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

Appellants' Brief

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CERTIFICATE OF INTERESTED PERSONS

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED, NEXTERA ENERGY TRANSMISSION, L.L.C., NEXTERA ENERGY TRANSMISSION MIDWEST, L.L.C., LONE STAR TRANSMISSION, L.L.C., and 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, and COMMISSIONER DEANN T. WALKER, Public Utility Commission of Texas, in her official capacity,

Defendants-Appellees

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

1. Plaintiffs-Appellants:

> NextEra Energy Capital Holdings, Inc., NextEra Energy Transmission, LLC, NextEra Energy Transmission Midwest, LLC, Lone Star Transmission, LLC, and NextEra Energy Transmission Southwest, LLC, all of which are direct or indirect subsidiaries of NextEra Energy, Inc., which is a publicly held

corporation with no parent company, and no entity owns 10% or more of its stock.

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2. Defendants-Appellees:

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5. Attorneys for the United States, which submitted a statement of interest:

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Attorney of record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants request oral argument. This case presents substantial and important questions of Constitutional law. It raises challenges, under the Commerce and Contracts Clauses, to a Texas law that reserves for Texas companies the rights to build, own, and operate transmission lines even when those lines serve interstate electric power grids subject to federal regulation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF JURISDICTION

Plaintiffs-Appellants filed this action in the United States District Court for the Western District of Texas (Judge Lee Yeakel) to enjoin the Defendant State officials from enforcing Texas Senate Bill 1938 ("SB 1938") because it is unconstitutional. Plaintiffs brought claims under 42 U.S.C. § 1983 and the United States Constitution, asserting that SB 1938 violates the Constitution's Commerce Clause (U.S. Const. Art. I § 8) and Contracts Clause (U.S. Const. Art. I § 10). ROA.29 (¶ 5). The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

On February 26, 2020, the District Court granted Defendants' motion to dismiss with prejudice and denied Plaintiffs' motion for a preliminary injunction. ROA.3036. Final judgment was entered the same day. ROA.3037. Plaintiffs timely appealed on February 28, 2020. ROA.3038-39; Fed. R. App. P. 4(a)(1).

This Court has jurisdiction because this is an appeal from a final judgment of the United States District Court, 28 U.S.C. § 1291, as well as an appeal from the denial of a request for preliminary injunction, 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Texas' SB 1938 allows a company to build, own, and operate new electric transmission lines in the state if, but only if, the company already owns one of the existing facilities to which the line will connect. The issues on appeal are:

1. Whether Plaintiffs have plausibly alleged that SB 1938 is unconstitutional because it discriminates against interstate commerce on its face, in its effects, or in its purpose, by allowing only in-state businesses with existing facilities in the state to build, own, and operate transmission lines, even if the lines are part of the interstate transmission grid.

2. Whether Plaintiffs have plausibly alleged that SB 1938's preference for incumbents imposes burdens on interstate commerce that are excessive in relation to any local benefits.

3. Whether Plaintiffs have plausibly alleged that SB 1938 substantially impairs their existing contracts, which predate SB 1938, to build and operate transmission lines, and whether that impairment is unreasonable in light of any legitimate and important public purpose.

4. Whether the Court erred in denying Plaintiffs' motion for a preliminary injunction.

STATEMENT OF THE CASE

A. INTRODUCTION

In May 2019, Texas passed a law, which gave the exclusive right to build, own, and operate electric transmission lines in the State to the existing incumbents (by definition, in Texas) that currently owned the endpoints from which new transmission lines would be built. SB 1938, Texas Utilities Code §§ 37.051, 37.056, 37.151, 37.154; ROA.46 (¶ 66).[1] That law applies with full force to transmission lines that are part of the federally regulated interstate transmission grid. SB 1938 was a dramatic change to the status quo in Texas: prior to SB 1938 non-Texas incumbents had the ability to compete to build, own, and operate transmission lines, and indeed, had already built and successfully operated transmission lines in Texas. ROA.34-36 (¶¶ 21-24); ROA.45 (¶¶ 59-60). That change flies in the face of the Commerce Clause, which prohibits such blatant favoritism to local businesses. That

discrimination is particularly egregious here, because SB 1938 regulates the construction and operation of transmission lines that are part of the country's interstate transmission grid, subject to federal regulation. The Texas law also violates the Contracts Clause of the United States Constitution because the law abrogates two of NextEra's existing contracts to build or acquire transmission lines in Texas. The United States agreed with NextEra and filed a supporting Statement of Interest. ROA.2884-2906. The District Court nonetheless granted a motion to dismiss, and therefore, denied NextEra's request for a preliminary injunction.

B. INTERSTATE TRANSMISSION LINES INVOLVE INTERSTATE COMMERCE AND ARE SUBJECT TO FEDERAL REGULATION

This case concerns large, interstate transmission lines that transmit electricity over long distances to reach local utilities for distribution. ROA.32-33 (¶¶ 16-18). In the early 20th Century, "state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in

[1] The full text of SB 1938 is set out ROA.87-92 and can also be found in

confined geographic areas." *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). Although states possessed broad power to regulate all levels of these systems, in 1927, the Supreme Court found that a state's attempt to regulate the rates of electricity sold across state lines violated the Commerce Clause. *Pub. Utils. Comm'n of R.I. v. Attelboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927). The Court reasoned that the regulation imposed a "direct burden upon interstate commerce," and accordingly, only Congress had the power to regulate the interstate transactions. *Id.*

Congress responded to *Attelboro* by enacting the Federal Power Act ("FPA"). *New York v. F.E.R.C.*, 535 U.S. 1, 6 (2002). The FPA charges the Federal Energy Regulatory Commission ("FERC") with providing "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Id.* (quotation omitted). More specifically, and more importantly here, the FPA gave FERC exclusive jurisdiction over the transmission of electricity in interstate commerce. *Id.* at 6-7.

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the addendum to this brief.

C. FERC ATTEMPTS TO INCREASE COMPETITION IN THE TRANSMISSION MARKET

Over the last hundred years, technological changes have made it possible for electricity generated in the far corners of the country to be transmitted over long distances to meet distribution needs. But vertically integrated utilities, which held the vast majority of infrastructure, often prevented the expansion of new market entrants by refusing to deliver wholesale energy produced by these emerging generators, or by making their transmission lines available to competitors "only on inferior terms." *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 49-50 (D.C. Cir. 2014). To that end, "[t]he Commission concluded that the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms to emerging competitors." *Id.*

To address this anticompetitive behavior, FERC adopted a series of orders to foster competition in the transmission of electricity:

In 1996, FERC adopted Order No. 888, which "required each jurisdictional electric public transmission provider to 'functional[ly] unbundl[e]' its wholesale generation and transmission services . . ." *Id.* Functional unbundling required each utility to set a separate rate for

its transmission services and charge all other users the same transmission price it would charge for transmission of its own electricity. *New York*, 535 U.S. at 11; *S.C. Pub. Serv. Auth*, 762 F.3d at 50. The goal of functional unbundling was to open the grid to new sources of electric power, by allowing new electricity generators access to transmission lines on an equal basis.

In 1999, FERC adopted Order No. 2000, which sought to encourage transmission owners operating in interstate commerce to cede operation of their transmission systems to regional transmission organizations ("RTOs") and independent system operators ("ISOs") (collectively "ISOs"). *See* 65 Fed. Reg. 810. ISOs are non-governmental bodies, created under FERC's authority, which are charged with operating and planning the transmission grid on a regional basis.

Next, in 2007, FERC adopted order No. 890, which required "each transmission provider to establish an open, transparent, and coordinated transmission planning process." *S.C. Pub. Serv. Auth.*, 762 F.3d at 51.

"[B]y late 2008, the electric industry was reporting that an estimated $298 billion of investment in new electric transmission

facilities would be needed between 2010 and 2030 to maintain current levels of reliable electric service across the United States." *S.C. Pub. Serv. Auth.*, 762 F.3d at 51. To facilitate this investment, FERC issued Order No. 1000 ("Order 1000") which, as relevant here, required ISOs to eliminate "right-of-first refusal" provisions for regional transmission facilities from their FERC-approved tariffs and agreements. *Id.* at 48-53.

Prior to Order 1000, most ISOs, including both interstate ISOs in Texas, had tariff provisions that gave incumbent transmission owners the right to construct and operate new transmission facilities in their service areas. ROA.37-38 (¶ 31). In Order No. 1000, FERC repudiated that practice, finding that "it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Order 1000, Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities, 136 FERC ¶ 61051 at ¶ 256 (F.E.R.C. July 21, 2011). In reaching that conclusion, FERC made the following findings:

- Failing to remove rights of first refusal "would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers." Order 1000 ¶ 253.

- Rights of first refusal "creat[e] a barrier to entry that discourages nonincumbent transmission developers from proposing alternative solutions for consideration at the regional level." Order 1000 ¶ 257.

- "[J]ust because an incumbent public utility transmission provider may have certain strengths," does not mean that "a nonincumbent transmission developer should be categorically excluded from presenting its own strengths in support of its proposals or bids." Order 1000 ¶ 260.

- "We are not persuaded by commenters who argue that the reliability of the transmission system is a function of the number of public utility transmission providers of that system. In fact, to enhance reliability, among other reasons, public utility transmission providers have historically connected to the transmission systems of others, as well as jointly owned transmission facilities, and have therefore developed experience, protocols, and business models for coordinated operations with multiple transmission providers, operators, and users. . . . All providers of bulk-power system transmission facilities, including nonincumbent transmission developers, that successfully develop a transmission project, are required to be registered as functional entities and must comply with all applicable reliability standards." Order 1000 ¶ 266.

D. EFFECT OF ORDER 1000 IN TEXAS

Order 1000 required federal ISOs to remove rights of first refusal from their tariffs. Texas has two federal ISOs and one Texas-only ISO. The federal ISOs are the Midcontinent Independent System Operator ("MISO"), which spans much of the Midwestern United States, parts of Canada, and parts of eastern Texas and the Southwest Power Pool ("SPP"), which runs from Canada into parts of eastern Texas and the Texas panhandle. The Texas-only ISO is the Electric Reliability Council of Texas, Inc. ("ERCOT"), which covers much of Texas and is wholly within the state. ROA.33 (¶ 18). Within ERCOT, the Public Utility of Texas ("PUCT") has exclusive jurisdiction. *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 312 (Tex. 2001); ROA.33-34 (¶ 19). The areas of Texas within SPP or MISO have transmission systems that cross state lines and are thus subject to concurrent FERC and PUCT jurisdiction. ROA.33-34 (¶ 19). In the SPP and MISO regions, the PUCT sets retail rates, Tex. Util. Code § 36.001, but FERC sets wholesale transmission rates. 16 U.S.C. § 824 (b).

Because MISO and SPP are FERC-created ISOs, they are subject to Order 1000, and are the subject of this case. ROA.41 (¶ 42). In

response to Order 1000, MISO and SPP amended their tariffs to remove their federal rights of first refusal and to implement competitive bidding for new transmission projects that are part of the interstate transmission grid. ROA.41 (¶ 42).

MISO, for example, adopted an intricate process governing competitive bids and regional cost allocation. ROA.42 (¶ 47). Under MISO's rules, new projects are sorted into buckets. Some buckets are automatically assigned to the incumbent line owner, with costs allocated locally. ROA.42-43 (¶ 48). Other buckets, however, require competitive bidding and regional cost distribution. ROA.43 (¶ 49). For example, Multi Value Projects seek to support a range of public policies (such as promoting renewable energy) and/or provide widespread reliability, public policy, and economic benefits across the MISO footprint. ROA.43 (¶ 50). The costs of Multi-Value Projects are 100 percent allocated system-wide. ROA.43 (¶ 50). Market Efficiency Projects seek to reduce market congestion. ROA.43 (¶ 51). Under the MISO Tariff, 80 percent of the costs of Market Efficiency Projects are distributed to local resource zones commensurate with the expected

benefit, and the remaining 20 percent are allocated to the system-wide planning area (which always includes multiple states). ROA.43 (¶ 51).[2]

At the same time that MISO adopted competitive bidding and regional cost allocation, MISO added language to its Tariff to recognize state-created rights of first refusal. ROA.42 (¶ 45). Thus, if a state law mandates the results of a bid, then MISO's tariff does not require competition for no purpose. ROA.42 (¶ 45). In doing so, MISO did not bless state laws that disrupt competitive bidding; instead, MISO recognized that there is little point in holding a bid when state-law mandates a single outcome. As then-Chair of FERC, Norman Bay, made clear "State laws that discriminate against interstate commerce—that protect or favor instate enterprise at the expense of out-of-state competition—may run afoul of the dormant commerce clause. The Commission's order today does not determine the constitutionality of any particular state right-of-first refusal law. That determination, if it

[2] MISO has recently proposed to modify how it allocates costs for market efficiency projects on a going forward basis. The change requires FERC approval.

is made, lies with a different forum, whether state or federal court." ROA.42 (¶ 46). SPP adopted similar rules. ROA.43 (¶ 53).

E. NEXTERA WINS PROJECTS FOLLOWING ORDER 1000

In 2018, MISO held its first competitive bid in Texas. ROA.52 (¶ 82). On February 6, MISO issued a request for proposals for the construction of a 500 kV competitive transmission project known as the Hartburg-Sabine Junction Transmission Project ("Hartburg-Sabine"), to be constructed in the Entergy service territory in East Texas. ROA.52 (¶ 82). MISO received 12 bids from 9 qualified developers to build the line. ROA.52 (¶ 82). In November, MISO selected Plaintiff-Appellant NextEra Energy Transmission Midwest ("NEET Midwest") to build the line, concluding that NEET Midwest's proposal 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.52-53 (¶ 83). Additionally, MISO indicated that NEET Midwest's bid conveyed "substantial benefits to ratepayers over time." ROA.52-53 (¶ 83). Notably, NEET Midwest's selected bid included: a construction cost cap of $114.8 million, or $7.6 million below MISO's initial scoping-level cost estimate for the project;

caps of 9.8 percent on the return on equity and 45 percent equity that NEET Midwest would recover over the life of the project; a cap on the revenues that NEET Midwest would recover for the project over the first ten years of the project's life; and agreements to forgo certain revenues during construction of the project. ROA.52-53 (¶ 83).

After being selected to build the Hartburg-Sabine Line, NEET Midwest and MISO entered into a "Selected Developer Agreement" dated January 25, 2019. ROA.53 (¶ 84). This contract allows NEET Midwest to recover its costs in building the line and to recover a reasonable return for transmission once the line is operational. ROA.53 (¶ 84). The Selected Developer Agreement required NEET Midwest to secure the necessary state-law Certificate of Convenience and Necessity ("CCN"), to be requested from the PUCT pursuant to Texas state law. ROA.53 (¶ 84). NEET Midwest anticipated being able to demonstrate to the PUCT its qualifications to obtain a CCN. Indeed, MISO found in its selection report that, "NextEra identified and provided experience for routing and siting staff, as well as third-party contractors engaged to provide permitting support. NextEra also furnished a clear summary and timeline for the [CCN] process." ROA.53 (¶ 84).

About a year before MISO held a bid for the Hartburg-Sabine, SPP prepared to hold its first competitive bid in Texas. ROA.44 (¶ 56). One of the projects to be bid on was a 90-mile transmission line from a substation in Potter County, Texas to Southwestern Public Service Company's ("SPS") Tolk Generating Plant. ROA.44 (¶ 56). Before the bid could be held, SPS claimed that it was entitled to build the project as a matter of Texas law because the line would run in its service area. ROA.44 (¶ 56). On February 28, 2017, SPS and SPP filed a joint request for a declaratory ruling from the PUCT. ROA.45 (¶ 58). The parties asked the PUCT whether "SPS ha[d] the exclusive right to construct and operate new, regionally-funded transmission facilities in areas of Texas that lie within SPS's certificated service area." *Joint Petition of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order*, 341 P.U.R. 4th 195 (Oct. 26, 2017). The PUCT found that SPS did not have such exclusive rights, because "[n]owhere does [Texas utility law] explicitly grant incumbent transmission and distribution utilities an exclusive right to provide transmission service—including the right to construct transmission facilities—within their certificated service areas." *Id.* at *16.

At the time, the State of Texas agreed with that view, arguing to the Austin Court of Appeals that the challenge did not even merit oral argument because the case was controlled by the 2010 *Harlingen* decision, which had allowed out-of-State transmission companies into Texas. *See* Br. of Appellee Public Utility Commission of Texas, *Entergy Texas Inc. et al., v. Public Utility Commission of Texas*, Case No. 03-18-00666-CV (Tex. App. – Austin, Mar. 28, 2019).[3] Indeed, Texas suggested that the opposite view was contrary to "the plain language" of Texas' utility statutes and "illogical." *Id.* Put more finely, Texas argued that Texas' in-state utilities had wrongly asked "the Court to invent a state-law right to exclude wholesale transmission competitors from bidding on transmission projects within a vertically-integrated electric utility's certificated retail service area." *Id*.

Also around this time, in late 2017, Plaintiff-Appellant NextEra Energy Transmission Southwest, LLC ("NEET Southwest") entered into a purchase agreement to acquire 30 miles of 138 kV transmission line

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[3] *Available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=8f611751-c337-4589-b42c-8f1a2a41308f&coa=coa03&DT=Brief&MediaID=6c391b95-b20c-41b2-a7ce-a2eb263321cd

facilities from Rayburn Country Electric Cooperative, Inc. (the "Jacksonville-Overton Line") in the SPP region. ROA.31 (¶ 10). The contract required Rayburn to transfer its CCN to NEET Southwest, and such transfer required PUCT approval. ROA.31 (¶ 10). In October 2018, PUCT staff signed a stipulation recommending approval of the transfer, but the application remains pending before the Commission. Stipulation, PUCT Docket No. 48071, Item Number 80.[4]

F. REGULATION OF TRANSMISSION IN TEXAS

FERC was not alone in seeking to spur transmission development. Texas too sought to spur transmission growth. In 2007, an entity that did not own endpoints in Texas, Electric Transmission Texas, LLC, sought approval from the PUCT to commence operations in Texas by seeking a CCN to build and operate a transmission line in the ERCOT region, which is wholly within Texas and not part of an interstate ISO. *Pub. Util. Com'n of Texas v. Cities of Harlingen*, 311 S.W.3d 610, 614 (Tex. App. – Austin, 2010, no pet.); ROA.35-36 (¶ 24). The PUCT

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[4] *Available at* https://interchange.puc.texas.gov/Documents/48071_80_995044.PDF

granted the application, but that determination was promptly challenged. *Harlingen*, 311 S.W.3d at 610. The challengers argued that under Texas law, all utilities needed a geographic service area—which new transmission-only companies lacked. *Id.* at 618. Under the challengers' view, new entrants could not come to Texas until they established a geographic service area in the State. *Id.* The Court rejected those claims, explaining that PUCT "has been conferred power under the PURA to grant a CCN to a transmission-only utility that does not have a certificated service area." *Id.* at 619-20.

Indeed, in the Competitive Renewable Energy Zones ("CREZ") program, Texas turned to competitive transmission to spur development of new lines. ROA.34-35 (¶ 22). The goal of the CREZ program was to deliver electricity from Texas' wind farms in the western parts of the state to Texas' electricity consumers primarily located in central and north-central Texas. ROA.34-35 (¶ 22). The PUCT was tasked with developing a plan to construct the transmission capacity necessary to deliver the electric output from the renewable energy generated as part of the CREZ program. ROA.34-35 (¶ 22). After holding a competitive process, the PUCT selected Lone Star Transmission, a NextEra

subsidiary, as well as two other independent transmission companies, even though they did not already own endpoints in Texas, to build needed CREZ transmission lines. ROA.34-35 (¶ 22). Those out-of-state entrants have effectively, cheaply, and reliably provided Texans with transmission service since they were allowed to enter the state. ROA.50-51 (¶ 77).

Thus, the status quo in Texas, prior to enactment of SB 1938, embraced the ability of out of state companies to compete for, build, and operate transmission lines. ROA.34 (¶ 22).

G. TEXAS MOVES TO RESTRICT NEW BUILDING, OWNING, AND OPERATING OF TRANSMISSION LINES TO EXISTING TEXAS INCUMBENTS

Following NextEra's successful bid on the Hartburg-Sabine Line and agreement to purchase the Jacksonville-Overton Line, Texas incumbents turned to the state legislature to prevent further competition. In March 2019, at the end of the legislative session, companion bills SB 1938 and HB 3995 were introduced in the Texas Legislature. The identical bills sought to amend Texas' Utilities Code in two critical respects: *first*, the bills would limit the persons to whom the PUCT may grant a certificate to build, own, or operate a new electric

transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility to the owner of that existing facility; and *second*, the bills would require that if a CCN holder transfers or sells a CCN, he or she must transfer or sell it to another entity that already holds a CCN in the power region. As Representative Phelan, the sponsor of the House bill stated, the bill reflected the judgment that "transmission operations are best managed by accountable companies w*ith boots on the ground in our communities*." ROA.47 (¶ 64). That is, only Texas entities would be permitted to build, own, and operate transmission in the State. Because ERCOT was not subject to Order 1000 and has its own tariff-based rights-of-first-refusal provisions, the new law's focus and impact was necessarily directed at the large projects that are part of the interstate grid administered by MISO and SPP.

SB 1938, as implemented, will have profound implications on Plaintiffs specifically, and interstate commerce generally. As explained, Plaintiff-Appellant NEET Midwest won a bid from MISO to construct, own, and operate the Hartburg-Sabine Line. ROA.52-53 (¶¶ 83-84). It was selected because it offered MISO (and its end-users in multiple

states) "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.52-53 (¶ 83). That will all be lost because under SB 1938, NEET Midwest cannot complete the line. ROA.53-4 (¶ 86). The same is true for NEET Southwest, which agreed to acquire a line in the SPP region. ROA.31 (¶ 10). According to PUCT staff, NEET Southwest will provide "adequate service," such that the transaction should be approved. Supplemental Testimony of Constance McDaniel Wyman, PUCT Docket No. 48071, Item Number 86.[5]

H. PROCEEDINGS BELOW

Plaintiffs filed their Complaint on June 17, 2019, soon after SB 1938 was enacted into law. ROA.27-61. In the Complaint, Plaintiffs alleged that SB 1938 was unconstitutional under both the Commerce Clause and the Contract Clause. ROA.55-59 (¶¶ 90-111). Accordingly, Plaintiff sought declaratory and injunctive relief. ROA.60 (¶¶ 118-119). Moreover, due to the effect on pending projects which NextEra

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[5] *Available at* https://interchange.puc.texas.gov/Documents/48071_86_997502.PDF

companies had contracts regarding, preliminary injunctive relief was sought the same day. ROA.73-84. The District Court initially set a preliminary injunction hearing for September 10, 2019, ROA.601, then cancelled that hearing so as to first resolve the motion to dismiss. ROA.2815-16, 3123-24. Argument on that motion was heard on December 4, 2019, and on February 26, 2020, the District Court dismissed the complaint in its entirety with prejudice.

In its ruling, the District Court rejected each of the cases cited by NextEra, finding "all of [them] involve[d] the flow of goods in interstate commerce or burdensome requirements as a precondition for allowing the flow of goods in interstate commerce," while SB 1938 "does not purport to regulate the transmission of electricity in interstate commerce." ROA.3031. The District Court also found the reasons for upholding an Ohio sales tax exemption for natural gas utilities in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) applied to S.B 1938. ROA.3031. The District Court also believed SB 1938 "does not single out Texas transmission line providers as the sole beneficiaries of the right of first refusal" noting that "most incumbent providers in Texas are owned by out-of-state companies" and that out-of-state companies could

buy a Texas utility. ROA.3031. The District Court also rejected NextEra's allegations of discriminatory purpose, and found that the burden imposed by SB 1938 did not impermissibly burden interstate commerce. ROA.3031-33. Finally, holding that NextEra had no reasonable contractual expectations that the State could impair, the District Court dismissed NextEra's Contract Clause claim. ROA.3034-35. Because it dismissed the case, the District Court also denied the motion for preliminary injunction. ROA.3036. This appeal was filed the following day. ROA.3038.

SUMMARY OF ARGUMENT

The District Court erred from the start in asserting that "Plaintiffs' allegations are based on the premise that the Commerce Clause grants Plaintiffs the right to compete to build transmission lines in Texas." ROA.3028. On the contrary, NextEra's claim is that Texas may not pass a law allowing only Texas incumbents to compete to build, own, and operate certain transmission projects that are part of the *interstate* electric grid, and in part financed by ratepayers in other states. Preventing this kind of overt favoritism for local producers is at the heart of the dormant Commerce Clause, where a long line of U.S. Supreme Court cases have found laws that discriminate against out-of-state producers violate the Commerce Clause. These laws are "per se invalid" unless the state can justify such discrimination as required to advance an important local interest.

The District Court erred when it distinguished these *per-se* invalidity cases as limited to regulations on the interstate flow of goods. Not only are interstate transmission lines classic instrumentalities of interstate commerce, but the Commerce Clause principles of non-discrimination extend to the provision of services, exemplified by the

long line of cases invalidating state efforts to allow local operators to monopolize the handling of waste. Texas may no more limit the construction and ownership of new transmission lines to Texas incumbents than it can restrict the building of new homes to Texas home builders or the transmission of coal, natural gas, or uranium used to produce power to incumbent Texas companies.

Tracy does not insulate Texas' discrimination from Commerce Clause scrutiny. The Supreme Court in *Tracy* recognized that ordinary Commerce Clause principles apply to electric utilities. 519 U.S. at 291, n.8. Nothing in *Tracy* authorizes a state to give local companies a monopoly over business opportunities to construct, own, and operate transmission facilities, particularly those that are part of an interstate grid, and subject to federal regulation. *Tracy* simply held that Ohio could exempt fully regulated local distribution utilities from a sales tax, even though there could be some effects on separate sales by unregulated producers who were taxed. Here, SB 1938 discriminates in a single market—the market to build, own, and operate interstate transmission lines. The District Court's other rationale to uphold SB 1938 as a matter of law also fails. A discriminatory law is not saved by

the fact that the ultimate owners of certain favored business may reside out-of-state, or by the hypothetical ability of the disadvantaged entity to buy a favored in-state operator. These concepts find no support in a century of Commerce Clause jurisprudence. Further, the issues of discriminatory purpose and burden on interstate commerce are inherently factual and not properly dismissed on a Federal Rule of Civil Procedure 12(b)(6) motion.

Finally, because SB 1938 not only burdens but essentially abrogates NextEra's Hartburg-Sabine and Jacksonville-Overton contracts, the law is an unconstitutional impairment of contracts. If the Contract Clause means anything, it should mean that a state cannot follow a competitive bidding by legislatively overturning the winner. Even in a regulated business, the anticipation that there may be reasonable future regulation does not give the state carte blanche to abrogate contractual rights.

STANDARD OF REVIEW

This Court reviews "a District Court's grant of a motion to dismiss de novo," and must "accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff." *Whitley v. Hanna*, 726 F.3d 631, 637 (5th Cir. 2013).

While "the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*." *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001).

ARGUMENT

I. SB 1938 DISCRIMINATES AGAINST INTERSTATE COMMERCE.

SB 1938 violates fundamental principles of our constitutional Union. The Supreme Court has recognized that "removing state trade barriers was a principal reason for the adoption of the Constitution," and thus "when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). For this reason, "[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978)). The dormant Commerce Clause prohibits laws, like SB 1938, that discriminate against interstate commerce either on their face, in their effects, or in their purpose, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (citation omitted). SB 1938 cannot possibly satisfy this stringent test because instead of banning out-of-

staters, Texas could simply regulate electric transmission as it has always done, by having the PUCT individually review each new entrant and each project.

A. SB 1938 FACIALLY DISCRIMINATES BECAUSE IT ALLOWS ONLY IN-STATE ENTITIES TO COMPETE FOR INTERSTATE TRANSMISSION PROJECTS.

SB 1938 facially discriminates against interstate commerce with an in-state presence requirement: companies may only build a transmission line in Texas if they already own an "existing electric utility facility" in Texas. SB 1983 § 4. It is well established that this sort of in-state presence requirement is virtually *per se* invalid under the dormant Commerce Clause. *Tenn. Wine & Spirits*, 139 S. Ct. at 2457 (striking down in-state residency requirement that "blatantly favors the State's residents"); *Granholm*, 544 U.S. at 474-75 (striking down law requiring in-state presence to ship wine directly to consumers).

In addition to its blatant in-state presence requirement, SB 1938 unconstitutionally establishes a preference for in-state incumbents against out-of-state businesses. *See, e.g.*, *Carbone*, 511 U.S. at 392 (striking down regulation that gave one processor a monopoly over local

waste-processing services); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (striking down regulation requiring all milk to be processed at local facilities within short distance from Madison); *Buck v. Kuykendall*, 267 U.S. 307, 316 (1925) (striking down certificate-of-need requirement for operating transportation services on interstate highways). These "economic barrier[s] protecting a major local industry against competition from without the State" violate the Commerce Clause even if they also exclude some in-state businesses, *Dean Milk*, 30 U.S. at 356, and even if they protect only a single favored incumbent, *Carbone*, 511 U.S. at 392 (although ordinance favored only "a single local proprietor," this fact "just makes the protectionist effect of the ordinance more acute").

For example, in *Carbone*, the Court considered a regulation that allowed only one favored local provider to process all local waste. *Carbone*, 511 U.S. at 391. In this way, the state gave the favored producer a monopoly on providing a lucrative service, squelching competition and "leaving no room for investment from outside." *Id.* at 392. In striking down the statute, the Court explained it was "just one

more instance of local processing requirements that we long have held invalid." *Id.* at 391.[6]

Contrary to the District Court's holding, cases striking down discriminatory laws (like *Carbone* and *Granholm*) cannot be distinguished as involving limitations on the "flow of goods in interstate commerce." ROA.3031 ("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, which distinguishes it from the cases upon which Plaintiffs rely."). For one thing, interstate transmission lines are instrumentalities of interstate commerce, and hence just as critical to the flow of such commerce as the electricity that they transmit. Moreover, while *Carbone* involved the interstate flow of trash, the Court

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[6] Nothing in *United Haulers* changes this conclusion: that decision involved the distinct situation where the *state itself* entered the market and discriminated in favor of itself against all private businesses. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 – 43 (2007) ("States and municipalities are not private businesses—far from it."). Indeed, *United Haulers* affirms the importance of *Carbone* and its progeny "when a law favors in-state business over out-of-state competition." *Id.* at 343.

was clear that "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Carbone*, 511 U.S. at 391. So too here: Texas has not restricted the "flow" of electricity, but the *service* of building, owning, and operating the transmission lines through which electricity travels in interstate commerce.

In fact, SB 1938 is much worse than typical flow-control ordinances because it directly controls an instrumentality of interstate commerce: transmission lines that facilitate the movement of vast pools of interstate electricity throughout the various states in MISO and SPP. *New York*, 535 U.S. at 7 ("[A]ny electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce"). Going beyond the restrictions on local waste-processing services at issue in cases like *Carbone*, SB 1938 restricts which entities can contract to build transmission lines for the interstate entities charged with operating and maintaining these grids. Indeed, many of the affected projects must be financed not just by Texans, but also by other states' participants in the same regional grid, who will also benefit from the new transmission project. ROA.43 (¶¶ 51-

52). Whatever Texas' power to limit competition in local concerns, Texas cannot connect to interstate grids and then only allow Texas businesses to build the transmission lines that serve those entire grids, nor can Texas force other states to finance projects for favored local incumbents. *Cf. Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Com'n*, 461 U.S. 375, 377 (1983) ("[T]ransmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests."). Because this law facially discriminates against interstate commerce by privileging a small group of local incumbents against those who lack an in-state presence, it is virtually *per se* invalid.

But even on its own terms, there is no support for the District Court's suggestion that discriminatory limitations on "the flow of goods" are treated any differently than discriminatory limitations on the provision of services in interstate commerce—particularly when that service is building, owning, and operating instrumentalities of interstate commerce. To the contrary, the Supreme Court has "long noted the applicability of . . . dormant Commerce Clause jurisprudence

to service industries." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 n.10 (1997); *see also Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986) (finding a Commerce Clause violation when Rhode Island law precluded out-of-State service providers, namely debt collectors).

Indeed, as early as 1925 the Supreme Court explained that a State could not, consistent with the Commerce Clause, use its powers to prevent out-of-state service providers from engaging in interstate commerce in the State. In *Buck v. Kuykendall*, 267 U.S. 307, 315–16 (1925), the Supreme Court struck down a Washington law that determined *who* could carry passengers traveling interstate, but did not otherwise limit the flow of those passengers. In an opinion by Justice Brandeis, the Court explained:

> [The challenged law's] primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner.

Id. That is exactly what SB 1938 does. It limits the pool of providers who can build, own, or operate new interstate transmission projects, allowing only in-state incumbents to provide this service.[7]

B. *TRACY* DOES NOT ADDRESS DISCRIMINATION BETWEEN SIMILARLY SITUATED SERVICES ON THE BASIS OF INCUMBENCY.

The District Court incorrectly concluded that *General Motors v. Tracy*, 519 U.S. 278 (1997), allows Texas to create monopolies for in-state incumbents seeking to build transmission projects. To begin with, *Tracy* did not deal with a statute that excluded out-of-state companies from competing in the provision of a good or service, let alone the service of constructing, owning, and operating transmission facilities that are part of an interstate grid regulated by federal law and

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[7] A Minnesota District Court wrongly rejected these arguments in *LSP Transmission Holdings, LLC v. Lange* 329 F. Supp. 3d 695 (D. Minn. 2019). The case is on appeal in the 8th Circuit, where the appellant, with the support of United States has argued that the decision is flawed and should be vacated and remanded. *See* Br. of United States, *LSP Transmission Holdings, LLC v. Lange*, No. 18-2559, at 5-17(8th Cir. 2018). Indeed, as the United States noted, the *Lange* District Court decision made "three discrete, analytical errors in its decision." *Id.* at 5. As we explain, many of those same analytical errors infected the decision below here.

administered by an interstate ISO. *Tracy* dealt with Ohio's tax law for retail sales of natural gas, under which sales by fully regulated, local distribution utilities were exempt from the tax, but sales by unregulated producers and marketers were taxed. *Id.* at 284-85, 297-98.

State regulation and taxation of retail sales of natural gas is a domain long reserved for state regulation. *Tracy*, 519 U.S. at 304; 15 U.S.C. § 717. By contrast, SB 1938 purports to regulate instrumentalities of interstate commerce: transmission lines planned and ordered by an interstate entity like MISO (and overseen by FERC), designed to facilitate the interstate flow of electricity across a region, and often funded by participants in multiple states, which all benefit from the project. Here, for example, the Hartburg-Sabine project will be funded by rate payers in several different states participating in MISO—but SB 1938 allows only Texas incumbents to construct and operate the project. We are not aware of any Supreme Court (or Circuit Court) case that has ever upheld a law that discriminates against out-of-state businesses in this manner. Indeed, the Supreme Court has long been deeply skeptical of state laws that attempt to regulate which entities can participate in interstate commerce. *E.g.*, *Sprout v. City of S.*

Bend, 277 U.S. 163, 171 (1928) ("The privilege of engaging in such commerce is one which a state cannot deny."); *Barrett v. City of N.Y.*, 232 U.S. 14, 31 (1914) ("Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license.").

Further, *Tracy* dealt with the somewhat unique situation of a tax exemption that affected two different retail products and markets. Local distribution utilities sold a "bundled" product of natural gas coupled with a host of regulations and protections for consumers, whereas unregulated marketers sold only unbundled natural gas. *Id.* at 297-98. These products were mostly sold in different retail markets: the "core market" of the local distribution companies was the "captive" market, comprised of people who needed to buy the bundled gas; while the unregulated marketers primarily sold to large "bulk buyers," companies that "have no need for bundled protection." *Id.* at 302-03. In this latter, "noncaptive" market, however, there was a "possibility" of competition between bundled and unbundled products, since some mid-size consumers (large enough to buy in volume from marketers, but small enough to benefit from bundled protection) might have to choose which

type of product they preferred. *Id.* Nonetheless—even though both products occasionally competed in the same market, the Supreme Court held that Ohio could permissibly tax these two retail products differently, because they were not "similarly situated." *Id.* at 297-98, 310 (describing a "noncompetitive bundled gas product that distinguishes its regulated sellers from independent marketers to the point that the enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause").

Here, SB 1938 does not discriminate between two different products nor two different markets; the only market at issue is the interstate market for building, owning, and operating transmission services, a market regulated by FERC and overseen by interstate independent system operators pursuant to FERC Order 1000.[8] *Cf. Camps Newfound*, 520 U.S. at 583 n.16 ("[T]his case is quite unlike [*Tracy*]. There, the Court premised its holding that the statute at issue was not facially discriminatory on the view that sellers of 'bundled' and

[8] In ERCOT, the market is overseen by a Texas-regulated ISO.

'unbundled' natural gas were principally competing in different markets.").[9] The District Court below incorrectly believed that *Tracy* "grants controlling weight to the monopoly market," ROA.3031,[10] but *Tracy* does not allow discrimination between identical products in one market merely because such discrimination might have an incidental benefit in a different "monopoly market."

The Court in *Tracy* itself recognized that distinctions between similarly situated parties on the basis of geographical presence presented a different issue. "Of course, if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny[.]" *Tracy*, 519 U.S. at

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[9] Similarly, the Second Circuit's decision in *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017), dealt with two "different products." *Id.* at 105. There, Connecticut invented a type of product, called a "REC," and the court found that Connecticut's RECs were different from RECs produced in states like Georgia. *Id.* Thus, the court found that Connecticut could treat these products differently. *Id.*.

[10] SB 1938 favors incumbents *regardless* of their participation in the "monopoly market" (by which the court meant utilities with retail-distribution facilities and obligations), which is why some of the favored incumbents under SB 1938 do not serve retail customers at all.

307 n.15. The *Tracy* Court reaffirmed that ordinary Commerce-Clause principles apply to electric utilities in the same way they apply to waste processors and other regulated businesses. *Id.* at 291 n.8; *see, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

Nor is it an answer to say that States play a role in transmission regulation. Although Order 1000 did not preempt laws like SB 1938, the fact that FERC has not preempted a state law does not insulate it from a Commerce Clause challenge. *Wyoming*, 502 U.S. at 458 (decision not to preempt is not approval to violate Commerce Clause); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). FERC Chairman Bay explained in his concurrence approving MISO's tariff: "The Commission's order today does not determine the constitutionality of any particular state right-of-first-refusal law. That determination, if it is made, lies with a different forum, whether state or federal court." *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61037, 61195 (F.E.R.C. Jan. 22, 2015) (Bay, Comm'r, concurring).

Indeed, the United States (which included the views of the Antitrust Division of the Department of Justice) submitted a brief in

the court below arguing that *Tracy* is inapplicable here for many of these same reasons. ROA.2901-04. As the United States explained, "SB 1938 is unlike the Ohio tax law in *Tracy*," because it "only restricts who can build, own, or operate new transmission facilities in Texas—a noncaptive market where local utilities and nonlocal companies compete." *Id*. Unlike the tax law in *Tracy*, "SB 1938 does not also apply to a 'noncompetitive, captive market in which the local utilities alone operate.'" *Id*. (quoting *Tracy* at 303–04).

C. SB 1938 ALSO DISCRIMINATES AGAINST OUT-OF-STATE BUSINESS IN ITS EFFECTS.

Even facially neutral statutes violate the Commerce Clause if they have the effect of favoring in-state businesses over similarly situated out-of-state businesses. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36-37 (1980). The effect of SB 1938 is plainly discriminatory: it allows businesses to build, own, and operate new transmission lines and to purchase existing transmission line if—but only if—they already own an existing facility in Texas. By definition, all entities who do not currently own facilities in Texas are excluded from the interstate market for building new transmission lines or purchasing existing

transmission lines, while in-state incumbents are given exclusive access to these markets.[11]

This effect on interstate commerce is not incidental: by its terms, SB 1938 distinguishes favored providers *solely* on the basis of their ownership of in-state facilities. This is unlike laws that distinguish between certain permissible "business forms" while having a merely disproportionate impact on out of state businesses. *E.g.*, *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978) (upholding law that distinguished between service stations owned by petroleum producers and refiners, and those owned by others); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Commission*, 945 F.3d 206, 220 (5th Cir. 2019) (upholding law that distinguished on the basis of whether company was a "public corporation"); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007)

[11] Because SB 1938 excludes out-of-state entities by definition, it is unlike the gambling statute at issue in the unpublished decision of *Churchill Downs Inc. v. Trout*, 589 F. App'x 233 (5th Cir. 2014). That case dealt with a law requiring all horse-racing bets to be placed in person, but did not otherwise limit who could own a horse-racing business, or prevent out-of-state businesses from opening a new horse-racing track in Texas. *Id.* at 234. The court held that any effect on out-

(upholding law that distinguished between insurance companies and non-insurance companies); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001) (upholding a law that distinguished between car dealers owned by auto manufacturers and those owned by non-manufacturers).

Here, SB 1938 is indifferent to a utility's "form of business": owners of existing facilities in Texas can build new transmission lines, whether they are vertically integrated utilities, transmission-only companies, cooperatives, or any other form of business; entities without in-state facilities cannot build new transmission lines, whether they are vertically integrated utilities, transmission-only companies, cooperatives, or any other form of business. SB 1938 thus discriminates based on geography, not business form. *See Lewis*, 447 U.S. at 42 (striking down business-form regulation that "discriminates *among* affected business entities according to the extent of their contacts with the local economy").

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of-state businesses was merely speculative—and indeed, that there was no evidence of a discriminatory impact. *Id.* at 237.

The District Court nonetheless discounted these discriminatory effects for two reasons that have no basis in Commerce Clause jurisprudence. *First*, the District Court stated that "most incumbent providers in Texas are owned by out-of-state companies." ROA.3032. But when a statute discriminates based on a business's physical, in-state presence, the Supreme Court has never asked whether those in-state businesses have shareholders residing elsewhere. *Granholm*, 544 U.S. at 475 (striking down in-state presence requirement without considering whether New York's wineries were owned by New York citizens); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (striking down tax on milk produced out-of-state without considering whether in-state dairy farms were owned by out-of-state interests); *Dean Milk*, 340 U.S. at 352 (striking down requirement that milk be pasteurized at facilities within five miles of Madison, Wisconsin without considering where the owners of local pasteurization facilities resided).

The Eleventh Circuit explicitly rejected a similar argument in *Fla. Transp. Servs. v. Miami-Dade Cty.*, 703 F.3d 1230, 1259 (11th Cir. 2012), finding that a law favoring incumbents had a disparate impact on out-of-state businesses, even though some favored incumbents were

incorporated out of state. *Id.* (explaining that Commerce Clause does not "turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies"). The court explained that while some incumbents "were incorporated out-of-state, *all* of the [incumbents] were operating locally at the Port or were otherwise entrenched at the Port." *Id.* So too here: while some of the incumbents favored by SB 1938 are incorporated elsewhere, *all* of the incumbents are operating locally in Texas—and entities without Texas operations are entirely excluded from the market.

Second, the District Court wrongly concluded that these effects do not matter because SB 1938 allows out-of-state entities to enter the Texas market "by buying a Texas utility." ROA.3032. No case law was cited in support of this proposition, because there is none. This theory would eviscerate the dormant Commerce Clause: in response to almost *any* protectionist measure favoring in-state businesses, the otherwise unconstitutional statute could be cured by simply including an exception for the acquisition of an in-state entity (which, of course, is generally available in any business anyway). But under the Commerce

Clause, states "cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Granholm*, 544 U.S. at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963)). Thus, a state may not even require out-of-state companies to "open a branch office" in the state to compete on equal terms. *Id.* (explaining that requiring these "additional steps" would "drive up the cost" of the enterprise). Certainly Texas may not impose the much more burdensome requirement that out-of-state businesses must *purchase an entire in-state utility* in order to compete on equal terms.

D. SB 1938 WAS ENACTED WITH A PURPOSE OF DISCRIMINATING AGAINST OUT-OF-STATE BUSINESSES.

Purposeful discrimination is a question of fact. *Wal-Mart*, 945 F.3d at 218 (citing *Veasey v. Abbott*, 830 F.3d 216, 235 (5th Cir. 2016)). Accordingly, at the motion to dismiss phase, the District Court was required to "accept all well-pleaded facts as true" and draw "all reasonable inferences in [Plaintiffs'] favor." *Benfield v. Magee*, 945 F.3d 333, 336 (5th Cir. 2019). To dismiss the purposeful discrimination claim, however, the District Court did the opposite: it disregarded Plaintiffs' well-pleaded factual allegations and drew every inference in

Texas' favor. That was error, and should be reversed. *E.g.*, *N. Am. Meat Institute v. Becerra*, 219CV08569CASFFMX, 2020 WL 919153, at *5 (C.D. Cal. Feb. 24, 2020); *cf. Wal-Mart*, 945 F.3d at 218 (remanding for new trial on purpose claim because there were disputed issues of fact).

Courts consider the following non-exhaustive factors when assessing discriminatory purpose:

> (1) whether the effect of the state action creates a clear pattern of discrimination; (2) the historical background of the action, which may include any history of discrimination by the decisionmakers; (3) the "specific sequence of events leading up" to the challenged state action, including (4) any "departures from normal procedures[;]" and (5) "the legislative or administrative history of the state action, including contemporary statements by decisionmakers.

Wal-Mart, 945 F.3d at 214 (quoting *Allstate*, 495 F.3d at 160). The Complaint has ample allegations of these factors.

First, the "effect of the state action creates a clear pattern of discrimination." *Id.* After all, the clear purpose and effect of SB 1938 was to prevent out-of-state transmission builders from building in Texas. ROA.47 (¶ 64). That shows discriminatory purpose. *E.g.*, *SDDS, Inc. v. State of S.D.*, 47 F.3d 263, 268 (8th Cir. 1995) (finding discriminatory purpose when an initiative was "specifically designed

and intended to hinder the importation of out-of-state waste into South Dakota").

Second, the historical background of SB 1938, including the sequence of events leading to its passage, evidences discriminatory purpose. SB 1938 was passed in response to the recent introduction of competitive transmission following the implementation of Order No. 1000, as well as NEET Southwest's attempt to purchase the Jacksonville-Overton Line. Prior to Order 1000, Texas had accepted the benefits of out-of-state transmission development by using out-of-state, transmission-only companies to build CREZ lines. Texas law further allowed the PUCT to certificate transmission-only companies both inside and outside of ERCOT. Representative Phelan, Chairman of the Texas House State Affairs Committee and sponsor of the house bill, made clear that SB 1938 was introduced in response to "doors opened by FERC with their order." House State Affairs Committee, April 1, 2019 at 8:41:02-8:41:43; *see also* ROA.45-46 (¶ 61). It is thus no accident that SB 1938 was adopted immediately following the Hartburg-Sabine award by MISO to Plaintiff-Appellant NextEra Energy Transmission Midwest, which was the first MISO-run competitive bid in Texas in

which the Texas incumbent lost. *See Lewis*, 447 U.S. at 32 (noting that Florida legislature acted to curtail market in response to introduction of competition). Indeed, the legislative record is clear that SB 1938 arose because of complaints about this type of interstate competition. ROA.45-46 (¶ 61).

In rejecting this analysis, the District Court concluded (without citation to the Complaint or any other evidence) that "[t]he legislative history indicates instead that the Texas Legislature disagreed with the statutory analysis reflected in a 2017 PUCT declaratory order and enacted SB 1938 to eliminate any uncertainty in Texas law." ROA.3033. But that interpretation is contrary to allegations in the Complaint, ROA.45-46 (¶¶ 61, 62), and runs headlong into Supreme Court law on determining purpose, which is clear that in determining "the purpose of a challenged statute" the Court "is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but" must instead, "determine for itself the practical impact of the law." *Hughes*, 441 U.S. at 336 (quoting *Lacoste v. La. Dep't of Conservation*, 263 U.S. 545, 550 (1924)). Here, there is ample

historical evidence that SB 1938 was passed with the express aim of keeping foreign concerns out of Texas.

Third, SB 1938 was introduced late in the session and sped through the process. ROA.47 (¶ 65). In rushing the bill, the Texas legislature chose a "highly ineffective means to promote the legitimate interest asserted by the state." *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004); *see also Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994) (finding Dormant Commerce Clause violation when State's "justifications are unpersuasive and insufficient"). That mismatch between ends and means is evidence of discriminatory purpose. *S. Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 595 (8th Cir. 2003).

For example, one of the major themes focused on by the legislators was that the Bill was "needed" to protect the PUCT's rate jurisdiction. ROA.50 (¶ 76). But that explanation was pretextual; the PUCT explained to a Texas State court just weeks before the legislative hearings on the Bill that allowing out-of-state transmission utilities into Texas does nothing to divest it of jurisdiction. *Id.* Or in the PUCT's own words "there is no possibility of ceding jurisdiction" if a

"transmission-only" utility is certificated "outside of ERCOT." Br. of PUCT, *Entergy Texas Inc. v. Pub. Util. Comm. of Texas*, No. 03-18-006666-CV (Tex. App. – Austin, Mar. 28, 2019) at 27 (hereinafter "Tex. 2019 Br.").

The legislature's purported reliability fears were also pretextual. ROA.50-51 (¶ 77). After all, for an out-of-state transmission project to be sited in Texas the ISO responsible for transmission must first find that the service will be reliable. Consider, the Hartburg-Sabine project. Before NextEra could build that line, it needed to: (1) demonstrate that it could provide reliable service to MISO; and (2) make the same showing to the Texas PUCT. For those reasons, the out-of-state transmission companies selected to build CREZ lines have consistently provided reliable service. ROA.50-51 (¶ 77).

Fourth, the contemporaneous statements of the legislature constitute clear evidence of discrimination. Indeed, the sponsor of the House Bill, Representative Phelan, admitted that he was discriminating against out-of-staters, stating, "transmission operations are best managed by accountable companies with boots on the ground in our communities." ROA.47 (¶ 64). This comment is "no doubt

relevant" to a determination of purpose, *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1259 (4th Cir. 1995), and was entirely overlooked by the District Court.

In short, there were ample allegations in the Complaint that SB 1938 was enacted with discriminatory purpose.

E. SB 1938 DID NOT CODIFY EXISTING TEXAS LAW.

Texas argued in the District Court that SB 1938 was justified because it codified what was always the law. For the reasons explained above, even if that were true, all it would mean is that Texas' historical practice was unconstitutional. But it is not true: before SB 1938, longstanding PUCT practice, the Texas state courts, the Texas Attorney General, and the federal ISOs operating in Texas all agreed that out-of-state entities, who did not already own transmission facilities in Texas, could enter the State and provide transmission services.

Indeed, just a year ago, Texas explained to the Austin Court of Appeals that:

> Texas law does not explicitly or implicitly grant vertically-integrated utilities a right of first refusal or the exclusive right to construct transmission lines in their certificated areas. …"
>
> Appellants cite to no provision of PURA that grants a utility the exclusive right to provide

> transmission services in any area. … If only incumbent utilities are eligible to provide transmission services in their certificated area, PURA would limit CCN applications accordingly, rather than allowing for "[a]n electric utility *or other person* that wants to obtain" a CCN to apply. *Id.* (emphasis added).

Tex. 2019 Br. at 30. In support of this argument, Texas noted that it had "a ***historical understanding*** that a certificated retail area did ***not*** grant a transmission monopoly." Tex. 2019 Br. at 32-33 (emphasis added). That historical understanding was based on "by longstanding agency practice," under which the PUCT had consistently "allowed utilities to build their transmission facilities across the certificated area of other utilities." *Id.* at 32. Texas further bolstered its position by pointing to *Public Utility Commission of Texas v. Cities of Harlingen*, 311 S.W.3d 610 (Tex. App.—Austin 2010, no pet.), which squarely held that the plain language of Texas law allows transmission-only entities to build transmission lines before SB 1938. Indeed, Texas warned against the consequences of a new law like SB 1938:

> If the Commission were to give only the incumbent utility the right to build transmission, it could result either in transmission projects being routed inefficiently to avoid the service areas of competitors or complicated projects with

> multiple utilities coordinating to each build the piece across their individual service area.

Tex. 2019 Br. at 32. Taking these factors together, Texas thought that the question was not even particularly close, and for that reason, advised the appellate court that oral argument was unnecessary. *Id.* at 2.

Numerous bodies agreed with Texas. For one, the federal ISOs in Texas, believed that they could hold competitive bids. That view was shared by the PUCT itself, which for many of the same reasons as Texas, had concluded that out-of-state transmission entities could enter Texas, bid on transmission lines put out for bid by the federal ISOs, and provide transmission services. *See* Declaratory Order, PUCT Docket No. 46901 (2017).[12] In fact, the PUCT noted that a contrary rule would raise a constitutional question because the Texas constitution forbids monopolies. *Id.* at 18 n.76. The PUCT's view was affirmed by the reviewing Texas court over the protest of the Texas utilities. *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, No. D-1-GN-18-000208 (Texas

[12] *Available at* https://interchange.puc.texas.gov/Documents/46901_76_959583.PDF

State District Court, 459th Judicial District, Travis County, Sept. 27, 2018).

In short, SB 1938 cannot be justified as a codification of Texas' historical practice.

II. THE BURDEN SB 1938 PLACES ON INTERSTATE COMMERCE OUTWEIGHS ANY LOCAL BENEFITS.

Even laws that do not directly discriminate are unconstitutional if they impose burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* test is a fact-intensive inquiry, and thus, is generally inappropriate for resolution before discovery. *United Transp. Union v. Foster*, 205 F.3d 851, 863 (5th Cir. 2000); *Lebanon Farms Disposal, Inc. v. Cty. of Lebanon*, 538 F.3d 241, 252 (3d Cir. 2008); *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 52 (2d Cir. 2007). To dismiss the *Pike* claim at the outset of the litigation, the District Court disregarded the allegations in the Complaint, ignored the reasoned views of the United States, and misapprehended the *Pike* test.

The District Court did not consider the interstate commerce burdens imposed by SB 1938. But as the United States explained, "the burden on interstate commerce [here] appears to be a more substantial

version of the very kind of harm found in *Pike*." ROA.2898. Under SB 1938, NextEra (like all other out-of-state firms) does not have the option of making a small, unnecessary expenditure (like that found excessive in *Pike)* to enter the Texas market. Instead, NextEra is entirely precluded from entering the Texas market, and therefore, must forfeit the Hartburg-Sabine Line—a hundred-million-dollar interstate opportunity that MISO awarded to NextEra because it offered "substantial benefits to ratepayers" in many States. ROA.52-53 (¶ 83); *see also Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283 (8th Cir. 1993) (burden on single firm can violate Commerce Clause).

That burden falls not only on NextEra, but also on the entire transmission system. For one, consumers throughout MISO would have paid for (and benefited from) the Hartburg-Sabine Line. ROA.43 (¶ 51). Moreover, as FERC has explained, without competition for transmission lines, there is little incentive to identify and build new, important interstate lines. *See MISO Transmission Owners v. FERC*, 819 F.3d 329, 332-33 (7th Cir. 2016) ("[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"). As the United States explained below "[w]ith less robust transmission, both in-state and out-of-state consumers may have reduced access to lower cost and more reliable generation." ROA.2899.

In assessing burden, courts also examine "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). If every State adopted a law like SB 1938, it would nullify FERC's abolition of federal rights of first refusal and eliminate competition in the transmission market, taking away the reliability and price benefits of Order 1000.

The District Court also erred in assessing benefits, and its conclusion that SB 1938 improves reliability is not supported. *Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75 (5th Cir. 1980) ("[A] court must examine the benefits that supposedly result from the local law, and not rely merely on the assertion of an accepted local interest.") Texas had previously allowed out-of-state transmission providers to enter the State and suffered no reliability costs. ROA.50-1 (¶ 77). Allowing new transmission providers to enter Texas would not harm reliability, because even "nonincumbent transmission developers"

must "comply with all applicable reliability standards." Order No. 1000 ¶ 266. And to the extent there are reliability concerns beyond the applicable standards, those are already addressed by both the federal ISOs and the PUCT. ROA.50-51 (¶ 77). Indeed, in awarding the Hartburg-Sabine Line to NextEra, MISO found that 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.52-53 (¶ 83).

Moreover, Texas could obtain all of SB 1938's purported benefits without burdening interstate commerce. *Pike*, 397 U.S. at 142. Indeed, the PUCT already has the authority to require that transmission developers provide reliable service, and can deny unreliable providers a CCN. ROA.50-51 (¶ 77). Further, "[i]f Texas desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applicants with the 'burden' of residing in Texas." *Cooper*, 11 F.3d at 554.

III. THE DISTRICT COURT ERRED IN DISMISSING THE CONTRACTS CLAUSE CLAIM.

The Contracts Clause imposes limits on a state's "power . . . to abridge existing contractual relationships, even in the exercise of its

otherwise legitimate police power." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978). The District Court erred in two respects when it dismissed NextEra's Contracts Clause claim. *First*, in finding no substantial impairment of the SDA, it incorrectly accorded dispositive weight to the fact that the electric transmission industry is heavily regulated. *Second*, in ruling that SB 1938 was justified by "significant and legitimate state interests," the District Court impermissibly went beyond the four-corners of the complaint and disregarded a critical aspect of the inquiry. ROA.3035.

A. SB 1938 SUBSTANTIALLY IMPAIRED NEXTERA'S REASONABLE CONTRACTUAL EXPECTATIONS.

In assessing a claim under the Contracts Clause, the "threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Grp., Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983) (quoting *Allied Structural Steel*, 438 U.S. 234). The District Court resolved this inquiry against NextEra because "Texas's regulation of the electric transmission has a long and extensive history." ROA.3035. However, a "history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause." *Chrysler Corp. v. Kolosso Auto*

Sales, Inc., 148 F.3d 892, 895 (7th Cir. 1998). For example, this Court has upheld a Contracts Clause challenge in the highly regulated insurance industry. *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 627 (5th Cir. 2010) (involving law favoring in-state insurers despite existing contracts with out-of-state insurers).

Rather, the appropriate focus is upon "the extent to which the [new] law upsets the reasonable expectations the parties had at the time of contracting, ***regarding the specific contractual rights the state's action allegedly impairs***." *United Healthcare*, 602 F.3d at 627 (emphasis added). Here, SB 1938 wholly "upset" NextEra's reasonable contractual expectation that it would be able—***under the PUCT's then-existing certification criteria***—to apply for and obtain a CCN from the PUCT so that it could construct the transmission line, which was "the specific contractual right" the new law impairs. As the facts pled in the complaint (*see* ROA.52-53 (¶¶ 81-84)) demonstrate, it would have made no sense for MISO or NextEra to have gone through the time, expense, and effort of a competitive bidding process involving non-incumbents if a law such as SB 1938 was contemplated. *See United Healthcare*, 602 F.3d at 629 (looking to the expectations of the parties to

the agreement to determine impairment); *see also Six Kingdoms Enterprises, LLC v. City of El Paso*, 2011 WL 65864, at *6 (W.D. Tex. Jan. 10, 2011) ("It would not have been a rational business investment for either Plaintiff or Petland to open this franchise in a market subject to potential regulations of the type at issue in this case, and the Court does not presume that they did so.").

The District Court acknowledged that "[c]ourts look to the terms of the contract to determine the parties' reasonable expectations, including whether the risk of a change in the law was contemplated at the time of contracting," ROA.3034-35 (quoting *United Healthcare*, 602 F.3d at 627), yet did not identify any provision in the SDA indicating that the risk of a law such as SB 1938 was foreseen by the parties to the agreement. Nor is SB 1938 an incremental and foreseeable evolution of the ***existing regulation*** at the time of contracting. Instead, SB 1938 was a reversal of longstanding court and PUCT interpretation of the existing law and regulations. *See supra* Part I.E.

In fact, a few months before SB 1938 was passed, the Texas Attorney General argued to a state appellate court that "Texas law does not explicitly or implicitly grant vertically-integrated utilities a right of

first refusal or the exclusive right to construct transmission lines in their certificated areas." Tex. 2019 Br. at 30. In other words, at the time of the SDA, Texas did not regulate the construction of transmission lines in the manner that SB 1938 now does. Contrary to any argument that SB 1938 should have been foreseen, the Attorney General stated that to "invent a state-law right to exclude wholesale transmission competitors from bidding on transmission projects" in the incumbent utility's service area, as SB 1938 does here, would "ignore" the "Legislature's stated preference for competitive markets" and "longstanding agency practice." *Id.* at 30-32.

This case is fundamentally different from *Energy Reserves*, the case principally relied on by District Court, which concerned a new law affecting regulated prices for natural gas. In *Energy Reserves*, "the contract itself included terms that adjusted for changes in gas-price regulation," ROA.3035, so the plaintiff had to necessarily foresee that "its contractual rights were subject to alteration by state price regulation," *Energy Reserves*, 459 U.S. at 416. Here, unlike in *Energy Reserves*, the SDA is not made subject to any present or future regulation that imposes an incumbency requirement. Instead, we deal

here with the enactment of a Texas law imposing a new requirement that results in the outright abrogation of two contracts, one of which was executed only after a competitive bidding process that would have been unnecessary if the parties had foreseen the new law. This constitutes precisely the type of legislative action the Contracts Clause was intended to prevent. *United Healthcare*, 602 F.3d at 628 ("To determine whether an impairment was substantial, the Supreme Court has considered factors that reflect the high value the Framers placed on the protection of private contracts, namely, the parties' entitlement to rely on rights and obligations set by the contract so that they can order their personal and business affairs according to their particular needs and interests.") (internal quotation marks and citation omitted) .

B. THE DISTRICT COURT IMPROPERLY WENT BEYOND THE FOUR CORNERS OF THE COMPLAINT IN FINDING LEGITIMATE STATE INTERESTS JUSTIFIED AN IMPAIRMENT OF NEXTERA'S CONTRACT RIGHTS.

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Energy Reserves*, 459 U.S. at 411. In a single sentence, the District Court determined that, even if NextEra's

contractual rights have been impaired by SB 1938, the Contracts Clause challenge fails because the law "rests on, and is prompted by, significant and legitimate state interests." ROA.3035.

That ruling was improper on a motion to dismiss. Courts generally hold that "[r]esolution of … whether the contract-impairing enactment was 'reasonable and necessary to serve an important public purpose' … is not appropriate in the context of a motion to dismiss." *Kuritz v. New York*, 2012 WL 6020039, at *22 (N.D.NY. Dec. 3, 2012) (internal citation omitted). That is because this inquiry is "necessarily fact-intensive and does not lend itself well to resolution on a motion to dismiss." *Air Evac EMS, Inc. v. Cheatham*, 260 F. Supp. 3d 628, 647 (S.D. W. Va. 2017).[13]

The District Court's resolution of the factual issue here is particularly flawed because "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied*

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[13] *Six Kingdoms*, 2011 WL 65864, at *5; *Image Media Advertising, Inc. v. City of Chicago*, 2017 WL 6059921, at *11 (N.D. Ill. Dec. 7, 2017) (denying motion to dismiss based on allegations in complaint); *cf. Matsuda v. City and County of Honolulu*, 512 F.3d 1148, 1155 (9th Cir. 2008) (reversing summary judgment because "the record is not fully developed" as to substantial impairment).

Structural Steel, 438 U.S. at 245. When, as here, there is "[s]evere impairment," it "will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Id*. As is apparent from the face of the Order, the District Court failed to conduct that type of searching examination (and could not have properly done so on a motion to dismiss) and so could not have properly determined whether SB 1938 was "enacted to deal with a broad, generalized or social problem." *Id*. at 250 (upholding Contracts Clause challenge because, among other things, the legislation "was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's").

Even if one were to credit the District Court's factual finding of the existence of "significant and legitimate state interests," ROA.3035, the court erred by failing to even address the "next inquiry": "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Powers v. United States*, 783 F.3d 570, 578 (5th Cir. 2015) (quoting *Energy Reserves*, 459 U.S. at 412). This is a critical inquiry because a state "is

not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."[14] *U.S. Trust Co. of N.Y v. New Jersey*, 431 U.S. 1, 31 (1977). It was plainly inappropriate for the District Court to ignore this inquiry.

IV. NEXTERA IS ENTITLED TO A PRELIMINARY INJUNCTION.

The court below dismissed NextEra's motion for preliminary injunction, relying entirely on its simultaneous ruling on the Defendants' motion to dismiss. As demonstrated above, the court's decision was wrong as a matter of law: SB 1938 is virtually *per se* invalid under the dormant Commerce Clause, and could be justified only by significant state interests under the *Pike* test and the Contracts Clause. Contrary to the district court's decision, a preliminary injunction is warranted here, and the case should be remanded with instructions to expeditiously craft a narrow injunction protecting the Hartburg-Sabine and Jacksonville-Overton projects pending full

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[14] Although the District Court never addressed this issue, as with the "public purpose" inquiry this involves a fact-based inquiry not appropriate on a motion to dismiss. *NCO Acquisition, LLC v. Roberts*, 2013 WL 2393237 at *10 (E.D. Mich. May 31, 2013).

consideration of the case on remand—or at a minimum, to expeditiously reconsider the motion for preliminary injunction. *Cf. In re Deepwater Horizon*, 732 F.3d 326, 345–46 (5th Cir. 2013) (directing district court to "expeditiously craft a narrowly-tailored injunction that allows the time necessary for deliberate reconsideration of these significant issues on remand").

A plaintiff seeking a preliminary injunction must show a substantial likelihood of success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the injury outweighs the threatened harm to the enjoined party, and that the preliminary injunction will not disserve the public interest. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017). Because the law is virtually *per se* invalid, NextEra has a strong likelihood of success on the merits. *See Or. Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 101 (1994) (explaining that state's burden to justify a *per se* invalid law is "so heavy" that facial discrimination may itself be a fatal defect).

Moreover, as set forth in the Motion to Expedite the Appeal filed in this Court, and in the request for a preliminary injunction filed below

ROA.82-83, NextEra faces an imminent risk of irreparable harm absent an injunction: MISO is currently weighing whether to reassign the project in light of the delay caused by SB 1938. ROA.3009-10. Any such decision would likely be approved within two months by FERC. NextEra would have no remedy for the loss of its expected profits on this project, since the Texas defendants are protected by sovereign immunity. *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). This Court has recognized that when money damages are not available at the end of a suit, then the risk of substantial economic harm *is* irreparable injury. *E.g.*, *Texas v. United States Envt'l Prot. Agency*, 829 F.3d 405, 434 (5th Cir. 2016).

Having established a strong likelihood of success and imminent irreparable harm absent an injunction, the remaining factors are any possible injury to Texas and the public interest. Neither points against entry of an injunction here: both can be adequately protected by the project-level review by MISO and the PUCT that Texas has relied on long before SB 1938 was enacted.

Thus, NextEra respectfully asks that the denial of the preliminary injunction be reversed and remanded with instructions for the district

court to craft an injunction protecting the Hartburg-Sabine and Jacksonville-Overton projects pending full consideration of the case (or at least to expeditiously reconsider the motion for preliminary injunction), in light of NextEra's strong likelihood of success on the merits, so that these issues may be considered before NextEra is irreparably harmed.

CONCLUSION

For the foregoing reasons, the District Court's order dismissing the Complaint and denying the preliminary injunction should be reversed.

Dated: March 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this Brief contains 12,905 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

2. 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 this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 with Century Schoolbook 14-point type.

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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ADDENDUM – TEXT OF SB 1938

S.B. No. 1938

AN ACT

relating to certificates of convenience and necessity for the construction of facilities for the transmission of electricity.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 37.051(a), Utilities Code, is amended to read as follows:

(a) An electric utility [~~or other person~~] may not directly or indirectly provide service to the public under a franchise or permit unless the utility [~~or other person~~] first obtains from the commission a certificate that states that the public convenience and necessity requires or will require the installation, operation, or extension of the service.

SECTION 2. Section 37.053(a), Utilities Code, is amended to read as follows:

(a) An electric utility [~~or other person~~] that wants to obtain or amend a certificate must submit an application to the commission.

SECTION 3. Section 37.055, Utilities Code, is amended to read as follows:

Sec. 37.055. REQUEST FOR PRELIMINARY ORDER. (a) An electric utility [~~or other person~~] that wants to exercise a right or privilege under a franchise or permit that the utility [~~or other person~~] anticipates obtaining but has not been granted may apply to the commission for a preliminary order under this section.

(b) The commission may issue a preliminary order declaring that the commission, on application and under commission rules, will grant the requested certificate on terms the commission designates, after the electric utility [~~or other person~~] obtains the franchise or permit.

(c) The commission shall grant the certificate on presentation of evidence satisfactory to the commission that the electric utility [~~or other person~~] has obtained the franchise or permit.

SECTION 4. Section 37.056, Utilities Code, is amended by adding Subsections (e), (f), (g), (h), and (i) to read as follows:

(e) A certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility may be granted only to the owner of that existing facility. If a new transmission facility will directly interconnect with facilities owned by different electric utilities or municipally owned utilities, each entity shall be certificated to build, own, or operate the new facility in separate and discrete equal parts unless they agree otherwise.

(f) Notwithstanding Subsection (e), if a new transmission line, whether single or double circuit, will create the first interconnection between a load-serving station and an existing transmission facility, the entity with a load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility at the load-serving station shall be certificated to build, own, or operate the new transmission line and the load-serving station. The owner of the existing transmission facility shall be certificated to build, own, or operate the station or tap at the existing transmission facility to provide the interconnection, unless after a reasonable period of time the owner of the existing transmission facility is unwilling to build, and then the

entity with the load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility may be certificated to build the interconnection facility.

(g) Notwithstanding any other provision of this section, an electric utility or municipally owned utility that is authorized to build, own, or operate a new transmission facility under Subsection (e) or (f) may designate another electric utility that is currently certificated by the commission within the same electric power region, coordinating council, independent system operator, or power pool or a municipally owned utility to build, own, or operate a portion or all of such new transmission facility, subject to any requirements adopted by the commission by rule.

(h) The division of any required certification of facilities described in this section shall apply unless each entity agrees otherwise. Nothing in this section is intended to require a certificate for facilities that the commission has determined by rule do not require certification to build, own, or operate.

(i) Notwithstanding any other provision of this section, an electric cooperative may be certificated to build, own, or operate a new facility in place of any other electric cooperative if both cooperatives agree.

SECTION 5. Section 37.057, Utilities Code, is amended to read as follows:

Sec. 37.057. DEADLINE FOR APPLICATION FOR NEW TRANSMISSION FACILITY. [~~The commission may grant a certificate for a new transmission facility to a qualified applicant that meets the requirements of this subchapter.~~] The commission must approve or deny an application for a certificate for a new transmission facility not later than the first anniversary of the date the application is filed. If the commission does not approve or deny the application on or before that date, a party may seek a writ of mandamus in a district court of Travis County to compel the commission to decide on the application.

SECTION 6. Section 37.151, Utilities Code, is amended to read as follows:

Sec. 37.151. PROVISION OF SERVICE. Except as provided by Sections [~~this section, Section~~] 37.152[~~,~~] and [~~Section~~] 37.153, a

certificate holder[~~, other than one granted a certificate under Section 37.051(d),~~] shall:

(1) serve every consumer in the utility's certificated area; and

(2) provide continuous and adequate service in that area.

SECTION 7. Section 37.154(a), Utilities Code, is amended to read as follows:

(a) An electric utility or municipally owned utility may sell, assign, or lease a certificate or a right obtained under a certificate if [~~the commission determines that~~] the purchaser, assignee, or lessee is already certificated by the commission to provide electric service within the same electric power region, coordinating council, independent system operator, or power pool, or if the purchaser, assignee, or lessee is an electric cooperative or municipally owned utility [~~can provide adequate service~~]. As part of a transaction subject to Sections 39.262(l)-(o) and 39.915, the commission may approve a sale, assignment, or lease to an entity that has not been previously certificated if the approval will not diminish the retail rate jurisdiction of this state. Any purchase,

assignment, or lease under this section requires that the commission determine that the purchaser, assignee, or lessee can provide adequate service.

SECTION 8. Sections 37.051(d), (e), and (f), Utilities Code, are repealed.

SECTION 9. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2019.

United States Court of Appeals

FIFTH CIRCUIT
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March 18, 2020

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

Dear Mr. Tillotson,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

Sincerely,

LYLE W. CAYCE, Clerk

Mary Frances Yeager

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

cc: Ms. Lisa Bennett
Mr. Evan Matthew Ezray
Mr. John Richard Hulme
Mr. Pascual Armando Oliu
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