some alternative) while this case was pending before the Court, that development might require supplemental briefing or otherwise complicate this Court's consideration. Given that possibility, and petitioners' ability to file another petition for a writ of certiorari at a later stage of the case if they do not prevail at final judgment, the most prudent course is to deny review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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