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 a February 26, 2020 Order on Motion to Dismiss
in the U.S. District Court for the
Western District of Texas, Austin Division
Case No. 1:19-cv-00626-LY (The Honorable Lee Yeakel)

BRIEF OF AMICUS CURIAE
ONCOR ELECTRIC DELIVERY COMPANY LLC
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CERTIFICATE OF INTERESTED PERSONS

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

Oncor Electric Delivery Company LLC ("Oncor") is a Delaware limited liability company and a majority-owned subsidiary of Oncor Electric Delivery Holdings Company LLC ("Oncor Holdings"). Oncor Holdings is indirectly and wholly owned by California-based Sempra Energy. Oncor Holdings owns 80.25% of Oncor's outstanding membership interests and Texas Transmission Investment LLC owns 19.75% of Oncor's outstanding membership interests.

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS iii
TABLE OF CONTENTS viii
TABLE OF AUTHORITIES x
STATEMENT OF LEAVE TO FILE 1
STATEMENT OF AMICUS CURIAE 2
INTRODUCTION AND SUMMARY OF ARGUMENT 3
ARGUMENT 7
I. NextEra's Challenge Ignores the Nature and History of Texas's Heavily-Regulated, Overwhelmingly-Intrastate Electric Market. 7
A. NextEra Tacitly Concedes Its Dormant Commerce Clause Challenge Does Not Apply Within ERCOT—Because ERCOT Is Purely Intrastate and Subject Only to Texas's Authority. 7
B. Texas Preserved the Status Quo Through S.B. 1938. 10
1. S.B. 1938 clarified the law and codified well-established, binding ERCOT protocols. 10
2. Texas has never allowed full-scale competition for transmission projects. 12
C. Texas Rationally Exercised Its Broad Police Power and Policy Judgments Through S.B. 1938 to Ensure Security and Reliability. 15
1. Allocating project responsibilities based on endpoint ownership avoids unnecessary, piecemeal, and inefficient administration of the grid. 15
2. The Legislature chose to codify ERCOT's rules rather than implement problematic competitive bidding 17
3. Federal law affirms Texas's police power to make policy judgments in siting transmission lines. 18
D. This Court Should Not Second-Guess Texas's Rational Choices. 20
1. Overturning S.B. 1938 would threaten the balance of burdens and benefits under Texas's regulatory compact. 22

2. Overturning S.B. 1938 would call into question the PUCT's authority over other regulatory matters.....23

II. S.B. 1938 Does Not Violate the Dormant Commerce Clause, Even as Applied to Interstate Transmission.....25

III. CONCLUSION 28

CERTIFICATE OF SERVICE.....30

CERTIFICATE OF COMPLIANCE 31

TABLE OF AUTHORITIES

Cases

Allco Fin. Ltd. v. Klee,
861 F.3d 82 (2d Cir. 2017) 27

Allstate Ins. Co. v. Abbott,
495 F.3d 151 (5th Cir. 2007) 6, 26

Ameren Servs. Co., v. FERC,
893 F.3d 786 (D.C. Cir. 2018) 17

Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,
461 U.S. 375 (1983) 3

BP Chems., Inc. v. AEP Tex. Cent. Co.,
198 S.W.3d 449 (Tex. App.—Corpus Christi 2006, no pet.).....9, 11

Carr Staley, Inc. v. United States,
496 F.2d 1366 (5th Cir. 1974) 21

Cinel v. Connick,
15 F.3d 1338 (5th Cir. 1994) 6, 7

City of San Antonio v. PUCT,
506 S.W.3d 630 (Tex. App.—El Paso 2016, no pet.).....5, 8, 20, 21

Colon Health Centers of Am., LLC v. Hazel,
83 F.3d 145 (4th Cir. 2016) 25

CTS Corp. v. Dynamics Corp. of Am.,
481 U.S. 69 (1987) 25, 26

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 20

E. Pipe Line Co. v. Mich. Pub. Serv. Cmm'n,
341 U.S. 329 (1951) 22

Elec. Power Supply Ass'n v. Star,
904 F.3d 518 (7th Cir. 2018) 19

Energy Reserves Grp., Inc. v. Kan. Power & Light Co.,
459 U.S. 400 (1983) 3

Entergy Tex., Inc. v. PUCT,
No. 03-18-00666-CV, 2019 WL 3519051 (Tex. App.—Austin Aug. 2, 2019, no pet.).....4, 10

Exelon Corp. v. Commissioner,
147 T.C. 230 (2016) 5

Funk v. Stryker,
631 F.3d 777 (5th Cir. 2011) 5

Gen. Motors Corp. v. Tracy,
519 U.S. 278 (1997) 3, 6, 20, 24

Int'l Truck & Engine Corp. v. Bray,
372 F.3d 717 (5th Cir. 2004), *opinion corrected on denial of reh'g*,
380 F.3d 231 (5th Cir. 2004) 4

LSP Transmission Holdings, LLC v. Lange,
329 F. Supp. 695 (D. Minn. 2018), *aff'd sub nom. LSP Transmission Holdings, LLC v. Sieben*, ___ F.3d ___, No. 18-2559, 2020 WL 1443533 (8th Cir. Mar. 25, 2020) .....passim

Moosa v. I.N.S.,
171 F.3d 994 (5th Cir. 1999) 21

N.W. Enters., Inc. v. City of Houston,
352 F.3d 162 (5th Cir. 2003), *on reh'g in part*, 372 F.3d 333 (5th Cir. 2004).....21

Office of Pub. Util. Counsel v. PUCT,
104 S.W.3d 225 (Tex. App.—Austin 2003, no pet.) 19, 22

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 27

S.C. Pub. Serv. Auth. v. FERC,
762 F.3d 41 (D.C. Cir. 2014).....8, 17, 18

Snake River Valley Elec. Ass'n v. PacifiCorp,
357 F.3d 1042 (9th Cir. 2004) 3

Sw. Elec. Power Co. v. Grant,
73 S.W.3d 211 (Tex. 2002) 8

Swindol v. Aurora Flight Sciences Corp.,
805 F.3d 516 (5th Cir. 2015) 6

Territory of Alaska v. American Can Co.,
358 U.S. 224 (1959) 4

Texas v. EPA,
829 F.3d 405 (5th Cir. 2016) 4, 5, 7, 17

TXU Generation Co., L.P. v. PUCT,
165 S.W.3d 821 (Tex. App.—Austin 2005, pet. denied)..... 8

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
550 U.S. 330 (2007) 20

United States v. Salerno,
481 U.S. 739 (1987) 27

Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n,
945 F.3d 206 (5th Cir. 2019) 25, 26

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008) 27

Young v. Am. Mini Theatres, Inc.,
427 U.S. 50 (1976) 13

Statutes

16 U.S.C. § 824(b)(1) 7, 19, 20

Ind. Code Ann. § 8-1-38-9 16

Minn. Stat. § 216B.246 16

N.D. Cent. Code § 49-03-02 16

Neb. Rev. Stat. Ann. § 70-1028(1).....16

Okla. Stat. Ann. tit. 17 § 292.....16

S.D. Codified Laws § 49-32-20 16
Tex. Util. Code § 11.002(a) 9
Tex. Util. Code § 14.152.....23
Tex. Util. Code § 14.204.....23
Tex. Util. Code § 14.206.....23
Tex. Util. Code § 31.001(a) 9
Tex. Util. Code § 31.001(b) 8
Tex. Util. Code § 35.005.....10
Tex. Util. Code § 37.051..... 3
Tex. Util. Code § 37.051(a) 9
Tex. Util. Code § 37.056..... 3
Tex. Util. Code § 37.056(a) 10
Tex. Util. Code § 37.056(e) 10
Tex. Util. Code § 37.057..... 3
Tex. Util. Code § 37.151.....3, 22, 24
Tex. Util. Code § 37.154..... 3
Tex. Util. Code § 38.071(1) 10
Tex. Util. Code § 39.001.....21
Tex. Util. Code § 39.151(d) 11
Tex. Util. Code § 39.151(j) 11
Tex. Util. Code § 39.904.....12

Rules and Other Authorities

5th Cir. R. 28.2.1 iii

AEP Energy Partners, Inc.,
164 FERC ¶ 61,056 (2018) 5

ERCOT Nodal Protocol § 3.11.4.8 ..... 5, 11

ERCOT's Notice of Filing of the ERCOT Power System Planning Charter and Processes, Attachment A at 12, PUCT Docket No. 27706 (Oct. 31, 2003) 11

H.J. of Tex, 86th Leg., R.S. 2991 (2019), *available at* https://journals.house.texas.gov/hjrnl/86r/pdf/86RDAY59FINAL.PDF#page=78 17

Hearing on H.B. 3995 Before the House Comm. on State Affairs, 86th Leg., R.S. (April 1, 2019), *available at* https://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=16845 ..... 15, 17, 18

Hearing on S.B. 1938 Before Senate Comm. on Bus. & Commerce, 86th Leg., R.S. (April 2, 2019), *available at* https://tlcsenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=14109 17

Jared M. Fleisher, *ERCOT's Jurisdictional Status: A Legal History and Contemporary Appraisal*, 3 TEX. J. OIL GAS & ENERGY L. 4, 4 (2008) 4

LS Power Dev., LLC,
155 FERC ¶ 61,176 (2016) 9

Open Meeting Tr., PUCT Docket No. 48017 (Feb. 7, 2019) 11, 15

Order 1000-A, 139 FERC ¶ 61,132 (2012) 16

Order 1000-B, 141 FERC ¶ 61,044 (2012) 16

Order on Rehearing, PUCT Docket No. 33672 (Oct. 7, 2008), https://interchange.puc.texas.gov/Search/Documents?controlNumber=33672&itemNumber=1423 12

Order on Remand, PUCT Docket No. 37902 (Mar. 30, 2010), https://interchange.puc.texas.gov/Search/Documents?controlNumber=37902&itemNumber=25; Order on Remand at 3–5 13

Order on Remand, PUCT Docket No. 37928 (Feb. 25, 2010), https://interchange.puc.texas.gov/Search/Documents?controlNumber=37928&itemNumber=7 13

PUCT Docket No. 35665, 2009 WL 1431662, Order on Rehearing (May 15, 2009) 13

R. Ryan Staine, Crez II, *Coming Soon to A Windy Texas Plain Near You?: Encouraging the Texas Renewable Energy Industry Through Transmission Investment*, 93 Texas L. Rev. 521, 526-27 (2014) 13

Scope of Competition in Electric Markets in Texas: Report to the 86th Legislature, PUCT Jan. 2019, at 8, *available at* https://www.puc.texas.gov/industry/electric/reports/scope/2019/2019scope_elec.pdf 11

Senate Comm. on Bus. & Commerce, Bill Analysis, Tex. S.B. 1938, 86th Leg., R.S. (2019) 14

Sharyland Util., L.P., 121 FERC ¶ 61,006 (2007) 9

Staff Petition, PUCT Docket No. 35665, 2009 WL 1431662 (May 15, 2009) 15, 16

Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, 136 FERC ¶ 61,051 (2011) 16

STATEMENT OF LEAVE TO FILE

Oncor Electric Delivery Company LLC ("Oncor") moved to intervene in this matter before the District Court, appealed the denial of leave to intervene (in now-severed appeal No. 20-50168), and thus is a Movant-Appellant with leave to file "a brief as an amicus in this case" under this Court's March 13, 2020 Order. Oncor conferred with the parties, and no party objects to Oncor filing an amicus brief.

STATEMENT OF AMICUS CURIAE

Oncor is Texas's largest electric transmission-and-distribution utility. Oncor's network—of approximately 139,000 miles of transmission and distribution lines and more than 3.6 million utility meters across Texas—is located entirely within the Electric Reliability Council of Texas ("ERCOT"), a wholly-intrastate regional transmission organization and region accounting for about 90% of Texas's power consumption. Oncor serves approximately 10,000,000 customers across Texas and employs over 4,000 individuals to maintain reliable electric delivery service.

Oncor moved to intervene to support Senate Bill 1938 ("S.B. 1938"). ROA.736-75. The district court denied Oncor's motion in the same order in which it properly dismissed the challenge to S.B. 1938. ROA.3023-24. Oncor appealed that denial, and submits this brief to assist the Court in deciding NextEra's dormant Commerce Clause challenge.

No party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Electric markets are uniquely suited to monopoly treatment. Because of "the importance of avoiding any jeopardy to service of the state-regulated captive market," the U.S. Supreme Court has explained that the Commerce Clause imposes no barrier on States' power to enact even "an outright prohibition of competition" in electric markets. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 305-07 (1997). In S.B. 1938,[1] Texas exercised its broad police powers to manage its already-fully-regulated transmission-and-distribution utility industry and to ensure an essential service—a reliable electric grid with timely access to electric power.

The U.S. Supreme Court recognizes that regulation of utilities is "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Yet, NextEra and the United States scarcely acknowledge the police-power implications of NextEra's lawsuit—in 12,905 words, NextEra refers to "police power" only once, and only while addressing its Contracts Clause claim.[2] NextEra

[1] The relevant provisions of S.B. 1938 are codified at Tex. Util. Code §§ 37.051, 37.053, 37.056, 37.057, 37.151, and 37.154. ROA.3027.

[2] Because the transmission market in Texas (and elsewhere) is "a heavily regulated industry," and because S.B. 1938 codifies the existing rules that govern the transmission industry in most of Texas, NextEra has not adequately alleged a Contracts Clause claim. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 413-16 (1983); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1051 n.9 (9th Cir. 2004); Entergy Amicus Br. at Part B.

Br. at 58-59. The United States never uses the phrase. And both NextEra and the United States base their arguments on inaccurate, incomplete descriptions of the state of "competition" in Texas's electric market.

Through S.B. 1938, the Texas Legislature exercised its fundamental police power in determining that incumbent status for builders of transmission facilities is crucial to the security and reliability of Texas's electrical grid. This was not a cataclysmic change, as NextEra and the United States assert.[3] S.B. 1938 codified rules that had been in place for decades in ERCOT, which delivers 90% of power consumed in Texas and covers 75% of Texas's geographic area.[4] *Texas v. EPA*, 829 F.3d 405, 431 (5th Cir. 2016). By using endpoint ownership to determine who will build, own, and operate new transmission facilities, S.B. 1938 ensures that Texas has "a robust, reliable, and well-regulated electric grid" and retains the State's jurisdiction over rate-setting and operational issues. House Comm. on State Affairs, Bill Analysis, Tex. H.B. 3995, 86th Leg., C.S. (2019) (ROA.1514).[5]

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[3] NextEra Br. at 3 ("SB 1938 was a dramatic change to the status quo in Texas"); *id.* at 19 ("[T]he status quo in Texas, prior to . . . SB 1938, embraced the ability of out of state companies to compete for, build and operate transmission lines."). The United States did not attempt to describe the status quo in Texas except for one 2017 decision that was appealed and was rendered moot by S.B. 1938's passage. U.S. Amicus Br. at 5-6; *Entergy Tex., Inc. v. PUCT*, No. 03-18-00666-CV, 2019 WL 3519051 (Tex. App.—Austin Aug. 2, 2019, no pet.)).

[4] *Texas v. EPA*, 829 F.3d 405, 431 (5th Cir. 2016); Jared M. Fleisher, *ERCOT's Jurisdictional Status: A Legal History and Contemporary Appraisal*, 3 TEX. J. OIL GAS & ENERGY L. 4, 4 (2008).

[5] This Court may take judicial notice of S.B. 1938's legislative history. *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27 (1959); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 728

NextEra tacitly concedes that its dormant Commerce Clause challenge does not apply to ERCOT[6]—and for good reason. FERC disclaimed jurisdiction over the ERCOT market. *AEP Energy Partners, Inc.*, 164 FERC ¶ 61,056 at ¶ 2 (2018); NextEra Br. at 10 (noting the Public Utility Commission of Texas ("PUCT") has "exclusive jurisdiction" within ERCOT, which "covers much of Texas and is wholly within the state"). And FERC's Order 1000 admittedly does not apply to ERCOT. NextEra Br. at 20 ("ERCOT was not subject to Order 1000 . . . ."); *Exelon Corp. v. Commissioner*, 147 T.C. 230, 250 (2016).

The PUCT tasked ERCOT with oversight of transmission service for this overwhelmingly-intrastate Texas market. *City of San Antonio v. PUCT*, 506 S.W.3d 630, 635-36 (Tex. App.—El Paso 2016, no pet.). ERCOT (the governing board of the region that shares the same name) has expertise managing Texas's unique grid reliability concerns. *Texas v. EPA*, 829 F.3d at 431, 433. And ERCOT has enforced longstanding, binding protocols with the same basic requirements as S.B. 1938 for

n.13, *opinion corrected on denial of reh'g*, 380 F.3d 231 (5th Cir. 2004) (without noting the need to take judicial notice, considering legislative history and noting it was "mischaracterize[d]" by one of the parties). S.B. 1938's legislative history was also incorporated by reference into NextEra's complaint. *Funk v. Stryker*, 631 F.3d 777, 783 (5th Cir. 2011); ROA.46-47 (quoting legislative committee hearings).

[6] NextEra Br. at 38 ("[T]he only market at issue is the interstate market for building, owning, and operating transmission services, a market regulated by FERC and overseen by interstate system operators pursuant to FERC Order 1000."); *see also id.* at 20, 24-25, 33 (similar).

over seventeen years, with favorable results.[7] In enacting S.B. 1938, Texas did not change the status quo. It chose to continue its existing regulatory model rather than to adopt Order 1000's model.

Even as applied to the 10% of Texas power consumption outside of ERCOT that is part of an interstate grid, S.B. 1938's policy choices do not violate the dormant Commerce Clause in their incidental, interstate effects. Texas's comprehensive regulatory framework distinguishes incumbent utilities (wherever they may reside) from prospective entrants (wherever they may reside) such that these entities are not similarly situated for constitutional purposes. Thus, NextEra's suit is foreclosed by *Tracy*. And because S.B. 1938 treats all "similarly situated in-state and out-of-state companies . . . identically," *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007), NextEra cannot plead that S.B. 1938 discriminates against out-of-state interests.

[7] *E.g.*, ERCOT Nodal Protocol § 3.11.4.8 (2011) ("Upon completion of the RPG Project Review, ERCOT shall determine designated providers for the recommended transmission projects. The default [transmission service providers, or] TSPs will be those TSPs that own the end points of the new projects"); ERCOT's Notice of Filing of the ERCOT Power System Planning Charter and Processes, Attachment A at 12, PUCT Docket No. 27706 (Oct. 31, 2003) ("The default transmission providers will be those transmission providers that own the end points of the new projects."), https://interchange.puc.texas.gov/Documents/27706_11_413899.PDF. Courts may take judicial notice of matters of public record, including official documents like PUCT orders and ERCOT rules. *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994); *Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 519 (5th Cir. 2015).

This Court should affirm the District Court's dismissal and avoid the unpredictable consequences of disturbing Texas's delicately-balanced regulatory framework. The power and the expertise to manage this framework lie squarely with Texas—and should remain there to avoid judicial pronouncements that might unintentionally damage a complex, crucial industry.

ARGUMENT

I. NextEra's Challenge Ignores the Nature and History of Texas's Heavily-Regulated, Overwhelmingly-Intrastate Electric Market.

A. NextEra Tacitly Concedes Its Dormant Commerce Clause Challenge Does Not Apply Within ERCOT—Because ERCOT Is Purely Intrastate and Subject Only to Texas's Authority.

NextEra readily admits that ERCOT "covers much of Texas and is wholly within the state." NextEra Br. at 10. But while NextEra acknowledges the PUCT has exclusive jurisdiction within ERCOT, *id.*, NextEra does not analyze what this means for the application of S.B. 1938. Rather, NextEra insists, without support, that "[S.B. 1938's] focus and impact was necessarily directed at the large projects that are part of the interstate grid." *Id.* at 20. That insistence ignores the effects of S.B. 1938 in ERCOT, which delivers 90% of the state's electricity.[8]

[8] *Texas v. EPA*, 829 F.3d at 431. Courts may refer to matters of public record in considering a 12(b)(6) motion. *Cinel*, 15 F.3d at 1343 n.6.

NextEra does not challenge Texas's sole authority to regulate transmission within ERCOT because Texas retains complete regulatory authority within this intrastate market. Congress expressly preserved States' authority over in-state "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce," 16 U.S.C. § 824(b)(1), giving States unquestioned control over siting and permitting for transmission facilities, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014).

Texas has a long history of regulating its unique electric market. Electricity has several components: "generation of power; transmission of that power on high-voltage lines over long distances; and distribution of power over shorter distances to the ultimate consumer." *TXU Generation Co., L.P. v. PUCT*, 165 S.W.3d 821, 827 (Tex. App.—Austin 2005, pet. denied). Practically, these components are divided into distinct industries with specific regulatory frameworks: generation; transmission and distribution; and retail sale. Because electricity cannot easily be stored once generated, the industry requires a complex transmission grid, which must be constantly balanced by either adding or removing power to ensure an uninterrupted flow of energy to consumers. *City of San Antonio*, 506 S.W.3d at 635. While the Texas Legislature has deregulated "the [generation] and sale of electricity for a large portion of the state," *transmission-and-distribution* service remains a state-regulated monopoly. *Id.* The Legislature charged the PUCT "to regulate

[transmission] utilities as a substitute for competitive forces." *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002) (citing Tex. Util. Code § 31.001(b)).

In turn, ERCOT oversees transmission service in most of Texas, as an independent organization subject to PUCT oversight. *City of San Antonio*, 506 S.W.3d at 635-36. ERCOT is responsible for ensuring the electric grid's reliability and adequacy. *BP Chems., Inc. v. AEP Tex. Cent. Co.*, 198 S.W.3d 449, 451-52 (Tex. App.—Corpus Christi 2006, no pet.). ERCOT is a wholly intrastate grid, and because FERC's jurisdiction extends only to transmission of electric energy in *interstate* commerce, *most of Texas's electric system (the ERCOT grid) is not subject to plenary federal regulation*. FERC has often recognized ERCOT's independence and disclaimed plenary federal jurisdiction over ERCOT assets.[9]

While NextEra is correct that it cannot challenge Texas's authority to implement S.B. 1938 within ERCOT, it is mistaken that Texas must have directed S.B. 1938 "at the large projects that are part of the interstate grid administered by MISO and SPP." NextEra Br. at 20. Rather than directing S.B. 1938 only at Texas's small interstate market, S.B. 1938 codifies preexisting, binding ERCOT rules.

[9] *E.g.*, *LS Power Dev., LLC*, 155 FERC ¶ 61,176 at ¶¶ 1, 13 & n.2 (2016); *Sharyland Utils., L.P.*, 121 FERC ¶ 61,006 at ¶ 7 (2007).

B. Texas Preserved the Status Quo Through S.B. 1938.

Texas exercised its police power in creating a regulatory framework that "protect[s] the public interest inherent in the rates and services of electric utilities" and "assure[s] rates, operations, and services that are just and reasonable to the consumers and to the electric utilities." Tex. Util. Code §§ 11.002(a), 31.001(a). Before a new transmission line can be built in Texas, a utility must obtain a certificate of convenience and necessity ("CCN") from the PUCT. *Id.* §§ 37.051(a), 37.056(a). Importantly, the PUCT is authorized to obligate incumbent utilities to build, operate, and maintain electric transmission lines. *Id.* §§ 35.005, 38.071(1). Texas's regulatory framework thus imposes "a typical blend of limitation and affirmative obligation" on electric utilities. *Tracy*, 519 U.S. at 295-96.

S.B. 1938 fits well within that blend. Tex. Util. Code § 37.056(e). NextEra, the United States, and LSP Transmission Holdings II, LLC ("LSP") incorrectly describe S.B. 1938 as a radical departure from the status quo in Texas, when in fact S.B. 1938 codified existing rules.

1. S.B. 1938 clarified the law and codified well-established, binding ERCOT protocols.

Texas has long used comprehensive state regulation as a substitute for competition in the transmission-and-distribution industry. Outside of ERCOT, utilities remain vertically integrated, including fully-bundled generation,

transmission, distribution, and retail services, through monopolistic entities.[10] In that 10% of the Texas market, S.B. 1938 preserves the status quo, as there was no competition in transmission and distribution for the law to disturb.[11]

Within ERCOT, while market competition exists in electric generation and retail sales, Texas continues to regulate transmission-and-distribution services.[12] ERCOT's Planning Charter and protocols—which bind utilities in Texas[13]—have established *for at least seventeen years* S.B. 1938's preference for existing endpoint owners (incumbent providers) to build new transmission lines. *E.g.*, ERCOT's

[10] LSP incorrectly claims "Texas has abandoned vertical integration." LSP Amicus Br. at 7, 21-22. For explanations of the fully-bundled nature of non-ERCOT entities and the lack of competition outside ERCOT, *see* SPS Amicus Br. at Part I.A; Entergy Amicus Br. at Background & Part A.1.

[11] The United States argues Texas previously authorized "transmission-only utilities without a service area anywhere in Texas." U.S. Amicus Br. at 5. Not so. When S.B. 1938 was enacted, there was ongoing litigation about the PUCT's authority to issue a CCN to a transmission-only entity outside of ERCOT. *See Entergy Tex.*, 2019 WL 3519051. The Austin Court of Appeals dismissed that lawsuit as moot after the Legislature resolved the question by passing S.B. 1938. *Id.* During that same time, two PUCT Commissioners questioned, in proceedings involving NextEra Energy Transmission Southwest, LLC, whether the PUCT had the authority to certificate a transmission-only entity outside of ERCOT. Open Meeting Tr. at 13-14, PUCT Docket No. 48017 (Feb. 7, 2019) (statements of Chairman Walker and Commissioner D'Andrea); ROA.1754-56.

[12] *Scope of Competition in Electric Markets in Texas: Report to the 86th Legislature* at 8, PUCT Jan. 2019, https://www.puc.texas.gov/industry/electric/reports/scope/2019/2019scope_elec.pdf ("PUCT Report on Competition").

[13] ERCOT's protocols are binding rules that "provide the framework for the administration of the Texas electricity market." *BP Chems., Inc.*, 198 S.W.3d at 451-52; Tex. Util. Code § 39.151(d), (j) (noting PUCT may delegate authority to regulate electricity delivery to ERCOT, that ERCOT planning policies, guidelines, and protocols are binding on all market participants, and providing penalties for violations).

Notice of Filing of the ERCOT Power System Planning Charter and Processes, Attachment A at 12, PUCT Docket No. 27706 (Oct. 31, 2003) ("The default transmission providers will be those transmission providers that own the end points of the new projects."), https://interchange.puc.texas.gov/Documents/27706_11_413899.PDF; ERCOT Nodal Protocol § 3.11.4.8 (2011) ("Upon completion of the RPG Project Review, ERCOT shall determine designated providers for the recommended transmission projects. The default [transmission service providers, or] TSPs will be those TSPs that own the end points of the new projects.").

2. Texas has never allowed full-scale competition for transmission projects.

NextEra and the United States suggest that Texas previously discarded this system in favor of full-scale competition for transmission projects, then retreated from competition in S.B. 1938. This is false. That narrative mischaracterizes a limited-scope initiative that the Legislature authorized to meet a specific, time-sensitive need. Contrary to NextEra's assertions, Texas did not "embrace[] the ability of out of state companies to compete for, build, and operate transmission lines" through its Competitive Renewable Energy Zones ("CREZ") initiative. NextEra Br. at 19.

Rather, in CREZ, the Legislature addressed the specific, time-sensitive mismatch between new wind energy generation in West Texas and the need for that

energy to be delivered in Central and East Texas.[14] Texas needed massive infrastructure in short order, so the Legislature provided the PUCT with limited and finite powers to address the situation. The Legislature directed the PUCT to establish "Competitive Renewable Energy Zones" to foster the wind generation market and build infrastructure to deliver wind power to cities.[15] CREZ was not a blanket endorsement of competition in building transmission lines, as NextEra claims. It was a targeted, limited departure from Texas's longstanding preference for incumbents—wholly within (intrastate) ERCOT—to address the need for substantial infrastructure on an expedited timeframe.[16] Even then, the PUCT recognized incumbents could best construct and operate "priority" CREZ transmission projects. PUCT Docket No. 35665, 2009 WL 1431662, Order on Rehearing at 9 & ¶¶ 59-61 (May 15, 2009) (noting incumbents' greater familiarity

[14] Order on Rehearing, PUCT Docket No. 33672 (Oct. 7, 2008), https://interchange.puc.texas.gov/Search/Documents?controlNumber=33672&itemNumber=1423.

[15] Tex. S.B. 20, 79th Leg., 1st C.S., ch 1, §1, 2005 Tex. Sess. Laws 1 (codified at Tex. Util. Code § 39.904); Staff Petition, PUCT Docket No. 35665, 2009 WL 1431662 (May 15, 2009) (hereinafter "PUCT Docket No. 35665"); Order on Remand at 3–4, PUCT Docket No. 37902 (Mar. 30, 2010), https://interchange.puc.texas.gov/Search/Documents?controlNumber=37902&itemNumber=25; Order on Remand at 3–5, PUCT Docket No. 37928 (Feb. 25, 2010), https://interchange.puc.texas.gov/Search/Documents?controlNumber=37928&itemNumber=7.

[16] R. Ryan Staine, Crez II, *Coming Soon to A Windy Texas Plain Near You?: Encouraging the Texas Renewable Energy Industry Through Transmission Investment*, 93 Texas L. Rev. 521, 526-27 (2014).

with regulations and locations for priority projects, plus efficiencies of geographically-proximate existing facilities).

The Legislature's police power fully allows for experiments like CREZ. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). And Texas's choice to use a finite, defined process for a limited circumstance cannot and should not be read to upend more recent, clear pronouncements of the Legislature on Texas's regulatory framework. CREZ was a one-time event, not an ongoing process designed to displace decades of established practice. Notably, competitive-zone projects occurred only once in Texas's history—with CREZ—and every transmission line the PUCT has certificated since CREZ ended has followed S.B. 1938's preference for endpoint owners. In fact, one purpose of S.B. 1938 was to "clean-up statutory remnants of the [CREZ] buildout," removing the limited, finite authority the Legislature granted the PUCT to implement CREZ. Senate Comm. on Bus. & Commerce, Bill Analysis, Tex. S.B. 1938, 86th Leg., R.S. (2019) (ROA.1518).

S.B. 1938 did not reverse settled law. It clarified the law by codifying existing rules and applying them throughout Texas. And NextEra's challenge does not seek to preserve the status quo—it seeks to impose a competitive transmission market where one has never existed and to upend decades of Texas's regulatory policy choices.

C. Texas Rationally Exercised Its Broad Police Power and Policy Judgments Through S.B. 1938 to Ensure Security and Reliability.

Codifying Texas's longstanding practice of allocating transmission projects based on endpoint ownership is not unconstitutional. The Legislature rationally favored transmission development based on endpoint ownership because it has serious, demonstrable advantages. And Texas's rational choice for its unique electric markets suffices to defeat NextEra's challenge.

1. Allocating project responsibilities based on endpoint ownership avoids unnecessary, piecemeal, and inefficient administration of the grid.

Texas chooses to avoid piecemeal administration of its grid. Competition in the electric transmission-and-distribution market is not like competition in other markets. Only one provider can build and maintain the singular wire that serves all customers—duplicative transmission services do not exist.[17] Allowing new entrants into an incumbent's existing service area can therefore increase "the potential complexity of coordination among multiple [providers] during the planning, certification, construction, and operation and maintenance stages." Staff Petition, PUCT Docket No. 35665, 2009 WL 1431662, at § III.A.5. For example, S.B. 1938 reflects Texas's rational policy decision that in a major weather event like a tornado,

[17] Hearing on H.B. 3995 Before the House Comm. on State Affairs, 86th Leg., R.S. (April 1, 2019) (hereafter "House Hearing") (statement of Katie Coleman at 8:31:50-8:33:10), *available at* https://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=16845.

hurricane, or ice storm that affects multiple transmission lines, power can be restored far more quickly if the response effort requires the coordination of fewer entities.

Beyond the benefits to reliability and security that flow from having fewer transmission owners, S.B. 1938's endpoint-owner preference avoids inefficiencies like duplication of facilities, equipment, and personnel that each transmission owner maintains. *See* PUCT Docket 48017 Tr. at 14 (Chairman Walker stating concerns about "inefficiencies" of allowing development of transmission lines by non-endpoint owner). Doubling facilities, equipment, and personnel in a given locale may not affect the up-front, estimated cost of a given transmission line—like the one NextEra proposes to build—but electric ratepayers ultimately shoulder those ongoing, extra costs.

Reliance on existing endpoint owners also ensures more rapid project completion. Incumbent providers "have greater familiarity with the process of obtaining and amending CCNs in Texas," which can reduce certification delays, including potential delays from coordination among "more numerous" providers. Staff Petition, PUCT Docket No. 35665, 2009 WL 1431662 ¶ 61. A "competitive" process to construct transmission lines, on the other hand, would require time for a central authority to solicit, review, and select winning bids—plus delays from any litigation challenging that authority's decisions.

Texas is not alone in recognizing the benefits of assigning projects to existing providers.[18] Even FERC acknowledges that "incumbent transmission providers may have unique knowledge of their own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability . . . ." *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, 136 FERC ¶ 61,051 at ¶ 260 (2011).[19] Selection based on endpoint ownership is a rational choice, fully within Texas's police powers, and it should not be disturbed.

2. The Legislature chose to codify ERCOT's rules rather than implement problematic competitive bidding

For these reasons, Texas codified protocols statewide that previously bound those entities within ERCOT.[20] Texas's electrical grid presents unique reliability challenges because it has fewer power plants than similarly-sized regions in other

[18] Other states have also enacted incumbent rights of first refusal, including Indiana, Minnesota, Nebraska, North Dakota, Oklahoma, and South Dakota. *E.g.*, Ind. Code Ann. § 8-1-38-9; Minn. Stat. § 216B.246; Neb. Rev. Stat. Ann. § 70-1028(1); N.D. Cent. Code § 49-03-02; Okla. Stat. Ann. tit. 17 § 292; S.D. Codified Laws § 49-32-20.

[19] *See also* Order 1000-A, 139 FERC ¶ 61,132 (2012); Order 1000-B, 141 FERC ¶ 61,044 (2012).

[20] House Hearing (statement of Tom Oney at 7:53:20-7:54:30) (describing benefits of ERCOT rules and advantages of applying those rules statewide); H.J. of Tex, 86th Leg., R.S. 2991 (2019) (statement of Representative Phelan) ("This bill will allow utilities to timely build needed transmission infrastructure to serve Texas's growing economy."), *available at* https://journals.house.texas.gov/hjrnl/86r/pdf/86RDAY59FINAL.PDF#page=78.

states. *Texas v. EPA*, 829 F.3d at 431. In codifying ERCOT's protocols, the Legislature affirmed what this Court has recognized: ERCOT is "the group with the greatest knowledge regarding questions of grid reliability in Texas." *Id.* at 433.

Texas made a rational choice well within its police powers to favor existing ERCOT rules over Order 1000's delay-ridden competitive bidding process.[21] The Legislature received testimony that litigation and uncertainty have followed Order 1000's process, whereas S.B. 1938 would expand an existing model that has worked well in Texas.[22]

3. Federal law affirms Texas's police power to make policy judgments in siting transmission lines.

Order 1000 and federal law do not weigh against S.B. 1938—rather, they affirm Texas's police power to make policy judgments about transmission regulation. NextEra claims FERC eliminated "right-of-first refusal provisions." NextEra Br. at 8 (citing Order 1000 ¶ 256). That is misleading and inaccurate. In

[21] *E.g.*, *Ameren Servs. Co. v. FERC*, 893 F.3d 786 (D.C. Cir. 2018) (challenging Order 1000's cost allocations); *S.C. Pub. Serv. Auth.*, 762 F.3d 41 (upholding Order 1000 against a barrage of legal challenges).

[22] Hearing on S.B. 1938 Before Senate Comm. on Bus. & Commerce, 86th Leg., R.S. (April 2, 2019) (hereafter "Senate Hearing") (statement of former FERC Commissioner Tony Clark that, since enacted in 2011, not one project has been placed in service under Order 1000), *available at* https://tlcsenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=14109; House Hearing (statement of former FERC Commissioner Tony Clark at 8:27:00-8:28:10) (same); *id.* (statement of Katie Coleman and question of Chairman Dade Phelan at 8:35:33-8:36:50) (suggesting utilities subject to FERC jurisdiction may underbid incumbent utilities on initial cost of construction because FERC allows higher return on equity than the PUCT).

fact, FERC expressly acknowledged States' "longstanding . . . authority over certain matters that are relevant to transmission planning and expansion, such as . . . siting, permitting, and construction,"[23] including the right "to adopt a right of first refusal to build new transmission lines." *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695, 708 (D. Minn. 2018), *aff'd sub nom. LSP Transmission Holdings, LLC v. Sieben*, ___ F.3d ___, No. 18-2559, 2020 WL 1443533, at *7 (8th Cir. Mar. 25, 2020) .

Nor does Order 1000 require competition, even in the ten percent of Texas's market that is not fully intrastate. NextEra acknowledges that some MISO projects are automatically awarded to incumbent utilities. NextEra Br. at 11 (citing ROA.42-43). And it is immaterial whether the transmission lines are "instrumentalities of interstate commerce," NextEra Br. at 31,[24] because Congress authorized States to regulate siting and permitting for transmission facilities for intrastate lines, 16 U.S.C. § 824(b)(1). Federal law thus does not limit Texas's power over the electric market, as NextEra and the United States suggest—it expressly affirms Texas's police powers to regulate transmission siting and who may construct, own, and operate those lines.

[23] Order 1000 ¶¶ 107, 156; *S.C. Pub. Serv. Auth.*, 762 F.3d at 76.

[24] *See also* U.S. Amicus Br. at 15; LSP Amicus Br. at 2, 10, 16-17.

D. This Court Should Not Second-Guess Texas's Rational Choices.

Texas's electric industry involves a complex balance of regulation and competition—regulation for Texas's electric transmission and distribution function, and competition within generation and retail markets. "[A]n electricity utility enters into a 'regulatory compact' with the public: in return for a monopoly over electricity service in a given area; the utility agrees to provide service to all requesting customers and to charge only the retail rates set by the [PUCT]." *Office of Pub. Util. Counsel v. PUCT*, 104 S.W.3d 225, 227-28 (Tex. App.—Austin 2003, no pet.). Granting NextEra's requested relief threatens to undermine Texas's regulatory framework, and that is not the function of the Commerce Clause.

The dormant Commerce Clause prevents "discriminatory state legislation" in the face of congressional silence, but "Congress has not been silent about electricity." *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 525 (7th Cir. 2018). Congress expressly authorized States to regulate locations and permits for transmission facilities and service. *See* 16 U.S.C. § 824(b)(1). *Tracy* instructs this Court to avoid "any judicial treatment" that could jeopardize the incumbent utilities' ability to provide reliable and efficient transmission service to Texas citizens and industry. 519 U.S. at 304-05, 309; *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (courts "should be particularly

hesitant" to interfere with local regulation in matters that are "both typically and traditionally a local government function" (citations omitted)).

NextEra requests exactly that interference. NextEra seeks to eliminate Texas's incumbent preference, presumably in favor of competitive bidding for new transmission lines in Texas. That would introduce competition where the Legislature has found competition inappropriate. *City of San Antonio*, 506 S.W.3d at 635 ("[T]he Legislature recognized that this aspect of the electricity industry is unique, and by its nature must be subject to some form of regulation.").

Overruling Texas's rational laws contradicts the Supreme Court's and this Court's instructions that courts are particularly ill-suited to second-guess these types of policy decisions. *E.g.*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 355 (2008) ("What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all."); *Carr Staley, Inc. v. United States*, 496 F.2d 1366, 1374-75 (5th Cir. 1974) ("[A] court's review is limited. [This Court] should not second-guess the legislature where there is factual support for the distinctions it has drawn."); *Moosa v. I.N.S.*, 171 F.3d 994, 1009 (5th Cir. 1999) (same); *N.W. Enters., Inc. v. City of Houston*, 352 F.3d 162, 181 (5th Cir. 2003) (a municipality was

"entitled to experiment" with its regulations, which "[c]ourts should not second-guess"), *reh'g granted in part*, 372 F.3d 333 (5th Cir. 2004).

Inappropriately second-guessing the Legislature's rational choices would have wide-ranging and unpredictable consequences for Texas's carefully-crafted regulatory framework.

1. Overturning S.B. 1938 would threaten the balance of burdens and benefits under Texas's regulatory compact.

Fully-regulated monopolies allow Texas to ensure quality utility service at low cost for Texans. If this Court concluded the U.S. Constitution prohibits Texas from preserving its system of regulation, it will call into question the entire system through which Texas ensures the availability of electric service to all its citizens.

Because the electric market is unique, Texas made the appropriate determination to regulate electricity transmission. *City of San Antonio*, 506 S.W.3d at 635 (quoting Tex. Util. Code § 39.001); *cf. Tracy*, 519 U.S. at 288-90 & nn.5-7 (explaining the "predictable and disastrous" results from States' "experiments with free market competition" in utility industries). Nonincumbent, transmission-only entities like NextEra do not bear the full weight of the regulatory compact with Texas. *Office of Pub. Util. Counsel*, 104 S.W.3d at 227-28 (describing the burdens incumbents shoulder under this regulatory compact).

NextEra asks the Court to disrupt Texas's longstanding regulatory regime and allow federally rate-regulated, transmission-only entrants to compete for every transmission project, while forcing incumbent transmission-and-distribution companies to serve all retail customers from their distribution facilities and meet related regulations.[25] The Court should decline to give NextEra "a right to compete for the cream of the . . . business without regard to the local public convenience or necessity." *See E. Pipe Line Co. v. Mich. Pub. Serv. Cmm'n*, 341 U.S. 329, 334, 336-37 (1951). NextEra's claims should be rejected because this outcome would be unfair and because it threatens Texas's entire regulatory framework.

2. Overturning S.B. 1938 would call into question the PUCT's authority over other regulatory matters.

If this Court held S.B. 1938 unconstitutional, it would jeopardize many laws that ensure the PUCT has the jurisdiction it needs to secure reliable and safe electric service for Texas consumers, including:

a. Texas Utilities Code § 14.152: requiring utilities to maintain an office in a Texas county where their physical plants are located and to keep their books, accounts, and records in Texas;

b. Texas Utilities Code § 14.204: authorizing the PUCT to inspect utilities' books, accounts, records, plant, equipment and other property within Texas; and

[25] Tex. Util. Code § 37.151 (requiring incumbent transmission-and-distribution utilities to provide continuous and adequate service and to serve every consumer in their respective certificated areas).

c. Texas Utilities Code § 14.206: authorizing the PUCT to enter utilities' premises to conduct inspections or exercise other powers granted by Texas law.

These acts of police power, which NextEra does not challenge, require even a prospective new entrant to become an "in-state" incumbent as soon as it becomes recognized as a utility. NextEra's pleadings demonstrate as much—all the NextEra plaintiffs are Florida-based, except Lone Star Transmission, which is an Austin-based, ERCOT-certificated utility from the CREZ initiative. Under NextEra's and the United States's arguments, these other statutes could be viewed as creating an impermissible "residency" requirement. *E.g.*, U.S. Amicus Br. at 10, 16 (arguing "in-state physical presence requirements" are "viewed with particular suspicion"). Yet, striking these laws would decimate the PUCT's important regulatory powers in ways that are difficult to foresee. The disruption within Texas's carefully-regulated electric market, however, is foreseeable.

In sum, second-guessing Texas's regulatory powers over electricity transmission and distribution as a matter of constitutional law would complicate Texas's ability to ensure safe, reliable, and secure electricity for its citizens. If this Court were to consider ruling in NextEra's favor, it would need to specify—as NextEra does not attempt to do—how such a ruling would impact ERCOT and the overwhelmingly-intrastate portion of Texas's electric market.

II. S.B. 1938 Does Not Violate the Dormant Commerce Clause, Even as Applied to Interstate Transmission.

NextEra's dormant Commerce Clause claim was properly dismissed. Incumbent utilities that provide transmission and distribution services—incumbents that must serve all retail customers from their distribution facilities and meet associated regulatory requirements[26]—are substantially dissimilar from transmission-only entrants under Texas's regulatory regime. *Tracy* therefore forecloses NextEra's claim.[27] S.B. 1938 is a legitimate, evenhanded regulation that treats all nonincumbents the same, and S.B. 1938 does not violate the dormant Commerce Clause.[28] *Sieben*, 2020 WL 1443533, at *1, *7 (concluding similar Minnesota statute was not discriminatory and affirming dismissal of dormant Commerce Clause claim).

As the Eighth Circuit concluded about the similar Minnesota law,[29] S.B. 1938 facially "draws a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether

[26] Tex. Util. Code § 37.151.

[27] *See* SPS Amicus Br. at Part I.B.2 (describing how incumbents and nonincumbents are not similarly situated in Texas's interstate markets).

[28] *See* Entergy Amicus Br. at Part A.3.

[29] Minnesota's decision to allow competition after an incumbent's unexercised preference does not change the dormant Commerce Clause analysis—regardless, a preference for existing endpoint owners is rational and proper. *Compare* U.S. Amicus Br. at 12 n.4, *with* SPS Amicus Br. at 16 n.5.

they are in-state or out-of-state." *Sieben*, 2020 WL 1443533, at *5 (citation omitted). And both the Eighth Circuit—and the District Court here—found it relevant that some incumbents—including Oncor—have headquarters out of state or are owned by out-of-state entities. *Id.*; ROA.3031-32. Companies headquartered elsewhere and doing business in Texas—like NextEra—cannot "argue [they are] discriminated against by [Texas] laws that apply equally to all businesses operating in the state." *Sieben*, 2020 WL 1443533, at *5 (citation omitted).

Moreover, treating "incumbency . . . as the proxy for in-state status would be a risky proposition"—one that has no support in the law. *Colon Health Centers of Am., LLC v. Hazel*, 813 F.3d 145, 152-54 (4th Cir. 2016) (rejecting argument that firms operating in-state were therefore in-state entities, instead examining place of incorporation). Courts consistently have focused on whether a statute differentiates between entities based on residency or citizenship. *E.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) (upholding statute that had "the same effects . . . whether or not the offeror is a domiciliary or resident"); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 214, 220-21 (5th Cir. 2019) (concluding facially neutral ban against public corporations had no discriminatory effect).

S.B. 1938 distinguishes between incumbents and nonincumbents, not in-state and out-of-state entities. *Sieben*, 2020 WL 1443533, at *5. Virtually all incumbents

that benefit from S.B. 1938 are owned by out-of-state entities or have headquarters outside of Texas.[30] And S.B. 1938's distinction is driven by the realities of transmission service. Incumbents possess tangible, physical assets in Texas that new entrants do not. Ensuring that Texas receives the benefits and efficiencies of incumbents' existing assets justifies S.B. 1938. Further, S.B. 1938 "visits its effects equally upon both interstate and local business." *CTS Corp.*, 481 U.S. at 87 (citation omitted). The statute limits opportunities for *any* utility, whether incumbent or prospective entrant, to compete for projects to build new transmission lines that directly interconnect with facilities owned by another utility.[31] NextEra failed to allege S.B. 1938 has a discriminatory effect or is facially discriminatory. *See Wal-Mart*, 945 F.3d at 214, 220-21; *Allstate*, 495 F.3d at 163.

NextEra's failure to contest S.B. 1938's application to transmission within ERCOT also exposes another fundamental flaw of its lawsuit. NextEra's claims cannot succeed because NextEra effectively concedes it cannot show there are "no set of circumstances . . . under which the Act would be valid," as required to mount

[30] ROA.1563-64 (citing ROA.1672-1734, public filings and documents of which the Court may take judicial notice); *see also* Entergy Amicus Br. at Part A.3.iii (noting New York entity recently became an incumbent by purchasing El Paso Electric).

[31] NextEra does not seriously contend otherwise, noting S.B. 1938 favors out-of-state incumbents over NextEra's *Texas-based* subsidiary. ROA.30-31; ROA.55.

a facial challenge,[32] because S.B. 1938 "has a plainly legitimate sweep" within ERCOT.[33] NextEra Br. at 24, 33, 38. For the same reason, the balancing of local interests against any incidental effects on interstate commerce under *Pike*[34] also weighs heavily in favor of S.B. 1938 here, where the purely intrastate ERCOT region delivers 90% of Texas's power. *Sieben*, 2020 WL 1443533, at *8; *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 107-08 (2d Cir. 2017). As the Eighth Circuit noted, "the Supreme Court has rarely invoked *Pike* balancing to invalidate state regulation under the Commerce Clause." *Sieben*, 2020 WL 1443533, at *8 (citation omitted). This Court should not break new ground here.

III. CONCLUSION

S.B. 1938 should be upheld. It represents Texas's rational, longstanding policy judgment about how best to ensure secure and reliable electric service for its residents. It differentiates between incumbents and nonincumbents—not between in-state and out-of-state residents—and does not evince a discriminatory purpose or effect, undue burden, or dormant Commerce Clause violation under well-established and recent precedent. Striking down S.B. 1938 as a matter of constitutional law

[32] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[33] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

[34] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); SPS Amicus Br. at Part III (arguing *Pike* balancing test weighs against NextEra's claims).

would wreak havoc on a carefully-crafted, delicately-balanced regulatory framework through which Texas exercises its core police powers. This Court should affirm the District Court's dismissal of NextEra's complaint with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 22, 2020, I caused a true and accurate copy of the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,474 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the type-face requirements and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) and Fifth Circuit Rules 32.1 and 32.2 because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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