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 – 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.

On Appeal from the United States District Court
for the Western District of Texas, Civil No. 1:19-cv-00626-LY

AMICUS BRIEF OF THE LOWER COLORADO RIVER AUTHORITY SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The Lower Colorado River Authority (LCRA) was created as a conservation and reclamation district by an act of the 43rd Legislature (now found at Chapter 8503, Texas Special District Local Laws Code) having all powers, rights, privileges and functions conferred on it therein and by general law upon any district created pursuant to Article 16, section 59 of the Texas Constitution. LCRA created LCRA Transmission Services Corporation, which is a Texas non-profit corporation wholly owned by LCRA, pursuant to Section 152.051(a) of the Texas Water Code to be responsible for its electric transmission operations.

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INTEREST OF AMICUS CURIAE

The Lower Colorado River Authority (LCRA) is a non-profit conservation and reclamation district and political subdivision created by the Texas Legislature in 1934. LCRA plays a key role in generating and delivering reliable, low-cost wholesale energy to more than 30 retail utilities in Texas, including municipally owned utilities and electric cooperatives. LCRA conducts its electric transmission business through LCRA Transmission Services Corporation (LCRA TSC), a wholly owned nonprofit corporation and instrumentality of LCRA created under Chapter 152 of the Texas Water Code. LCRA TSC holds a certificate from the Public Utility Commission of Texas (PUCT) to build, own, and operate transmission facilities and is a registered Transmission Operator with the Electric Reliability Council of Texas (ERCOT). LCRA TSC currently owns and operates more than 4,500 circuit miles of transmission lines in ERCOT.

As a Transmission Service Provider and wholesale energy supplier in ERCOT, LCRA has a direct interest in preserving the transmission project designation framework that was recently codified by Texas Senate Bill (SB) 1938. When portions of the ERCOT electric market were previously unbundled and opened to retail competition in 1999, the Texas Legislature intentionally carved out the electric service areas of public power utilities, who retained jurisdiction and

authority over their retail rates and the right to remain vertically integrated. *See generally* Tex. Util. Code §§ 39.002, 39.192, 40.001-.104, 41.001-.104. In other words, the public power utilities in ERCOT maintain the responsibility for generating or purchasing electric power at wholesale, managing delivery across the transmission and distribution grids, and serving as retail providers for the captive customers within their designated service areas.

SB 1938 is consistent with that historical compromise and represents the continued recognition of the autonomy of public power utilities to plan, construct, and operate their systems in a manner that best serves their local constituencies within ERCOT. Specifically, SB 1938 enshrines the right of public power utilities to own and operate the power delivery systems that directly serve their communities, and to partner with other qualified service providers as needed to develop and maintain a safe and reliable electric system. Tex. Util. Code § 37.056(e)-(g).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), LCRA certifies that no party authored this brief in whole or in part, and no party, party's counsel, or other person other than LCRA contributed money that was intended to fund preparing or submitting the brief.

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a)(2) with the consent of all parties.

STATEMENT OF THE ISSUE

Whether Texas Senate Bill (SB) 1938 is a constitutionally permissible state regulation on intrastate commerce as it applies within the Electric Reliability Council of Texas (ERCOT) region.

SUMMARY OF THE ARGUMENT

In purporting to challenge the facial validity of Texas Senate Bill (SB) 1938 under the dormant Commerce Clause, Appellants rely solely on the law's application to "interstate transmission projects." App.'s Br. at 29. Such a facial challenge cannot succeed unless Appellants can establish that "no set of circumstances exists under which the Act would be valid." *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 444 (9th Cir. 2019) (citing *Salerno* in construing facial challenge under dormant Commerce Clause). But, as Appellants acknowledge, the Electric Reliability Council of Texas (ERCOT) transmission grid is "wholly within Texas and not part of an interstate ISO." App's Br. at 17. Thus, the challenged provisions of SB 1938, as they apply within the ERCOT region of Texas, constitute a valid exercise of intrastate regulation, and Appellants' claims under the dormant Commerce Clause fail.

ARGUMENT

> In its electrical grid, as in so many things, Texas stands alone. While all the other states in the Union have extensive interconnections with neighboring states, nearly 90% of Texas is covered by a single isolated grid.

Texas v. U.S. EPA, 829 F.3d 405, 431 (5th Cir. 2016).

As this Court has previously acknowledged, and the record in this case demonstrates, the interconnected ERCOT transmission system is uniquely isolated from the interstate transmission network and "serves only intrastate needs." *Brazos Elec. Power Co-op., Inc. v. Sw. Power Admin.*, 819 F.2d 537, 540 (5th Cir. 1987); *see* App.'s Br. at 10 (citing ROA.33). Accordingly, the generation, transmission, distribution, and consumption of energy within ERCOT is an inherently local and intrastate business. The State's regulation of this wholly intrastate and local business does not implicate the dormant Commerce Clause.

A. The dormant Commerce Clause does not bar a State from regulating intrastate commerce.

It is well established that a State is free to regulate commerce that is intrastate in nature. *See Eli Lilly & Co. v. Sav-On-Drugs Inc.*, 366 U.S. 276, 279 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211 (1944); *Ry. Express Agency, Inc. v. Virginia*, 282 U.S. 440, 444 (1931); *Kansas City Structural Steel Co. v. Arkansas*, 269 U.S. 148, 152 (1925); *see also Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 434 (state's regulation of activities taking place exclusively

within state's borders does not implicate the dormant Commerce Clause); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 915 (7th Cir. 2003) ("States are free to enact statutes that regulate intrastate commerce alone, without violating the Commerce Clause.").

As the court below correctly determined, "SB 1938 does not purport to regulate the transmission of electricity in interstate commerce; it regulates only the construction and operation of transmission lines and facilities within Texas." ROA.3031. This wholly intrastate business falls squarely within the purview of Texas' exclusive regulatory authority.

B. With respect to the designation of transmission service providers *within ERCOT*, SB 1938 regulates only intrastate commerce.

Within ERCOT, SB 1938 does not regulate interstate commerce, much less discriminate against it, and therefore it does not rise to a *per se* violation of the dormant Commerce Clause.

A local law directly regulates interstate commerce only when it directly affects transactions that take place across state lines or entirely outside of the state's borders. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986).

The challenged provisions of SB 1938 do not regulate the transmission of electric energy, whether wholly intrastate or not; rather, they regulate the construction and operation of transmission lines exclusively within Texas. Even

were the Court to decide that the construction and operation of transmission lines is equivalent to the transmission of electricity—which it is not—the transmission of electric energy within ERCOT serves entirely intrastate needs, is not regulated by or subject to the jurisdiction of the Federal Energy Regulatory Commission, and is within the exclusive authority of the PUCT. Tex. Util. Code § 32.001; *AEP Energy Partners, Inc.*, 164 FERC ¶ 61,056 at ¶ 2 (2018).

The critical inquiry in determining whether state legislation violates the dormant Commerce Clause is if its practical effect is to control conduct beyond the boundaries of the state. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). As such, the wholly intrastate effect of SB 1938, as it operates within the isolated ERCOT transmission system, conclusively renders the law a valid exercise of state regulatory authority. In the vast majority of its applications, SB 1938 will function only to designate transmission services providers for intrastate transmission projects, consistent with the practice that has existed in ERCOT for decades. ROA.3033. Necessarily, all of these projects will be constructed and operated—and paid for by transmission ratepayers—wholly within Texas' borders.

Despite the exclusively intrastate nature of the ERCOT grid, Appellants seek broad declaratory and injunctive relief that would impact not only the award of "large projects that are part of the interstate grid administered by MISO and SPP," App.'s Br. at 20, but also strike significant statutory protections that apply statewide.

Specifically, Appellants seek to invalidate provisions of the Texas Utilities Code that:

(i) require a utility to obtain certification from the PUCT before directly or indirectly providing service to the public—a key public safety protection[1];

(ii) clarify where retail electric utilities may furnish service within the state—providing much needed regulatory certainty to all utility providers statewide[2];

(iii) balance the rights and obligations of certain public power utilities with respect to the transmission line siting oversight exercised by the PUCT[3];

(iv) define the statutory criteria, burden of proof, and jurisdictional deadline for applications for new transmission facilities—including applications that are currently pending[4];

(v) require a utility to serve every customer in the utility's certificated area, and provide continuous and adequate service in that area—two other critical safeguards to protect public safety and welfare[5]; and

(vi) grant utilities the right to sell, assign, or lease transmission facilities or other rights obtained under a certificate.[6]

This relief, if granted, would create a tremendous regulatory vacuum within ERCOT, paralyzing the sole overseer of the ERCOT transmission system, imperiling

[1] Tex. Util. Code § 37.051(a).

[2] *Id.* § 37.051(b).

[3] *Id.* § 37.051(c), (g)-(h).

[4] *Id.* §§ 37.056, 37.057; *see, e.g., Application of LCRA Transmission Services Corp. for an Amendment to its Certificate of Convenience and Necessity for the Proposed Mountain Home 138-kV Transmission Line Project in Gillespie, Kerr, and Kimble Counties, Texas*, PUC Docket No. 49523 (filed May 31, 2019) (pending).

[5] Tex. Util. Code § 37.151.

[6] *Id.* § 37.154.

the stability of the ERCOT transmission grid, and jeopardizing the safe and reliable provision of electric service to millions of customers.

In ERCOT, hundreds of utility providers, including over 70 municipally owned utilities and dozens of electric cooperatives,[7] have for decades relied on this comprehensive statutory scheme that Appellants now seek to overturn. *City of Corpus Christi v. Pub. Util. Comm'n*, 51 S.W.3d 231, 236-37 (Tex. 2001). Even the newly enacted provisions of SB 1938 merely preserve the long-standing precedent in ERCOT that incumbent utilities have the right to build the facilities that serve their localized needs and that interconnect into their existing intrastate facilities. *See* Tex. Util. Code § 37.056(e)-(f). As such, SB 1938 is an exercise of local control over what is inherently a local business. This local character is seen especially in the areas of ERCOT served by public power utilities, which are community-owned or managed, vertically integrated monopoly systems.[8]

[7] Market directories of all electric companies serving Texas are maintained on the PUCT's website at http://www.puc.texas.gov/industry/electric/directories/Default.aspx/.

[8] *See General Motors Corp. v. Tracy*, 519 U.S. 278, 306-07 (1997). In this sense, the district court's recognition that the "noncompetitive, captive market in which the local utilities alone operate" in *Tracy* is "just like the market in Texas" is particularly apt. ROA.3031. So, too, the reasons the court cited for giving great weight to the monopoly market in this case—"to avoid any jeopardy or disruption to the service of electricity to the state electricity consumers and to allow for the provision of a reliable supply of electricity"—resonate even more in the case of these vertically integrated public power systems operating within ERCOT. ROA.3031-32.

C. SB 1938 is not unconstitutional on its face.

In the context of the Commerce Clause, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). SB 1938 does not so discriminate either facially or in effect.

Rather, in dictating which entities may seek the right to build, own, and operate new transmission projects, SB 1938 treats all ERCOT transmission service providers the same regardless of citizenship—whether they are investor-owned utilities incorporated in Texas or other states, or public power providers like river authorities, electric cooperatives, and municipally owned utilities. *See* Tex. Util. Code § 37.056(a)-(h); *id.* § 31.002(6).

Moreover, while SB 1938 also governs the non-ERCOT areas of Texas that are in interstate commerce and subject to concurrent state and federal regulatory oversight, no assertion has been made, and no record evidence suggests, that the law is unconstitutional in its application *within the ERCOT region*.

To succeed on a facial challenge under the dormant Commerce Clause, Appellants must establish that no set of circumstances exists under which the regulation would be valid; the fact that the regulation might operate unconstitutionally under some set of circumstances is insufficient to render it wholly

invalid. *Salerno*, 481 U.S. at 745; *Rosenblatt*, 940 F.3d at 444 (citing *Salerno* in construing facial challenge under dormant Commerce Clause).[9] The record is clear that SB 1938 affects *only* intrastate commerce—with no impact at all on interstate commerce—when applied *within ERCOT*. Thus, SB 1938 cannot violate the dormant Commerce Clause in dictating which transmission service providers may be certificated by the PUCT to build, own, or operate transmission facilities *within ERCOT*, and Appellants cannot meet the elevated burden required to bring a facial constitutionality challenge.

D. Appellants' requested relief is improper and unnecessarily broad.

Challenges to statutes on their face, or "as enacted," *see* ROA.55-58, are strongly disfavored. As the Supreme Court has noted:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by

[9] It is not clear from Appellants' pleadings and briefing on appeal whether they intend their challenge in this case to be a facial challenge, in the sense of a "facial" or "as applied" constitutional challenge, or whether they are merely referencing the line of authority regarding state laws and regulations that discriminate against interstate commerce "on their face." *See* App.'s Br. at 28; *but see* ROA.55-58 (Count I of Plaintiffs' complaint alleging SB 1938 violates the Commerce Clause both "as enacted and as applied to Plaintiffs," as well as "other out-of-state, new entrant market participants"). Appellants have at least pleaded for "quasi-facial" relief—that is, relief that reaches "beyond the particular circumstances" of these plaintiffs—and so they must therefore satisfy the standards set forth in *Salerno* "for a facial challenge to the extent of that reach." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010).

> preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008) (citations and internal quotation marks omitted).

In this case, it would not be necessary or appropriate to invalidate SB 1938 on its face—even if the Court were to be persuaded by Appellants' arguments (under either the Commerce Clause or the Contracts Clause). As Appellants admit, the focus of both of those complaints is on the "large projects that are part of the interstate grid administered by MISO and SPP"—not any projects in ERCOT. *See* App.'s Br. at 20.

Invalidating all the challenged provisions of the Texas Utilities Code in their entirety would not be an appropriate remedy for the harm alleged. *See Am. Fed. of State, County & Mun. Employees Council 79 v. Scott*, 717, F.3d 851, 864-66, 870 (11th Cir.) (holding declaratory and injunctive relief granted by lower court was unnecessarily broad and an abuse of discretion when not narrowly tailored to the extent the challenged regulation was actually unconstitutional).

As explained above, Appellants have made no attempt to show that SB 1938 regulates interstate commerce as it applies within ERCOT. Nor have they demonstrated that SB 1938 operates to impair their reasonable contractual expectations relating to any project within ERCOT. Accordingly, any relief to which they may be entitled must focus only on the non-ERCOT areas of Texas, rather than

striking down the entire statutory scheme implicated by SB 1938. To grant their extraordinarily broad request for relief, thereby invalidating significant portions of a comprehensive statutory scheme, would be unjust and not narrowly tailored.

Even more significantly, it would gut the sole regulatory framework for the entire intrastate ERCOT electric market.[10] Because ERCOT exists wholly within Texas and is subject to the exclusive regulatory authority of State through the PUCT, the challenged provisions of the Texas Utilities Code are the only statutes governing many issues that are critical to the basic operation of the electric utility industry. Not only do these statutes dictate which utility providers are entitled to construct transmission facilities, but also where and how retail electric utilities are permitted to provide retail service,[11] whether and how a transmission service provider is permitted to transfer existing transmission facilities or the right to construct new facilities,[12] and how the PUCT is required to process applications for new transmission lines (including applications that are currently pending before the PUCT).[13] Eliminating these standards, processes, and consumer protections—most of which have no relationship to Appellants' constitutional complaints—will jeopardize the safe and reliable transmission of electricity to millions of Texans.

[10] *See* Section B, *infra* at 8.

[11] Tex. Util. Code § 37.051(b).

[12] *Id.* § 37.154.

[13] *Id.* § 37.056.

Moreover, transmission service providers will face tremendous uncertainty if the long-standing precedent of determining who builds transmission projects in ERCOT is upended. As the record demonstrates, and other amici explain in further detail, ERCOT has long had a system in place where it assigns transmission projects based on the utility that owns the end point.[14] This fundamental practice has gone unchallenged—even by Appellants' PUCT-certificated affiliate in ERCOT—despite the existence of a well-established procedural mechanism for revising existing ERCOT Protocols through the ERCOT stakeholder process.[15]

Accordingly, the Court should not grant the overbroad relief sought by Appellants, even if it were to find that SB 1938 cannot withstand Appellants' constitutional challenges.

[14] *See* Oncor Amicus Br. at Section I.B.1; *see generally* ERCOT Nodal Protocols § 3.11.4.8 (last revised March 1, 2020), *available at* http://www.ercot.com/mktrules/nprotocols/current.html (accessed April 21, 2020).

[15] ERCOT Nodal Protocols § 21, Revision Request Process (last revised November 1, 2017), *available at* http://www.ercot.com/mktrules/nprotocols/current.html (accessed April 21, 2020). A complete list of all revision requests filed by ERCOT or any other market participant is available at http://www.ercot.com/mktrules/issues/reports/nprr (accessed April 21, 2020).

CONCLUSION

For the foregoing reasons, SB 1938 should be upheld as a valid exercise of Texas' regulation of its wholly interstate electric transmission grid. The Court should therefore affirm the district court's dismissal of Appellants' complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed this Amicus Brief of the Lower Colorado River Authority with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for Appellants and Appellees are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Larry E. Gee
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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1, and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

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