No. 20-50160

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF OF AMICUS CURIAE SOUTHWESTERN PUBLIC SERVICE COMPANY IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29, *Amicus Curiae* Southwestern Public Service Company provides the following supplement to the Statement of Interest Parties set forth in Appellants' brief.

Southwestern Public Service Company is a wholly owned subsidiary of Xcel Energy Inc., a publicly traded company. No entity owns 10% or more of Xcel Energy Inc.'s stock.

In the district court, as movant-intervenor, Southwestern Public Service Company was represented by Matthew E. Price, Max Minzner, Tassity Johnson, and Jason Perkins of Jenner & Block LLP; Ron H. Moss of Winstead PC; and Mark A. Walker of Xcel Energy Services Company.

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STATEMENT REGARDING LEAVE TO FILE

Southwestern Public Service Company ("SPS") was a movant-intervenor in the district court. Its intervention motion was denied, and it has filed an appeal. *See* No. 20-10568. On March 13, 2020, this Court issued an order "granting leave to Movant-Appellants (and any other parties appealing the district court's denial of a motion to intervene) to file, if they so choose, a brief as an amicus in this case." Accordingly, having been granted leave to file, SPS submits this *amicus curiae* brief.

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

STATEMENT OF INTEREST

SPS is a vertically integrated electric utility with integrated operations in Texas and New Mexico. It owns and operates generation plants, high-voltage transmission lines, and low-voltage distribution lines within its service territory, which lies in the Panhandle and South Plains portion of Texas and in eastern New Mexico. SPS is part of the Southwest Power Pool regional transmission organization.[1]

[1] *Amicus* LSP Transmission ("LSP") asserts that "Texas decided to abandon vertical integration." LSP Amicus Br. 22. That is simply wrong. LSP also seems to think that there is something incompatible about vertical integration and

As a vertically integrated utility, SPS is responsible not only for building high-voltage transmission lines, but also for generating and distributing electricity to homes and businesses in its service territory. Texas, like many other states, has chosen not to leave provision of such a vital public service to the unpredictability of a competitive market. Instead, "[e]lectric utilities are by definition monopolies in many of the services provided and areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not always operate." Tex. Util. Code § 31.001(b).

SPS is subject to a "comprehensive … regulatory system for electric utilities," to "protect the public interest inherent" in electric utility rates and services. *Id.* § 31.001(a). The Public Utility Commission of Texas ("PUCT") oversees the comprehensive regulatory system that governs SPS. It has "exclusive original jurisdiction over the rates, operations, and services" of SPS and other electric utilities. *Id.* § 32.001(a). Among the duties imposed on SPS in exchange for its monopoly is the obligation to "serve every consumer in [its] certificated area," and to "provide continuous and adequate service in that area." *Id.* § 37.151.

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interconnection to an interstate grid. *Id.* That is also incorrect. *Most* utilities interconnected to the Southwest Power Pool and Midcontinent Independent System Operator are vertically integrated. *See Refinements to Horizontal Mkt. Power Analysis*, 168 FERC ¶ 61,040, at P 48 (2019) (acknowledging that "[Southwest Power Pool] is similar to [Midcontinent Independent System Operator] in that it mostly consists of vertically-integrated utilities.").

SPS can be ordered to construct or enlarge transmission facilities, *id.* § 35.005(b), and is forbidden from "discontinu[ing], reduc[ing], or impair[ing] service to any part of [its] certificated service area," except under specifically delineated conditions or PUCT order. *Id.* § 37.152(a).

S.B. 1938 is part-and-parcel of the regulatory compact that governs SPS. Indeed, no transmission-only developer has ever built a transmission line in SPS's service territory. As a vertically integrated utility required to provide universal service within its territory, SPS has a strong interest in the law's affirmance, and in resisting efforts by entities like NextEra and *amicus* LSP to cherry-pick the most lucrative transmission projects while remaining unencumbered by any of the obligations that apply to a vertically integrated utility like SPS.

SUMMARY OF ARGUMENT

A straightforward rule controls this case. As the Supreme Court has long recognized, the dormant Commerce Clause does not prohibit *all* differential treatment of in-state and out-of-state entities; it prohibits only differential treatment of *similarly situated* entities. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). The dispositive question therefore is: Are vertically integrated utilities like SPS—whom the complaint alleges S.B. 1938 was intended to favor, *see*

ROA.35 (Compl. ¶ 23), ROA.49-50 (Compl. ¶¶ 72, 74)—similarly situated to transmission-only developers like NextEra?[2]

The answer to that question is no, as the district court correctly held. SPS is required to "serve every consumer in [its] certificated area," and to "provide continuous and adequate service in that area." Tex. Util. Code § 37.151. It does so by providing every customer in its territory a bundled generation, transmission, and distribution service. By contrast, NextEra has no such obligation, and does not seek to provide that bundled service. Instead, it wants to own and operate transmission only. And it wants to do so only for projects it finds to be profitable. The dormant Commerce Clause does not entitle NextEra to do so. Nor does the dormant Commerce Clause prohibit the choice by Texas, and many other States, to rely on regulation rather than competition when it comes to electric service, an industry of utmost importance to public health, safety, and welfare.

NextEra and its *amici* devote much of their briefs to describing the pro-competition policy of the Federal Energy Regulatory Commission ("FERC"). But

[2] NextEra cannot dodge dismissal by asserting that, in the region of Texas overseen by the Electric Reliability Council of Texas ("ERCOT"), S.B. 1938 favors incumbents in addition to vertically integrated utilities. NextEra concedes that "the subject of this case" is the State's *non-ERCOT* regions, where all utilities are vertically integrated. NextEra Br. 10. Arguments about S.B. 1938's hypothetical application elsewhere, or to other entities, cannot justify an injunction against the law as applied to vertically integrated utilities in the non-ERCOT regions of Texas, like SPS and Entergy.

that policy in fact undercuts their position. To be sure, FERC eliminated a *federal* law that gave incumbent utilities the right of first refusal to build new transmission lines; but at the same time, FERC expressly did not preempt similar state laws, and subsequently approved federal tariffs accommodating such state laws. FERC thereby freed States to decide whether to experiment with competition, but it did not *require* States to take that path.

FERC recognized that since the days of Thomas Edison, States have closely regulated electric utilities and continue to have a strong interest in deciding how best to ensure the reliable and affordable delivery of electricity to residents. Some States chose to pursue competition with respect to transmission development, but many did not. Aside from a limited and now-concluded program (known as "CREZ") in the part of the State overseen by ERCOT, Texas is one of many States that have decided against introducing competition in transmission development. Yet now, NextEra and its *amici*—having failed to persuade FERC to mandate nationwide competition by preempting state law—ask this Court to hold that the dormant Commerce Clause requires the policy choice FERC rejected. That request finds no support in the Constitution, and the Court should reject it and affirm the district court's dismissal.

ARGUMENT

I. S.B. 1938 Is Not Unlawfully Discriminatory Under the Dormant Commerce Clause.

A. Texas Subjects Electric Utilities Like SPS to Comprehensive Regulatory Obligations, Which Do Not Apply to Transmission Developers Like NextEra.

The electric system includes three components. First, electricity is generated. Second, electricity is transmitted over long distances via high-voltage transmission lines. Third, electricity is delivered to end-users like homes and businesses, largely over lower voltage distribution lines. In the regions of Texas that NextEra describes as "the subject of this case," NextEra Br. 10—the territories of the Southwest Power Pool and Midcontinent Independent System Operator—Texas has chosen a traditional regulatory model of vertical integrated monopolies in order to ensure safe and reliable service for all Texas residents in those regions.

The "regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Co-op Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). For many decades, Texas has exercised that police power through a comprehensive regulatory scheme. "Public utilities traditionally are by definition monopolies in the areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not operate. Public agencies regulate utility rates, operations, and services as a substitute for competition." Tex. Util. Code § 11.002(b).

Texas's policy choice to rely on regulation is hardly unusual. In the nineteenth century, some States initially adopted an open market approach to electricity distribution. But this approach soon gave way to the "predictable and disastrous" results of "wasteful competition … massive consolidation and the threat of monopolistic pricing." *Tracy*, 519 U.S. at 289 (internal quotation marks omitted). States "learned from [this] chastening experience" that it was "virtually an economic necessity for States to provide a single, local franchise with a business opportunity free of competition from any source," balanced "by regulation and the imposition of obligations to the consuming public." *Id.* at 290.

To effectuate its policy choice, Texas grants vertically integrated electric utilities, like SPS and Entergy Texas, certificated service areas in which they are responsible for generating electricity, transmitting electricity over high-voltage lines, and distributing electricity to end-users. *See Lamb Cty. Elec. Co-op., Inc. v. Pub. Util. Comm'n*, 269 S.W.3d 260, 265 (Tex. App.—Austin 2008, pet. denied) ("[G]enerally speaking, a single utility was given the authority to provide all of the electricity to customers located inside a specific geographical region."). To be sure, elsewhere in Texas—namely, in the ERCOT region—Texas has allowed competition in the generation of electricity, and has permitted non-incumbents to build transmission lines to connect new renewable energy producers located in far-

flung Competitive Renewable Energy Zones ("CREZ").[3] But Texas has not allowed any such competition in the non-ERCOT regions of the State that are "the subject of this case." NextEra Br. 10. Within SPS's service territory, no transmission line has ever been built by a transmission-only developer like NextEra.

Insulation from competition is no free lunch. Electric utilities like SPS must abide by obligations to serve the public that do not exist in competitive markets. The utilities charge their customers a bundled rate for their generation, transmission, and distribution services—a rate set under the PUCT's "exclusive original jurisdiction." Tex. Util. Code § 32.001(a). Indeed, the PUCT enjoys pervasive regulatory authority over these utilities' "rates, operations, and services." *Id.* The utilities, moreover, must "serve every consumer in [their] certificated area"—an obligation particularly important in sparsely populated areas like SPS's service territory—and must "provide continuous and adequate service in that area." *Id.* § 37.151. If new transmission facilities are needed, SPS can be ordered to

[3] *See* Tex. Util. Code § 39.904(g). The CREZ transmission lines in ERCOT total only about 3,600 miles, *see* ERCOT, *Competitive Renewable Energy Zones Process* at 8 (Aug. 11, 2014), https://bit.ly/2KY0bt4—a sliver of ERCOT's 46,500 miles of lines, *About*, ERCOT, http://www.ercot.com/about; ROA.38 (Compl. ¶ 31) ("the vast majority of lines in ERCOT" are owned by transmission-distribution utilities). Aside from these CREZ lines, Texas has maintained the traditional regulatory model for transmission, even in ERCOT. *See* Tex. Util. Code § 39.001(a) (finding that "transmission and distribution services" remain a "monopoly warranting regulation," for which competition is not in the public interest).

construct or enlarge them even if it would prefer to deploy its capital in other ways, *id.* § 35.005(b), and SPS generally cannot "discontinue, reduce, or impair service to any part of [its] certificated service area." *Id.* § 37.152.

This combination of benefits and burdens creates a "regulatory compact": "a monopoly on service in a particular geographical area … is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987).

S.B. 1938, enacted to clarify and confirm preexisting law,[4] is a part of this regulatory compact. It gives existing certificated electric utilities the right to obtain certificates of convenience and necessity to build, own, or operate new transmission lines that will directly interconnect with their own facilities. Tex. Util. Code § 37.056(e). It thus protects the utility certificated to serve a particular service territory against *all* competitors, both in-state and out-of-state. On the one hand, SPS has no right to build transmission lines in Texas outside of its own service territory. And on the other, no other entity, whether or not an existing Texas utility, has a right to build transmission lines within SPS's service territory.

[4] *See* ROA.1893, Senate Research Center, Bill Analysis: S.B. 1938 (May 29, 2019) (S.B. 1938 would "codify the existing process in Texas for determining the proper party to construct" transmission lines, and clarify statutory "ambiguity").

In this way, S.B. 1938 protects Texas's policy—uniformly applied outside of ERCOT—to have regulated monopolies provide bundled generation, transmission, and distribution service to all customers in their service territories.

There is no dispute in this case that S.B. 1938 aimed at this goal. Indeed, the Complaint alleges as much, describing S.B. 1938 as an effort to protect Texas's traditional vertically integrated utilities from competition from transmission-only developers. *See* ROA.35 (Compl. ¶ 23) (alleging that S.B. 1983 reflects an effort to "prevent[] the PUCT from approving anything but a traditional transmission and distribution utility … from owning [transmission] facilities"); ROA.46 (Compl. ¶ 62) (alleging that S.B. 1938 was intended to favor existing "transmission and distribution utilities"); ROA.49-50 (Compl. ¶ 74) (alleging that S.B. 1983 was intended to "benefit … a defined few utilities that already own transmission and distribution facilities in Texas"). Instead, the only dispute in this case is whether the Constitution prohibits Texas from pursuing that goal. We now turn to that question.

B. The Dormant Commerce Clause Does Not Prohibit Texas's Policy Choice.

1. The Dormant Commerce Clause Does Not Prohibit Treating Entities Differently When They Are Differently Situated.

NextEra is not part of the Texas regulatory compact, nor does it want to be. Instead, as a transmission-only developer, it wants to be able to compete with SPS to build new transmission lines in SPS's service territory, without taking on the obligations the law imposes on SPS to provide universal electric service within that territory. The dormant Commerce Clause, however, does not give NextEra a constitutional right to an exemption from Texas's policy choice to rely on vertically integrated utilities subject to a regulatory compact.

That is so for a simple reason. NextEra and its *amici* make much of the assertion that S.B. 1938 yields differential treatment. But the bedrock dormant Commerce Clause principle is that "any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298 (footnote omitted); *see Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004) (dormant Commerce Clause prohibits only discrimination "among similarly situated" entities). And the regulated utilities in the non-ERCOT regions of the State are not "substantially similar" to transmission-only developers like NextEra. *Tracy*, 519 U.S. at 298.

These two types of entities provide "different products," *id.* at 299: Regulated utilities provide a bundled service consisting of generation, transmission, and distribution, while NextEra seeks to provide only transmission. These two types of entities also "serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed," *id.* The regulated utilities provide universal service to every home and business in their service territory, while NextEra seeks to provide only wholesale transmission service. Finally, these two types of entities serve these different markets in very different ways: The regulated utilities provide their bundled product to their customers subject to a host of requirements intended to protect the public interest, including an obligation to build new transmission lines at the PUCT's direction, an obligation to serve all customers, and an obligation to charge PUCT-determined rates. *See supra* Part I.A. NextEra seeks to operate its transmission lines free of those obligations.

NextEra's dormant Commerce Clause claim thus fails at the "threshold question whether the companies are indeed similarly situated for constitutional purposes." *Tracy*, 519 U.S. at 299. They are not. To be sure, NextEra "may or may not agree with" Texas's policy decision to "displace competition with regulation or monopoly public control" in the area of electric service, "but nothing in the Commerce Clause vests the responsibility for that policy judgment with the

Federal Judiciary." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344-45 (2007) (quotation marks, alterations omitted).

2. *Tracy* Controls This Case.

The Supreme Court in *Tracy* applied these principles to reject a dormant Commerce Clause challenge to Ohio's efforts to protect its regulatory compact. The district court correctly held that *Tracy* compels the same result here. *See* ROA.3031-32.

There, as here, the State had chosen a model of traditional regulation: Domestic gas utilities (known as "local distribution companies," or "LDCs") were subject to a regulatory compact in which they sold bundled gas service to retail customers under regulated rates and subject to various customer protection obligations, including the requirement to serve all retail customers in their service territories. There, as here, the State established a rule that favored those traditional utilities: The domestic gas utilities also competed against interstate gas marketers to sell unbundled gas to large industrial customers, *Tracy*, 519 U.S. at 304, and Ohio enacted a tax exemption for the domestic gas utilities which applied in the competitive market—giving them an advantage over the interstate gas marketers in that otherwise competitive market. *Id.* at 281-82. And there, as here, that rule was challenged as violating the dormant Commerce Clause.

The Supreme Court rejected that challenge. Although the dormant Commerce Clause generally prohibits states from favoring in-state entities in competitive markets, the Court upheld the tax exemption for Ohio domestic gas utilities because it found that those companies were not "similarly situated" to the interstate gas marketers. *Id.* at 310. To be sure, the two types of entities competed against one another to sell to large industrial customers. But the domestic utilities *also* served the regulated market, in which they had to comply with various regulatory requirements, including to serve all members of the public. *Id.* at 304, 310. Because of those obligations in the regulated market, to which the interstate gas marketers were not subject at all, the two types of entities were not "similarly situated" and the "claim of facial discrimination" thus failed. *Id.* at 310.

This case is the same, in every way that matters. Vertically integrated utilities like SPS bear significant obligations—obligations that NextEra is not subject to, and does not seek to become subject to. *See supra* Part I.A. Instead, NextEra wants to compete with SPS regarding only *one* of the services SPS offers, free of any such obligations—just as *Tracy*'s interstate marketers competed with the domestic gas utilities to sell to industrial customers. *Tracy*, however, makes clear that the dormant Commerce Clause creates no constitutional right for NextEra to do so.

The single difference between this case and *Tracy* only underscores the weakness of NextEra's position. In *Tracy*, Ohio chose to allow some competition for unbundled gas sales to industrial customers, and then tilted the playing field in that competitive market to favor the domestic gas utilities. Yet such was the "importance of traditional regulated service," and "the values served by … traditional regulation," that Ohio could permissibly favor its traditionally regulated utilities even in the portion of the market that Ohio had elected to open to competition. 519 U.S. at 304, 307. Ohio was not required to risk an effect even "at the margins" if its domestic utilities were forced to compete on equal terms with the interstate marketers in that competitive market. *Id.* at 307.

Here, Texas has chosen not to allow competition at all, but instead has continued to treat transmission as part of SPS's regulated service. *Tracy* therefore applies here with even greater force to make clear that the dormant Commerce Clause respects Texas's choice, and does not compel Texas to carve apart its regulatory compact just because an out-of-state company wants to compete with the regulated utility in one slice of its business. Indeed, *Tracy* itself emphasized that Ohio would equally have been within its power to protect the domestic gas utilities, "even if such regulation resulted in an outright prohibition of competition for even the largest end users." *Tracy*, 519 U.S. at 306-07. That statement compels affirmance here. *See* ROA.3031-32; *accord LSP Transmission Holdings,*

LLC v. Lange, 329 F. Supp. 3d 695, 707 (D. Minn. 2018) (rejecting dormant Commerce Clause challenge to Minnesota right-of-first-refusal law under *Tracy*: "LSP alleges that it wishes to compete against Minnesota electric utilities for the right to build transmission lines… Under *Tracy*, however, the Court grants controlling weight to the monopoly market. Minnesota is entitled to consider the effect on the public utilities and the consumers that the utilities serve and 'to give the greater weight to the captive market and the local utilities' singular role in serving it.'" (quoting *Tracy*, 519 U.S. at 304)), *aff'd sub nom., LSP Transmission Holdings, LLC v. Sieben*, No. 18-2559, __F.3d__, 2020 WL 1443533 (8th Cir. Mar. 25, 2020).[5]

[5] The Antitrust Division seeks to distinguish *LSP Transmission* on the ground that the Minnesota statute allowed competition if the utility decided not to exercise its right of first refusal. U.S. Amicus Br. 12 n.4. That was not the basis for upholding the statute. The district court relied on *Tracy*, as noted above. The Eighth Circuit did not reach *Tracy*, deciding to uphold the statute on the alternative ground that it does not discriminate: "Minnesota's preference is for electric transmission owners who have existing facilities, and its law applies evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere." *LSP Transmission Holdings, LLC v. Sieben*, No. 18-2559, __F.3d__, 2020 WL 1443533, at *5 (8th Cir. Mar. 25, 2020). (That rationale is equally applicable here, *see* R.1861; indeed, most of Texas's vertically integrated utilities, including SPS, are owned by out-of-state companies, R.1866.) The *dicta* on which the Antitrust Division relies *could not* have been the basis for the Eighth Circuit's decision. If it were illegal to favor regulated public utilities, that illegality would not be cured by the possibility that, if the incumbent public utility declined its preference, an aspiring competitor could then prevail; such possibility would mitigate only the degree of the preference. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 n.4 (1994).

This same point also spotlights what is so meritless about NextEra's sole attempt to distinguish *Tracy*. NextEra stakes its case on the claim that, supposedly unlike *Tracy*, "the only market at issue [here] is the interstate market for building, owning, and operating transmission services." NextEra Br. 38. But while NextEra wants this Court to *create* a world in which there is a standalone market for transmission services, that is not the world that *exists*—and that is not the policy that Texas has *chosen*. Texas has decided that there is no independent market for building, owning, and operating transmission services, but instead that such responsibility should lie with vertically integrated public utilities that provide a bundled, regulated service. Nothing in the dormant Commerce Clause forecloses Texas from making that choice.

NextEra relies heavily on *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). NextEra Br. 29-32. But in that case, there was no regulatory compact to advance the public health, safety, and welfare. Rather, *Carbone* concerned a municipal ordinance requiring all of a town's trash to be processed by a favored local trash processor. The favored processor received preferential treatment for purely financial reasons: That arrangement allowed the town "to amortize the cost of the transfer station," after which it would buy the station for $1. *Carbone*, 511 U.S. at 387. The favored local beneficiary had no special

regulatory obligations, and an out-of-state trash processor was available to perform the exact same service.

Tracy, decided after *Carbone*, makes clear that those distinctions make all the difference, and that public utilities with special obligations imposed for the benefit of the public present a different case: Given the "continuing importance of the States' interest in protecting [a] captive market from the effects of competition," States may favor their regulated utilities even by "prohibit[ing] … competition" for services that, standing alone, could be competitive, such as gas sales "for even the largest end users." *Tracy*, 519 U.S. at 306-07.[6]

In a subsequent decision, *United Haulers*, the Court drew on *Tracy* to uphold a local law requiring all trash to be processed by a municipally owned trash processor. The Supreme Court analogized the publicly owned facility in that case to the public utilities in *Tracy*, and distinguished it from the facility in *Carbone*, by quoting Justice Scalia's concurrence in *Tracy*: "'Nothing in this Court's negative Commerce Clause jurisprudence' compels the conclusion 'that private marketers engaged in the sale of natural gas are similarly situated to public utility

[6] Thus, NextEra's analogy to a discriminatory law "restrict[ing] the building of new homes to Texas home builders," NextEra Br. 25, wholly misses the mark. Home builders are not subject to any regulatory compact.

companies.'" *United Haulers*, 550 U.S. at 342-43 (quoting *Tracy*, 519 U.S. at 313 (Scalia, J., concurring)). So it is again here.

3. The Dormant Commerce Clause Does Not Prohibit Texas From Including Transmission in its Regulatory Compact.

To the extent NextEra contends there is something unconstitutional about the State's choice to include transmission service as an element of its regulatory compact with SPS, it is badly mistaken. No case law supports that strange notion. To the contrary, *Tracy* emphatically instructs courts to defer to state policy decisions of this kind, for three reasons. 519 U.S. at 303-09.

First, States have a legitimate interest in utility regulation because it "serves important interests of health and safety," and dormant Commerce Clause precedent has "traditional[ly] recogni[zed] … the need to accommodate" such interests. *Id.* at 306. Second, courts are "institutionally unsuited" and "ill qualified" to predict the economic consequences of upending carefully devised regulatory schemes. *Id.* at 308-09. *Tracy* therefore directs courts to refrain from decisions that could pose a risk to the balance that States have deemed necessary to protect reliable regulated utility service: It refused to second-guess Ohio's policy choices because doing so "*could* subject [utilities] to economic pressures that in turn *could* threaten" their ability to sell natural gas. *Id.* (emphasis added)).

Third, *Tracy* recognizes that judicial restraint is appropriate because Congress "has both the resources and the power" to act if necessary. *Id.* at 304.

Yet in exercising the Commerce Clause power, "Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies." *Id.* at 304-05. Indeed, Congress and FERC have expressly accommodated the kind of siting and construction regulations at issue in this case. *See infra* Part II. When FERC and Congress have concluded that these kinds of regulations do not unduly burden interstate commerce, this Court should not hold that the Commerce Clause dictates a different policy choice.

This same principle of deference is also why it is irrelevant that transmission *could* be competitive, and that some States have chosen to make it so. In *Tracy*, the market for large industrial customers *could* have been competitive, and in many States is competitive—but Ohio still would have been free to "prohibit[] … competition" altogether for such customers. *Tracy*, 519 U.S. at 306. That policy choice is up to the State. A contrary ruling would upend longstanding state utility regulation throughout this Circuit. The majority of States within it have maintained vertically integrated utilities, responsible for the monopoly provision of generation, transmission, and distribution bundled in a single rate—even though other States (including Texas) have shown that competition for generation is possible, and still others have experimented with competition for transmission.

The principle that States, consistent with the dormant Commerce Clause, may require or prohibit the bundling of certain services when they regulate for the

public interest is by no means limited to the public utility context. In *Allstate Insurance Co. v. Abbott*, this Court upheld a statute that distinguished between two business models for auto body shops. Any body shop will fix the dent from the parking lot. But some are independent while others are owned by insurers. Texas chose to regulate those business models differently, restricting insurer-owned shops while leaving independent shops unaffected. The Court rejected a dormant Commerce Clause challenge contending that this choice impermissibly discriminated against insurers (who were out of state) and in favor of independent body shops (who were in-state), explaining that the legislation merely "treat[ed] differently two business forms . . . a distinction based not on domicile but on business form." 495 F.3d 151, 161 (5th Cir. 2007). The Court explained that "[t]he dormant Commerce Clause is no obstacle" to regulation "prevent[ing] firms with superior market position … from entering a downstream market … upon the belief that such entry would be harmful to consumers." *Id.* at 162.

The same is true here. Texas has drawn a distinction based "on business form," *Allstate*, 495 F.3d at 161, deciding that transmission service should be bundled with the distribution service provided by public utilities, rather than cleaved apart to be offered separately—because that approach best protects consumers and the public interest. The public utility realm, with its century-long

tradition of state regulation, gives additional weight to the generally applicable principle that States are free to make such choices. *See Tracy*, 519 U.S. at 303-09.

II. FERC's Policy Supports the District Court's Decision to Dismiss.

NextEra and its supporting *amici* rely heavily on FERC orders establishing what they describe as a pro-competitive policy. These orders, however, in fact underscore why NextEra's claims were properly dismissed. FERC and Congress have carefully preserved room for States to adopt policies like S.B. 1938. But here, NextEra seeks in effect to wield the dormant Commerce Clause to *frustrate* those choices. That turns the Commerce Clause—which the Framers drafted as a source of federal power—on its head.

In the Federal Power Act, Congress made the core judgment that policies choices like Texas's here are for States to make. Even as Congress assigned to FERC the authority to regulate the interstate transmission of electricity, 16 U.S.C. § 824(b), it reserved to States the authority over the siting and construction of transmission lines.[7]

[7] *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) ("States retain control over the siting and approval of transmission facilities."); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities"); FERC, Order No. 1000, 136 FERC ¶ 61,051, P 107 (2011) ("Order No. 1000") ("[T]here is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction.").

Following Congress's lead, FERC has applied the Federal Power Act to recognize and accommodate the traditional state authority to adopt laws like S.B. 1938. In 1999, FERC began shifting responsibility for transmission-line planning and ratemaking from the national to the regional level by allowing non-governmental, non-profit entities—known as Regional Transmission Organizations ("RTOs") or Independent System Operations ("ISOs")—to oversee transmission functions and planning over large areas of the electricity grid. *See generally* FERC, Order No. 2000, 89 FERC ¶ 61,285 (1999); 18 C.F.R. § 35.34. As FERC oversaw that transition, many States had laws, like Texas, giving utilities a monopoly over transmission lines in their service territories. Far from seeking to frustrate those laws, FERC embedded a similar right in *federal* law by approving tariffs for RTOs and ISOs that included right-of-first-refusal provisions, giving the exclusive right to build and operate new transmission lines to the utility already serving the area.

In 2011, FERC eliminated its federal mandate, thereby freeing States to experiment with competition if they wished. FERC, Order No. 1000, 136 FERC ¶ 61,051, at PP 7, 253, 313 (2011), *aff'd*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Many parties, including *amicus* LSP, urged FERC to go further, by preempting state laws containing rights of first refusal. But FERC rejected those calls. FERC reaffirmed that States have the authority to decide

whether, where, and by whom transmission lines could be constructed and operated. *Id.* at PP 107, 227, 253 n.231, 287. It declared that it would not "limit, preempt, or otherwise affect state or local laws or regulations" regarding "construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Id.* P 287; *see MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016). FERC thus preserved for States their right to continue their traditional regulatory model—and the Courts of Appeals affirmed that choice and rejected arguments that FERC should have chosen preemption over accommodation. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 76 (in eliminating federal right of first refusal, FERC "t[ook] great pains to avoid intrusion on the traditional role of the States" as to siting and construction of transmission facilities); *MISO Transmission*, 819 F.3d at 336 (finding that FERC's desire to preserve the States' traditional authority was a "proper goal").

Accordingly, when FERC reviewed the federal tariffs for the RTOs/ISOs in charge of transmission planning in parts of Texas—the Southwest Power Pool and the Midcontinent Independent System Operator—FERC approved tariffs that expressly acknowledge and accommodate state laws like the ones challenged here.[8] *See Sw. Power Pool, Inc.*, 151 FERC ¶ 61,045, P 29 (2015) ("…it is appropriate

[8] Following Order 1000, several other States likewise adopted laws similar to S.B. 1938. *See* ROA.3026 at n.2 (collecting cites).

for [Southwest Power Pool] to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process"); *Midwest Indep. Transmission Sys. Operator Inc.*, 147 FERC ¶ 61,127, PP 147-150 (2014) (similar). As FERC explained, by accommodating state laws like Texas's, even as it removed the federal right of first refusal, FERC "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring" that its reforms "do not result in the regulation of matters reserved to the states." *Sw. Power Pool*, 151 FERC ¶ 61,045 at P 31.

Congress, too, has recognized the same point. It has acknowledged the existence of state laws, like the ones under challenge here, that prevent the issuance of "a permit or siting approval for [a] proposed [transmission] project in a State" to transmission companies that "do[] not serve end-use customers in the State." 16 U.S.C. § 824p(b)(1)(B). Congress chose to preempt some such laws—but only under limited circumstances not present here. *Id.* § 824p(a)(4), (b)(3)-(6).

Hence, NextEra and its *amici*'s portrait of FERC's policy—pro-competitive to the hilt—reflects the policy they wish FERC had adopted, rather than the one it actually did. In reality, FERC chose to balance its own pursuit of competition with respect for States' traditional authority, reaffirmed in the Federal Power Act, to control the siting and certification for new transmission lines. Now, having failed

to persuade FERC to adopt their favored regulatory approach—and, in LSP's case, having failed to persuade the federal courts to overrule FERC—NextEra and its *amici* ask this Court to hold that the Constitution mandates a competition policy that FERC itself declined to adopt. The dormant Commerce Clause, however, does not constitutionalize one economic or regulatory theory. "The battle between laissez fairists and regulators is as old as the hills…. Legislators, not jurists, are best able to compare competing economic theories and sets of data and then weigh the result against their own political valuations the public interests at stake." *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 158 (4th Cir. 2016). That is exactly what FERC (and Texas) did in striking the policy balance that NextEra now seeks to upset.

III. NextEra's *Pike* Claim Was Properly Dismissed.

NextEra's backup argument is that S.B. 1938 is invalid under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which prohibits even nondiscriminatory laws if their burden on interstate commerce is "clearly excessive" relative to the putative local benefits, *id.* at 142. This burden is rarely met, and courts routinely dismiss *Pike* claims once they have found an absence of discrimination. *See, e.g.*, *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524-25 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 1547 (2019); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 103-08 (2d Cir. 2017);

Grand River Enters. Six Nations, Ltd. v. Beebe, 574 F.3d 929, 941-43 (8th Cir. 2009). Here, Plaintiffs cannot satisfy *Pike*'s stringent pleading standard.

First, a *Pike* claim cannot survive when (as here) Congress and the relevant federal agency charged with regulating the interstate market have exercised the Commerce Clause power and decided that the state law at issue does not unduly burden the interstate market. *See Star*, 904 F.3d at 525 (rejecting *Pike* challenge to state regulation of power plants because "[t]he commerce power belongs to Congress; the Supreme Court treats silence by Congress as preventing discriminatory state legislation. Yet Congress has not been silent about electricity."); *Sw. Power*, 151 FERC ¶ 61,045 at P 31 (explaining that FERC "struck an important balance" when it removed the federal ROFR but accommodated state laws limiting siting and construction certificates to incumbent utilities).

Second, even when the federal government has not already struck a balance, courts cannot "second-guess the empirical judgments of lawmakers concerning the utility of legislation," *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (quotation marks omitted), but instead must credit a putative local benefit "so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes," *Allstate Ins. Co.*, 495 F.3d at 164 (quotation mark omitted). In particular, challenges to "part of a complex regime" for public utility regulation face a "substantial burden" in stating

a claim under *Pike*. *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002).

Here, Texas rationally concluded—based on testimony presented before the Legislature—that limiting transmission line construction to incumbent distribution-transmission utilities will "ensure the geographic continuity" of the State's electricity grid, "in a way that further facilitates reliability." *See* ROA.1893, Senate Research Center, Bill Analysis: S.B. 1938, at 1 (May 29, 2019). The Texas Legislature is uniquely situated to make the policy judgments that underpin S.B. 1938—*i.e.*, judgments regarding the "health, life, and safety" of its citizens—even if those judgments "might indirectly affect the commerce of the country." *Tracy*, 519 U.S. at 306 (quotation marks omitted). The decision is not one for the courts to second-guess.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 6,486 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Microsoft Office Word 2016 using 14-point Times New Roman a proportionally spaced typeface.

/s/ Matthew E. Price

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM.ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matthew E. Price