Case No. 20-50160

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED, NEXTERA ENERGY TRANSMISSION, L.L.C., NEXTERA ENERGY TRANSMISSION MIDWEST, L.L.C., LONE STAR TRANSMISSION, L.L.C.; NEXTERA ENERGY TRANSMISSION SOUTHWEST, L.L.C.,

Plaintiffs-Appellants,

v.

COMMISSIONER ARTHUR C. D'ANDREA, Public Utility Commission of Texas, in his official capacity, COMMISSIONER SHELLY BOTKIN, Public Utility Commission of Texas, in her official capacity; CHAIRMAN DEANN T. WALKER, Public Utility Commission of Texas, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

MAKAN DELRAHIM
Assistant Attorney General
MICHAEL F. MURRAY
Deputy Assistant Attorney General
DANIEL E. HAAR
MATTHEW C. MANDELBERG
Attorneys
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 598-2413

Counsel for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

INTEREST OF THE UNITED STATES

The United States has a longstanding interest in promoting and preserving competition in interstate commerce. We demonstrate this interest most commonly by enforcing the federal antitrust laws, which prohibit private conduct that harms competition in interstate commerce. We also further that interest through competition advocacy with state and local governments[1] and by ensuring that courts properly apply the Supreme Court's dormant Commerce Clause doctrine, which prohibits states from "unduly restrict[ing] interstate commerce" or "adopt[ing] protectionist measures." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). We filed a statement of interest before the district court below, ROA.2884-2905, and we file this brief, pursuant to Fed. R. App. P. 29(a), to promote sound dormant Commerce Clause analysis.

[1] For example, in a letter to the Texas legislature, the Antitrust Division of the U.S. Department of Justice opposed Texas Senate Bill 1938 (2019), the bill at issue here, because the bill could reduce competition, harm consumers, and interfere with interstate commerce. ROA.98-104.

STATEMENT OF THE ISSUE

Whether the district court properly dismissed a dormant Commerce Clause challenge to a Texas statute that gives electric transmission owners with an in-state presence exclusive rights to build transmission lines that connect to their existing facilities or to transfer those rights.

STATEMENT OF THE CASE

On February 27, 2020, the district court dismissed with prejudice the complaint of NextEra Energy Capital Holdings, Inc. and its affiliates ("NextEra") that Texas Senate Bill 1938 (2019) ("S.B. 1938") violates the dormant Commerce Clause.[2] NextEra appeals that decision.

A. Regulatory Background

Electric utility service consists of three distinct services: (1) generation of electricity; (2) transmission of electricity from generation facilities to load centers; and (3) distribution of electricity to consumers. Since the 1980s and 1990s, the idea that electric utilities are natural monopolies began to unravel, and federal legislation and regulation opened U.S. wholesale electricity markets to more competition. *See*

[2] This Statement does not address the Plaintiffs' Contracts Clause claim.

Morgan Stanley Capital Grp. v. Pub. Utility Dist. No. 1, 554 U.S. 527, 535-37 (2008) (describing technical and regulatory developments in the electric utility industry). Over this period, regulators realized that a fundamental impediment to competition in the generation sector was that "the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms to emerging competitors." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 50 (D.C. Cir. 2014). Consequently, FERC unbundled wholesale generation and transmission services to provide competitive electricity generators with non-discriminatory access to the electricity grid. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, at 21,552 (Apr. 24, 1996). FERC also promoted the use of independent system operators or regional transmission organizations to coordinate planning, operation, and use of regional and interregional transmission systems in competitive markets for wholesale power. Regional Transmission Organizations, 65 Fed. Reg. 810, at 811 (Dec. 20, 1999).

Prior to 2011, electric utilities in Regional Transmission Organizations were given federal rights of first refusal ("ROFRs") to

construct transmission lines that were located in their service territories and would connect to their on-site facilities. Consistent with the broader competition reform effort, in 2011, FERC eliminated federal ROFRs from FERC-jurisdictional tariffs and agreements, finding that they restricted competition, were not just and reasonable, and created the potential for undue discrimination and preferential treatment. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61,051, 2011 WL 2956837 (July 21, 2011) ("Order 1000"). Two courts of appeals have upheld Order 1000 as a valid exercise of FERC's authority, acknowledging the anticompetitive effect of ROFRs FERC had thereby eliminated. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016) (ROFRs "create[] a potential for higher rates to consumers of electricity than if competition to create transmission facilities in transmission companies' service areas was allowed"); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 74 (D.C. Cir. 2014) ("rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry").

Order 1000 also left in place any state authority (or lack thereof) regarding the construction of new transmission facilities, including as it

pertains to a ROFR or similar restriction. Order 1000 ¶ 287 (not "intend[ing] to limit, preempt, or otherwise affect state or local laws or regulations").[3] *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61,037 at ¶ 61,195 (Comm'r Bay, concurring) (noting that a court might find that state rights of first refusal "run afoul of the dormant commerce clause.").

Under Order 1000, and before S.B. 1938's passage, nonlocal entities could develop new transmission facilities. For example, the Public Utility Commission of Texas ("PUCT") could authorize transmission development and service by "transmission-only utilities without a service area anywhere in Texas." *Joint Petition of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order*, 341 P.U.R.4th 195, 2017 WL 5068379, at *12 (Oct. 26, 2017) [hereinafter PUCT Declaratory Order] (citing *Pub. Util. Comm'n of Tex. v. Cities of Harlingen*, 311 S.W.3d 610,

[3] The Supreme Court has made clear with respect to the Federal Power Act (16 U.S.C. § 824) that declining to preempt state law, without more, does not authorize states to violate the dormant Commerce Clause. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) ("[our] decisions have uniformly subjected [dormant] Commerce Clause cases implicating the Federal Power Act to scrutiny on the merits").

620-21 (Tex. App. 2010)) (addressing PUCT's authority dating back before 2009).

On May 16, 2019, the Texas legislature enacted S.B. 1938, now codified in Texas Utilities Code §§ 37.051-154. It changed Texas law so that the ability to build, own, or operate new transmission facilities "may be granted only to the owner of [an] existing facility" that directly interconnects to the new facility. Tex. Util. Code § 37.056(e). S.B. 1938 also provides the owner of an interconnecting facility the option to "designate another electric utility that is currently certificated by the commission" to build, own, or operate new transmission facilities. Tex. Util. Code § 37.056(g). In addition, PUCT has jurisdiction to grant a certificate only within Texas, so section 37.056(g) as modified permits designations only to utilities with a preexisting physical presence within Texas. S.B. 1938 allows one avenue for a transmission developer to enter the Texas market without an in-state presence. The PUCT may approve a qualified company not previously certificated if it acquires or obtains a controlling interest in an existing local utility. *See* Tex. Util. Code §§ 37.154(a), 39.262(l)-(o), 39.915.

S.B. 1938 is more restrictive than ROFRs adopted in recent years by some other states. In particular, S.B. 1938 grants to the local company with on-site facilities exclusive rights that are not time-limited. *Contra* Minn. Stat. § 216B.246, subdiv. 3(a) (the ROFR must be exercised within 90 days of a line's approval); Neb. Rev. Stat. Ann. § 70-1028(1) (same); 17 Okla. Stat. Ann. § 293(A) (same); S.D. Codified Laws § 49-32-20 (same). And S.B. 1938 is an outlier in granting the on-site company the authority to designate its replacement if it decides not to exercise its exclusive rights, and it is an outlier in preventing designations to out-of-state entities. *Contra* Minn. Stat. § 216B.246, subdiv. 3(b) (on-site company does not designate replacement; out-of-state developers not expressly prevented); Neb. Rev. Stat. Ann. § 70-1028(1) (same); 17 Okla. Stat. Ann. § 293(B) (same); S.D. Codified Laws § 49-32-20 (same).

B. Factual and Procedural Background

The Midcontinent Independent System Operator ("MISO") is a regional transmission organization approved by FERC to administer an electric transmission grid across fifteen states including portions of East Texas. In its 2017 MISO Transmission Expansion Plan, MISO designated the Hartburg – Sabine Junction 500kV Economic Project

("Hartburg-Sabine") in East Texas as a "market efficiency project" to relieve congestion in the region. *NextEra Energy Transmission Midwest, LLC*, 166 FERC ¶ 61,169, at P 3 (2019). FERC Order 1000 requires a comparison of competing proposals before awarding projects, like Hartburg-Sabine, that offer regional benefits and are subject to regional cost allocation. Order 1000 at PP 321, 326, 328, 330, 336. Accordingly, through an extensive "Comparative Analysis Process," MISO solicited and reviewed competing proposals to develop Hartburg-Sabine. *See* ROA.319-321, .408-413 (MISO Selection Report's evaluation process).

In 2018, NEET Midwest, a nonlocal subsidiary of NextEra with a principal place of business in Florida, prevailed over eleven local and nonlocal competitors to develop Hartburg-Sabine because it offered an "outstanding combination of low cost and high value, with best-in-class cost and design, best-in-class project implementation plans, and top-tier plans for operations and maintenance." ROA.303 (MISO Selection Report). NEET Midwest's proposal has an estimated benefit-to-cost ratio of 2.20, "which is well above the MISO estimated ratio [for Hartburg-Sabine] of 1.35," ROA.322, and well above the proposal with the lowest ratio of 1.37, ROA.306. NEET Midwest also offered "cost caps and cost

containment measures [that will] enhance cost certainty and convey substantial benefits to ratepayers over time." ROA.307.

The passage of S.B. 1938 threatens to preclude NEET Midwest from obtaining the necessary certificates in Texas to proceed with development because it lacks the requisite in-state presence. NextEra, therefore, filed a complaint alleging S.B. 1938 is unconstitutional and should not be enforced. ROA.55-60.

The defendants moved to dismiss the complaint for failure to state a claim. On February 22, 2020, the district court ruled that "S.B. 1938 does not violate the Commerce Clause" and dismissed NextEra's complaint. ROA.3034. As relevant here, the court held that under *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (*Tracy*), "the Supreme Court grants controlling weight to the monopoly market" and that "is also the market in Texas." ROA.3031. The court also found that S.B. 1938 "does not discriminate against out-of-state providers." ROA.3032. The court further determined that under the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), "*any* burden on interstate commerce is outweighed by the benefits of SB1938." ROA.3034 (emphasis added).

This appeal followed.

SUMMARY OF ARGUMENT

The district court made three analytical errors in its decision, warranting vacatur and remand for a revised analysis on the motions to dismiss. *First*, the district court erred in its evaluation of discrimination. The district court improperly distinguished binding Supreme Court precedent articulating principles of "ordinary Commerce Clause jurisprudence," *Tracy*, 519 U.S. at 291 n.8, failed to consider in-state physical presence requirements that are "viewed with particular suspicion," *Granholm v. Heald*, 544 U.S. 460, 475 (2005), and afforded improper significance to the location of a utility's parent company as opposed to whether discrimination was occurring "on the basis of some interstate element," *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015). *Second*, the district court misread and misapplied *Tracy*. *Tracy* does not control this case because S.B. 1938 does not apply to a "noncompetitive, captive market in which the local utilities alone operate." *Tracy*, 519 U.S. at 303-04. Moreover, the unique factors and concerns for utility markets that determined the outcome in *Tracy* are not present here and were not evaluated by the district court below.

Third, the district court erred when it failed to weigh whether any of the alleged burdens from S.B. 1938 substantially outweigh the law's putative benefits, as required under *Pike*.

ARGUMENT

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, gives Congress the power to regulate interstate commerce, and the Supreme Court has interpreted the Clause to contain as well the negative implication—also known as the "dormant Commerce Clause"—which "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Wynne*, 135 S. Ct. at 1794. The U.S. Supreme Court reaffirmed in 2019, in a seven-to-two decision, that the dormant Commerce Clause is "deeply rooted in our case law" and represents "the primary safeguard against state protectionism." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460-61 (2019) (*Tenn. Wine*).

NextEra alleges that S.B. 1938 runs afoul of the dormant Commerce Clause's prohibitions against "States . . . discriminating against or imposing excessive burdens on interstate commerce," *Wynne*,

135 S. Ct. at 1794, because it restricts who can develop electric transmission to those with a preexisting physical presence in the state.

The district court's decision rejecting that claim should be vacated because the court did not properly apply key dormant Commerce Clause precedents on what constitutes discrimination, on how the dormant Commerce Clause applies to local utilities, and on what constitutes an undue burden.[4] On remand, the district court should reexamine the complaint and the motions to dismiss applying the correct principles.

I. The District Court's Analysis of Discrimination Was Flawed.

The dormant Commerce Clause bars states from discriminating between "substantially similar entities," *Gen. Motors Corp. v. Tracy*,

[4] We note that the Eight Circuit recently issued a decision, in *LSP v. Sieben*, No. 18-2559, 2020 WL 1443533 (8th Cir. Mar. 25, 2020), upholding a district court's dismissal of a dormant Commerce Clause challenge to a Minnesota electricity ROFR law. Even if *LSP* were correctly decided, its analysis is inapplicable here. In analyzing both discriminatory effect and undue burden, the court of appeals stressed that, under the challenged Minnesota law, if the "incumbent owner chooses not to exercise its ROFR, for whatever reason, then other entities, including [the plaintiff], can seek approval and gain transmission facilities in Minnesota." Slip op. at 16; *see also id.* at 18 (making similar point in undue burden analysis). As discussed above, *see supra* pp. 6-7, however, this feature is not present in S.B. 1938: if the incumbent does not wish to build the transmission line it can only designate another utility in Texas that may do so.

519 U.S. 278, 298 (1997), "on the basis of some interstate element," *Wynne*, 135 S. Ct. at 1794. A state law runs afoul of the dormant Commerce Clause if it discriminates against interstate commerce on its face or if it has a discriminatory effect. *Id.* The Supreme Court has described this test as "a virtually *per se* rule of invalidity," *Granholm v. Heald*, 544 U.S. at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), upholding discriminatory regulations only if the "nondiscriminatory alternatives will prove unworkable," *id.* at 493. The district court made several errors in applying these principles.

1. First, in dismissing NextEra's claim of discrimination, the district court erred in concluding it could distinguish Supreme Court precedent on discrimination as inapplicable, in particular "*Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, *Granholm*, *and C & A Carbone, Inc.*," because they "involve the flow of goods in interstate commerce or burdensome requirements as a precondition for allowing the flow of goods in interstate commerce." ROA.3031. The district court distinguished these cases because S.B. 1938 "regulates only the construction and operation of transmission lines and facilities within Texas" and "does not purport to regulate the transmission of electricity

in interstate commerce." ROA.3031. This distinction and dismissal of the U.S. Supreme Court's dormant Commerce Clause jurisprudence is inconsistent with Supreme Court jurisprudence.

The district court's focus on "the flow of goods" (such as "transmission of electricity") rather than services (such as "construction and operation of transmission lines and facilities") cannot be squared with the Supreme Court's dormant Commerce Clause jurisprudence aimed at "preserv[ing] a national market for goods *and services*." *Tenn. Wine*, 139 S. Ct. at 2459 (emphasis added); *see also C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 391 (1994) ("the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."). In *Camps Newfound/Owatonna*, the Supreme Court emphasized how it has "long noted the applicability of our dormant Commerce Clause jurisprudence to service industries." *Camps Newfound/Owatonna v. Town of Harrison, Me.*, 520 U.S. 564, 577 n.10 (1997); *see also id.* at 572-574 (rejecting argument that the dormant Commerce Clause did not apply to camp services). As *Carbone* explained, with respect to services, "the essential vice in laws of this sort" is not that they disrupt the flow of a good (there, waste), but "that

they bar the import of the processing service" by would-be out-of-state servicers. 511 U.S. at 392. Likewise, *Tenn. Wine* addressed a state law that imposed durational residency requirements that restricted who could be involved in the sale of alcohol in the state, not whether that alcohol could flow in interstate commerce. Similarly, S.B. 1938 restricts out-of-state entities from providing the service of constructing and owning transmission lines.

Indeed, S.B. 1938 is more connected to the flow of interstate commerce than the laws in *Camps Newfound/Owatonna*, *Carbone*, or *Tennessee Wine* because the high-voltage transmission lines at issue here are instrumentalities of interstate commerce and part of the MISO-administered interstate electricity grid. As such, S.B. 1938 may affect the degree to which transmission of electricity is likely to flow at all: S.B. 1938 and ROFR laws like it ultimately create "little incentive to explore the need for a new transmission facility." *MISO*

Transmission Owners v. FERC, 819 F.3d 329, 333 (7th Cir. 2016) (Posner).

2. Second, the district court erroneously focused on whether Texas' law discriminates on the basis of a company's state of incorporation or headquarters. As the Supreme Court's decisions show, impermissible discrimination "on the basis of some interstate element," *Wynne*, 135 S. Ct. at 1794, includes discrimination based on facts other than a parent company's location of incorporation or headquarters. Specifically, an "in-state presence requirement," *Heald*, 544 U.S. at 475, also can discriminate against interstate commerce.

In *Heald*, the Supreme Court found that conditioning access to a local market on having physical assets in the state raises comparable concerns as requiring that "[a] 'firm become a resident to compete on equal terms.'" 544 U.S. at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)). Such laws may merit "particular suspicion" when business operations "could more efficiently be performed" without the in-state presence requirement. *Id.* Thus, a New York statute was discriminatory because it permitted out-of-state

entities to ship directly to in-state customers only if they established an unnecessary in-state brick-and-mortar distribution operation, including a branch office and warehouse. *Id.* at 474-76; *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42, (1980) ("discriminat[ing] among affected business entities according to the extent of their contacts with the local economy" is "local favoritism or protectionism that significantly alters [a law's] Commerce Clause status").

Similarly, the Fifth Circuit has explained that "discriminat[ion] among similarly situated business entities according to their contact with the local state economy" can constitute a "discriminatory effect" in violation of the dormant Commerce Clause. *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 223 n.28 (5th Cir. 2019) (citing *Lewis*, 447 U.S. 27).

The district court did not adequately account for these Supreme Court and Fifth Circuit decisions. Instead, the district court narrowed the dormant Commerce Clause's scope as if it protected against discrimination only if that discrimination were on the basis of a parent company's place of incorporation or headquarters. Thus, the district

court erred in finding that S.B. 1938 is saved 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." ROA.3032.

Similar to the laws in *Heald* and *Lewis*, however, S.B. 1938 discriminates against wholly out-of-state companies (in other words, on the basis of those companies' contacts with the local economy) in two ways. First, it restricts access to only owners of local facilities and acquirers of entire local utilities to build out transmission facilities. Second, S.B. 1938 discriminates against wholly out-of-state entities through limitations on a local owner's option to transfer its rights to develop new transmission to a designee. Because a potential designee needs a physical presence in Texas to have a PUCT certificate, the law restricts transfers to companies outside of Texas. The district court failed to consider whether either sort of discrimination implicated the dormant Commerce Clause.

3. The Supreme Court also has explained that the same dormant Commerce Clause concerns are present when a state law discriminates

in favor of companies with a *local* presence to the detriment of nonlocal in-state companies as well as out-of-state ones. For instance, the Supreme Court has found unconstitutional discrimination in a city ordinance that required that milk sold in a city be pasteurized within five miles of a city line, *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), in a state statute that effectively segmented the market in waste management along Michigan county lines, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Res.*, 504 U.S. 353 (1992), and in a town ordinance requiring that solid waste processed or handled in a town be processed or handled at the town's designated transfer station, *C & A Carbone, Inc. v. Town of Clarkstown*, *N.Y.*, 511 U.S. 383 (1994). *See also Camps Newfound / Owatonna*, 520 U.S. at 573 ("Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (internal quotations omitted).

Similar to these measures, S.B. 1938 discriminates in favor of companies with a local physical presence. S.B. 1938 restricts who can build, own, or operate new transmission to local entities—only the owner(s) of any existing facility that directly interconnects with the new

project are given that privilege. Tex. Util. Code § 37.056(e). The district court ignored, however, that by allowing only owners of local facilities to build transmission facilities S.B. 1938 discriminates against companies without a local presence.

II. The District Court Misread and Misapplied *General Motors Corp. v. Tracy*.

According to the district court, "under *Tracy*, the Supreme Court grants controlling weight to the monopoly market, which is also the market in Texas." ROA.3031. This reading, however, does not align with the holding or reasoning of *Tracy*. Rather, *Tracy* builds from the premise that "utilities should not be insulated from our contemporary dormant Commerce Clause jurisprudence by formalistic judge-made rules." *Tracy*, 519 U.S. at 291 n.8. That premise cannot be squared with the district court's categorical grant of controlling weight to the monopoly market. *Tracy*, contrary to the district court's approach, turned on case-specific factors not present here.

At issue in *Tracy* was an Ohio sales tax exemption that applied to natural gas sales by local distribution utilities, but not to sales by independent marketers of natural gas, which competed to serve mainly

large industrial customers. Because the utilities' tax exemption applied with equal force in the captive (i.e., non-competitive) market in which only the utilities operated and in the non-captive (i.e., competitive) market in which there was a possibility of competition among utilities and non-utilities, the Court had to choose which market to give controlling weight in its analysis.

Here, however, the district court did not confront a law that applies with equal force to a captive and non-captive market—a significant, material distinction from the Ohio tax law in *Tracy*. S.B. 1938 restricts only who can build, own, or operate new transmission facilities in Texas—i.e., it applies only to a noncaptive market where local utilities and nonlocal companies can compete. S.B. 1938 does not also apply directly to a "noncompetitive, captive market in which the local utilities alone operate." *Tracy*, 519 U.S. at 303-04. *Tracy*, therefore, does not control the outcome here.

Even when *Tracy* applies, the decision does not categorically shield energy-related regulation from dormant Commerce Clause scrutiny. The Supreme Court has invalidated state regulations that discriminated against or burdened interstate commerce in markets different from, but

adjacent to, retail electricity. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (holding that a state law violated the dormant Commerce Clause because it required in-state electricity generators to use a certain amount of coal mined in-state); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (holding that a state law unconstitutionally required an electric utility to obtain the state utility commission's permission before conveying electricity out-of-state). Given these precedents, which *Tracy* did not purport to touch, *Tracy* cannot be reasonably read to create a broad dormant Commerce Clause exception for public utilities.

Rather, when a state law applies to both a captive and a noncaptive market, *Tracy* acknowledged there is "no *a priori* answer" to the question of which market receives controlling weight. *Tracy*, 519 U.S. at 304. *Tracy*'s analysis was driven by the concern that "any decision to treat the [utilities] as similar to the interstate marketers . . . could affect the [utilities'] ability to continue to serve the captive market [i.e., residential and small-business customers] where there is no such competition." *Id.* at 307. This analysis was cautious because "the record before th[e] Court [in *Tracy*] reveal[ed] virtually nothing about the details of th[e]

competitive market." *Id.* at 302. Against concerns that the Court might "imperil the delivery by regulated [utilities] of bundled gas to the noncompetitive captive market," *id.* at 304, *Tracy* weighed merely a "possibility of competition" between utilities and non-utilities, *id.* at 302.

Here, the district court below did not address the case-specific factors that "for present purposes" in *Tracy* gave priority to the captive utility market. *Id.* at 304. Rather, the district court determined (on a motion to dismiss) that similar concerns about imperiled delivery exist here merely because state regulations impose service obligations upon utilities. ROA.3031-3032. States, however, generally impose service obligations on utilities. By deeming those obligations sufficient to give controlling weight to a utility market, the district court effectively created the very public utility exception that *Tracy* sought to avoid. Compounding that error, the district court did not inquire whether comparable, relevant service obligations could be imposed on a transmission developer seeking to enter the Texas market. The district court also did not weigh how here, unlike in *Tracy*, there is actual competition in the burdened market between utilities and non-utilities, as evidenced by the Hartburg-Sabine project.

More fundamentally, because many state electric markets operate without a ROFR or similar law, it is difficult to argue that those states have jeopardized the capacity of their utilities to serve retail markets; this comparative experience, moreover, gives courts ample evidence from which to analyze claims of discrimination. There are in fact compelling reasons to believe that competition in transmission development produces important benefits for retail consumers, including on the facts alleged. For example, the Hartburg-Sabine project won by NextEra is a market efficiency project organized by MISO to reduce congestion in the Sabine/Port Arthur area. *NextEra Energy Transmission Midwest, LLC*, 166 FERC ¶ 61,169 at P 4 (2019). FERC developed these regional planning processes because it recognized that local utility monopolies do not always have incentives to develop these projects independently, Order 1000, P 254, and accordingly MISO solicits competition to encourage higher quality and lower cost proposals that bring lower electricity prices for consumers. Consistent with that goal, the estimated market benefit-to-cost ratio for NextEra's winning proposal (2.20) is almost twice what MISO estimated initially (1.35) when MISO selected Hartburg-Sabine as a market efficiency project. Selection Report at 21.

The district court should reconsider its analysis based on a proper reading of *Tracy*.

III. The District Court Failed to Perform a Proper *Pike* Balancing Analysis.

Even when a state law is not discriminatory, it can violate the dormant Commerce Clause if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). "If a legitimate local purpose is found," its significance will depend on "whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Though "[s]tate laws frequently survive this *Pike* scrutiny," that is "not always [the outcome], as in *Pike* itself." *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 at 339 (2008) (internal citations omitted); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 643-46 (1982) (finding excessive burden under the *Pike* test); *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 678-79 (1981) (plurality opinion) (same); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978) (same). Here, the entry barriers on interstate commerce alleged by NextEra could exceed the type at issue in *Pike*, but the district court

failed to account for this factual possibility in rejecting NextEra's complaint at the motion to dismiss stage.

In the statute at issue in *Pike*, all cantaloupes grown in Arizona and offered for sale had to "meet certain standards of wholesomeness and quality, and . . . be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not 'materially misrepresent' the quality of the lot as a whole." *Pike*, 397 U.S. at 142-43. The plaintiff in *Pike*, an Arizona cantaloupe grower, had been shipping uncrated cantaloupe to out-of-state packers. To comply with the state law, the grower would have had to "build and operate an unneeded $200,000 packing plant in the State." *Id.* at 145. Even though the state law may not have had an "express or concealed purpose" to discriminate and did "not impose such rigidity on an entire industry," the Supreme Court found the "incidental consequence" of Arizona's law on the plaintiff to be a constitutionally excessive burden. *Id.* at 145-46.

Texas S.B. 1938 potentially could be more burdensome because NextEra alleges it is effectively foreclosed from entering the Texas market, whereas in *Pike*, the plaintiff faced a $200,000 hurdle in the form of an unnecessary packing facility that could be justified with sufficiently

high profits from its "exceptionally high quality" cantaloupes. *Id.* at 144. Here, a company cannot build, own, or operate a new transmission line in Texas unless it has a direct interconnection or a certificate within Texas or it purchases an entire utility with such an interconnection or certificate.

This kind of burden would fall not only on disfavored out-of-state companies, but also on consumers who experience the law's anticompetitive effects. As a result of less competition, the incentives to identify new transmission projects and to develop high-quality, low-cost proposals through interstate planning can be reduced. *See, e.g.*, *MISO Transmission Owners*, 819 F.3d at 332-33 ("[B]y 2011 FERC was convinced that competition . . . to build transmission facilities" would produce benefits like "a low bidder" and "incentive to explore the need for a new transmission facility"). With less robust transmission, both in-state and out-of-state consumers may have reduced access to lower cost and more reliable generation. *See, e.g.*, *id.* at 332 (a well-developed regional transmission system can "promote[] competition among the producers of electrical power"). In addition, the higher cost of Texas transmission lines may be passed on both to in-state and out-of-state

consumers under the regional cost-allocation process. *See* Order 1000 at P 622 (explaining cost allocation mechanism). As the Supreme Court has recognized, both in-state and out-of-state consumers can be victims of dormant Commerce Clause violations. *See, e.g., Tracy*, 519 U.S. at 286 (granting Article III standing to "[c]onsumers who suffer this sort of injury").

Instead of duly considering these burdens, the district court conclusorily granted Texas' motion to dismiss on the ground that "*any* burden on interstate commerce is outweighed by the benefits of [S.B.] 1938." ROA.3034 (emphasis added). This was error. *See Raymond Motor Transp. Inc.*, 434 U.S. at 443 (declining to end the *Pike* test "without a weighing of the asserted safety purpose against the degree of interference with interstate commerce."). At the motion-to-dismiss stage, the district court should not have resolved disputed issues of fact against NextEra. *See United Transp. Union v. Foster*, 205 F.3d 851, 863 (5th Cir. 2000) (remanding to district court question of whether an undue burden was imposed on interstate commerce because of "an empty record"). Compounding that error, the district court pointed only to the state's generalized interest in enacting legislation "relating to the health, life,

and safety of their citizens." ROA.3034. *See Kassel*, 450 U.S. at 670 (plurality opinion) ("[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack."). In fact, these generalized interests are often implicated in dormant Commerce Clause cases, including on a *Pike* balancing claim. *E.g.*, *United Transp. Union*, 205 F.3d at 863 (5th Cir. 2000) (implicating railroad safety); *see also Kassel*, 450 U.S. at 671 (plurality opinion) (implicating highway safety); *Raymond Motor Transportation, Inc.*, 434 U.S. at 442 (same). Without specifying the benefits and burdens of the law and weighing them against one another, the district court could effectively render the *Pike* test a toothless formality. *See Wal-Mart Stores*, 945 F.3d at 222 n. 27 ("In the absence of controlling authority, we will not exempt an entire category of laws from the *Pike* test.").

CONCLUSION

For the forgoing reasons, this Court should vacate the district court's judgment and remand for a reevaluation of the motion to dismiss.

Respectfully Submitted,

/s/ Matthew C. Mandelberg

MAKAN DELRAHIM
Assistant Attorney General

MICHAEL F. MURRAY
Deputy Assistant Attorney General

DANIEL E. HAAR
MATTHEW C. MANDELBERG
Attorneys
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 598-2413

Counsel for the United States of America

April 1, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 5501 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Microsoft Office Word 2019 using 14-point New Century Schoolbook, a proportionally spaced typeface.

/s/ Matthew C. Mandelberg
Attorney for the United States

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matthew C. Mandelberg
Attorney for the United States

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 02, 2020

Mr. Matthew C. Mandelberg
U.S. Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

No. 20-50160 NextEra Energy Capital Holding, et al v. Ken Paxton, et al
USDC No. 1:19-CV-626

Dear Mr. Mandelberg,

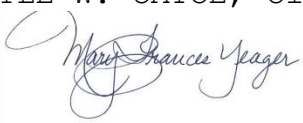
The following pertains to your brief electronically filed on April 1, 2020.

Caption on the brief does not agree with the caption of the case in compliance with FED. R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below)

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc: Ms. Lisa Bennett
Mr. Evan Matthew Ezray
Mr. John Richard Hulme
Mr. Michael F. Murray
Mr. Pascual Armando Oliu
Mr. Stuart H. Singer
Mr. Jeffrey Mark Tillotson

Case No. 20-50160

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED; NEXTERA ENERGY TRANSMISSION, L.L.C.; NEXTERA ENERGY TRANSMISSION MIDWEST, L.L.C.; LONE STAR TRANSMISSION, L.L.C.; NEXTERA ENERGY TRANSMISSION SOUTHWEST, L.L.C.,

Plaintiffs - Appellants - Appellees

v.

COMMISSIONER ARTHUR C. D'ANDREA, Public Utility Commission of Texas, in his official capacity; COMMISSIONER SHELLY BOTKIN, Public Utility Commission of Texas, in her official capacity; CHAIRMAN DEANN T. WALKER, Public Utility Commission of Texas, in her official capacity,

Defendants - Appellees