No. 22-601

In the Supreme Court of the United States

CHAIRMAN PETER LAKE, PUBLIC UTILITY COMMISSION OF TEXAS, IN HIS OFFICIAL CAPACITY, 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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

NextEra does not dispute that this case directly affects the affordability and the reliability of electricity for ratepayers in Texas and other States. And NextEra cannot refute that the decision below presents a straightforward conflict with this Court's precedent and implicates multiple circuit splits. Review is warranted to correct the errors of the court of appeals, which cast doubt on the States' ability to regulate an area where this Court has traditionally afforded the States latitude to make important health and safety regulations.

ARGUMENT

I. The Questions Presented Merit this Court's Attention.

NextEra's response cannot conceal that the Fifth Circuit's opinion conflicts with *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). And even the panel admitted that its decision split from the Eighth Circuit's opinion in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020), concerning rights of first refusal in electricity markets, Pet. App. 28a-29a & n.8, and deepened an existing circuit split concerning incumbency-related restrictions more generally, *id.* at 28a, 35a. Each warrants review.

A. The Fifth Circuit's decision is irreconcilable with *Tracy*.

1. In *Tracy*, this Court explained that any analysis of discrimination against out-of-state entities under the so-called dormant Commerce Clause "assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 299. As a result, whether "allegedly competing entities" are—as a matter of law—"similarly situated for

constitutional purposes" is a "threshold question" that must be resolved before addressing whether the dormant Commerce Clause has been violated. *Id.* "[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Id.* at 300.

As explained in the petition (at 14-18), NextEra, a transmission-only provider, is not similarly situated to the allegedly favored entities—namely, the vertically integrated, heavily regulated incumbents in the Texas energy market that generate, transmit, distribute, and ultimately provide power to consumers. NextEra challenges this conclusion in four ways. Each is off the mark.

First, NextEra echoes the court of appeals (at 32) by arguing that S.B. 1938 addresses only the market for building, owning, and operating transmission facilities for electric power grids. But, like the court of appeals, *NextEra* fails to grapple with the fact that *Tracy* speaks to the market for *customers* of the bundled, regulated service that vertically integrated power companies provide, *Tracy*, 519 U.S. at 302-03, 307—not the type of regulatory competition that NextEra seems to contemplate. Moreover, there is no market for power-transmission services alone in the parts of Texas at issue here because of policy choices made by the State. *See* Br. for Intervenor-Respondent at 7-10. And the dormant Commerce Clause is not a tool to force a State to create such a market or to "cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Tracy*, 519 U.S. at 306

(quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960)).

Second, NextEra cites (at 33) FERC's determination that elimination of rights of first refusal would increase competition. But this proves nothing about whether NextEra is similarly situated to incumbent, fully integrated utilities. After all, in the very same order, FERC expressly reaffirmed that "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61,051, ¶ 227 (July 21, 2011).

Third, NextEra attempts (at 34) to distinguish S.B. 1938 from the law at issue in *Tracy* because, according to NextEra, the latter "distinguished between forms of business." But as the Commissioners have explained (at 21), S.B. 1938's practical effect is to distinguish transmission-only companies—none of which have already been certificated in MISO or SPP—from vertically integrated utilities. And, as NextEra seems to acknowledge (at 27-28, 34), the dormant Commerce Clause does not prohibit distinctions based on business form. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125 (1978).

Finally, NextEra complains (at 31) that the Commissioners rely on a subsequent dissent "to construe this Court's decision in *Tracy* as effectively immunizing State utility regulations from Commerce Clause scrutiny." Respectfully, this misses the point: the Commissioners noted that four members of the *Tracy* majority later described *Tracy* as "effectively creat[ing] what might be called a 'public utilities' exception to the negative

Commerce Clause." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting). But that only four justices squarely reached that conclusion says nothing about whether vertically integrated and heavily regulated power companies are similarly situated to transmission-only NextEra. They are not for the reasons already discussed.

2. NextEra cannot avoid the conclusion that the Fifth Circuit broke from *Tracy* by invoking (at 25-31) this Court's decisions involving competitive markets for consumer goods. *E.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Granholm v. Heald*, 544 U.S. 460 (2005); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

As the dissenting judge below (at Pet. App. 43a) and the petition explain (at 19-21), the statutes in *Tennessee Wine*, *Granholm*, and *Dean Milk* "*add*[*ed*] requirements that discriminate against out-of-state entities" by creating barriers to entry into naturally competitive markets for the interstate transport of consumable (and often perishable) goods. Pet. App. 43a (Elrod, J., concurring in part and dissenting in part). Those statutes raise the concerns underlying the so-called dormant Commerce Clause because they run the risk of Balkanizing markets in which in-state and out-of-state interests would otherwise be easily able to compete.

"S.B. 1938's incumbency requirement is meaningfully different than [those] discriminatory in-state presence requirements," *id.*, because the market at issue is meaningfully different. Unlike the markets for alcohol or milk—where consumer interests favor robust competition—the market for electricity favors natural monopolies, vertically integrated producers, and state regulation. Pet. 20. Moreover, unlike the markets for alcohol or

milk, the provision of this vital public good *must* be delivered by someone with a presence in a given State. U.S. Energy Info. Admin., *Electricity Explained: How Electricity is Delivered to Consumers*, https://tinyurl.com/ye2yyh4t (last visited Feb. 12, 2023). As this Court recognized in *Tracy*, courts are to proceed with "extreme caution" in assessing such markets, 519 U.S. at 310, because they are "ill qualified to develop Commerce Clause doctrine dependent on . . . predictive judgments" about the economic consequences involved, *id.* at 309.

* * *

In sum, this case merits review because the Fifth Circuit disregarded this Court's warning to be wary of "judicial intervention" aimed at noncompetitive markets in vital public goods such as electricity. *Id.* at 303-10. Because the markets in *Tennessee Wine*, *Granholm*, and *Dean Milk* are fundamentally different, those cases cannot justify that disregard.

B. The Fifth Circuit creates one circuit split and deepens another.

1. The Fifth Circuit's opinion also merits review because it squarely splits with the Eighth Circuit's decision in *LSP*, which addressed a Minnesota law creating "an incumbency preference nearly identical" to S.B. 1938. Pet. App. 42a (Elrod, J., concurring in part and dissenting in part). Specifically, like the statute at issue in *LSP*, 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." *LSP*, 954 F.3d at 1027 (citation omitted). Unlike the Fifth Circuit, however, the Eighth Circuit correctly recognized that Minnesota's right-of-first-refusal law comports with constitutional requirements because it "applies evenhandedly to all

entities, regardless of whether they are Minnesota-based entities or based elsewhere." *Id.* at 1028.

NextEra makes two attempts to obfuscate this clear split; neither is successful. *First*, NextEra suggests (at 20) that S.B. 1938 is more restrictive than the Minnesota law. As the Commissioners explained (at 25) and NextEra agrees (at 22), that makes no legal difference under this Court's test. It also makes little practical difference: in *LSP*, the challenger explained to this Court that "given the nature of the opportunity, few, if any, in-state incumbents will ever decline their right of first refusal" under the Minnesota law. Reply Brief for Petitioner at 12 n.3, *LSP Transmission Holdings, LLC v. Sieben*, 141 S. Ct. 1510 (2021) (No. 20-641), 2021 WL 680535. Thus, there is neither a legal nor practical distinction between the Minnesota law at issue in *LSP* and S.B. 1938. Pet. App. 42a (Elrod, J., concurring in part and dissenting in part).

Second, NextEra insists (at 22) that the Court risks deciding the case on narrow grounds related only to S.B. 1938. But numerous States have similar right-of-first-refusal statues that the holding of the court of appeals endangers. *See, e.g.*, Minn. Stat. § 216B.246, subd. 2; Neb. Rev. Stat. § 70-1028(1); Okla. Stat. tit. 17, § 292; S.D. Codified Laws § 49-32-20. Because the question is whether these laws violate the dormant Commerce Clause, there is little risk that the Court would decide this case on grounds idiosyncratic to S.B. 1938.

2. The court of appeals also deepened a circuit split concerning whether incumbency- and geography-based restrictions are equivalent and whether place of incorporation or headquarters location determines whether a business is in- or out-of-state. Relying on *Florida Transportation Services, Inc. v. Miami-Dade County*, 703

F.3d 1230, 1259 (11th Cir. 2012), and *Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005), the Fifth Circuit concluded that incumbency is almost a synonym for local interests and that place of incorporation is irrelevant under this Court's cases. Pet. App.25a-27a. By following the First and Eleventh Circuit, however, the Fifth Circuit broke (at 32a-33a n.11), from the Fourth Circuit, which has warned that "[a]llowing incumbency to serve as the proxy for in-state status would be a risky proposition." *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016).

NextEra contends (at 24) that the Fourth Circuit's reasoning in *Colon Health* was limited to its facts. But the Fourth Circuit went further and expressly endorsed a place-of-incorporation test for determining in-state status under the dormant Commerce Clause because it is both "easily applied" and consistent with the idea that "[b]y choosing to incorporate within a particular state, a corporation opts to identify itself with both state law and state process in a way that an out-of-state corporation does not." *Id.* at 154. That rule is plainly inconsistent with the approach adopted here. This Court's guidance is needed to resolve the issue.

II. The Court Should Grant Review Now.

NextEra fails to persuasively identify any vehicle or other prudential concern that would counsel against giving that much-needed guidance at this juncture. Nor could it: this case implicates the States' ability to ensure that their citizens are provided safe, reliable, and affordable power. Indeed, as this Court has recognized, regulation of utilities is "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

A. Any purported vehicle problems are illusory.

NextEra tries to avoid review at the present juncture by erecting four purported vehicle or pseudo-vehicle problems. None has merit.

First, NextEra asserts (at 15-16) that this Court should deny review now because this case is in an interlocutory posture. The Commissioners have acknowledged (at 30-31) that "the Court considers the interlocutory nature of a judgment or order in determining whether to grant or deny a certiorari petition." Stephen M. Shapiro, SUPREME COURT PRACTICE § 2.2 (11th ed. 2019). But the Court may grant such review where further factual development is unnecessary to resolve the legal question presented, Pet. 30 (citing examples where this Court has granted interlocutory review), and where delay might cause harm to petitioners or to the larger public, Shapiro, *supra*, at § 2.3 (collecting cases). This is a case where interlocutory review of the threshold legal questions would be appropriate and is needed.

The question presented here is a threshold legal question that either requires no factual development or will guide any further factual development. If under *Tracy* the incumbent utilities are not similarly situated to NextEra for constitutional purposes, the inquiry is over. And if incumbency-based restrictions are permissible under the dormant Commerce Clause for at least some purposes, the facts that must be developed are fundamentally different than if the lower court is correct that they are always (or nearly always) blatant protectionism. In either event, this Court can and should clarify this important issue.

Second, NextEra charges (at 16) that the Commissioners' argument that this Court's intervention is needed to protect electricity ratepayers in Texas and

surrounding States is "wrong and ironic" because NextEra stands ready to invest and was selected by MISO. But NextEra's view that it is a better alternative to the one selected by the Texas Legislature is precisely the type of policy dispute that this Court warned against in *Tracy*. *Supra* at pp. 4-5.

Third, NextEra contends (at 17-18) that this Court should deny review at this juncture because S.B. 1938 is not presently enjoined, so the State can try, and should be required, to adduce various facts on remand. However, the State's opportunity to develop facts is illusory—not because (as NextEra contends) the State could not show the benefits of S.B. 1938, but because the court of appeals' panel majority squarely held that S.B. 1938 discriminates against interstate commerce *on its face*. Pet. App. 34a. And this Court has repeatedly stated that such restrictions are "virtually *per se* invalid." *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality Comm'n*, 511 U.S. 93, 99 (1994)).[1] Thus, if the Court does not step in now, the Commissioners will be left to overcome a fuzzy but nearly insurmountable evidentiary hurdle.

Fourth, NextEra suggests (at 18-19) that the Commissioners' petition relies on facts outside the record. Not so. Although NextEra suggests (at 18) that there are many examples of such reliance, they can cite only two.

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[1] *See also, e.g.*, *Granholm*, 544 U.S. at 476 ("State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly . . . discriminates against interstate commerce, . . . we have generally struck down the statute without further inquiry.").

NextEra primarily challenges (at 18-19) the Commissioner's description of Texas's near-uniform practice under which "owners of existing endpoint facilities build new transmission lines." But the petition acknowledges (at 6 n.2), the same exception to which NextEra cites from its complaint, ROA.34-36 (discussing the unique buildout of wind-energy transmission lines in West Texas); *accord PUCT v. Cities of Harlingen*, 311 S.W.3d 610, 619-20 (Tex. App.—Austin 2010).[2]

The only other "example" of facts outside the record that NextEra offers (at 19) is the petition's description (at 15) of the inherent differences between traditional, vertically integrated electric utilities and transmission-only companies like NextEra. But NextEra does not actually dispute that it offers different products or serves different markets than traditional, vertically integrated utilities. Instead, NextEra points (at 19) to the Commission's defense of the very order that the Texas Legislature repudiated by passing S.B. 1938.[3] NextEra makes no attempt to explain why a state agency's decision to defend an agency decision no longer in existence—or any other supposed lack of clarity in the record—should matter to this Court's review of threshold questions of law presented in the petition.

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[2] NextEra also points (at 18-19) to its own efforts to build transmission lines for one of the projects underlying this litigation. But this litigation only exists because Texas law does not allow such an exception.

[3] Contrary to NextEra's insinuation (at 19), the Texas Attorney General has not changed positions since *Entergy Texas, Inc. v. PUCT*, No. 03-18-00666-CV, 2019 WL 3519051 (Tex. App.—Austin 2019). Although the Texas Attorney General typically represents most state agencies in civil litigation, TEX. CONST. art. IV, § 22, he was not party to *Entergy* any more than he is a party here.

B. This is a case of exceptional importance.

Finally, the Court should grant review because this case is one of great importance, both as to electricity regulation and state laws implicating rights of first refusal and certificates of need more generally. The States' ability to exercise their traditional police powers to protect the health and safety of their people have long been recognized, and state utility regulation in particular is a core police power. *E.g.*, *New York v. FERC*, 535 U.S. 1, 24 (2002); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 106-07 (2d Cir. 2017). Indeed, this Court has described it as "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop.*, 461 U.S. at 377. That is why *Tracy* urged courts to proceed with "extreme caution," 519 U.S. at 310, before they sought under the guise of the so-called dormant Commerce Clause to superintend the regulation of a state utility market—a task for which courts are "institutionally unsuited," *id.* at 308.

Yet rather than heed that instruction, the Fifth Circuit cast aside the Texas Legislature's considered judgment and thus threatened the stability and affordability of electricity for Texans, those in surrounding States, and those in other States with similar laws. These impacts create a question of exceptional importance worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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