No. 22-601

IN THE

Supreme Court of the United States

PETER LAKE, CHAIRMAN, PUBLIC UTILITY COMMISSION OF TEXAS, ET AL.,

Petitioners,

v.

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* ITC HOLDINGS CORP. SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus ITC Holdings Corp. is the largest independent electricity transmission company in the United States. Through its regulated operating subsidiaries, ITC owns and operates high-voltage transmission infrastructure in Michigan, Iowa, Minnesota, Illinois, Missouri, Kansas, and Oklahoma. These systems serve a combined peak load

[1] Pursuant to Rule 37.2, *amicus* provided timely notice of its intention to file this brief to counsel for all parties. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

exceeding 26,000 megawatts along 16,000 miles of transmission line.

ITC, along with its affiliates and subsidiaries, is an incumbent transmission provider in multiple states, but like Respondent NextEra Energy Capital Holdings, Inc., ITC does not own any assets in Texas. As a result, it is subject to the same Texas-law right of first refusal that precluded NextEra from competing for the transmission projects at issue in this case. Yet, unlike NextEra, ITC recognizes the necessary and important regulatory functions that rights of first refusal (ROFRs) serve. That is why ITC submits this brief in support of Petitioners.

SUMMARY OF ARGUMENT

The electricity industry is heavily regulated. This regulatory regime was enacted in response to the ruinous consequences of unbridled competition between utilities. *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 305-307 (1997). The high cost of constructing infrastructure, combined with the low marginal cost of serving additional customers, means that utilities have long been seen as natural monopolies. See, *e.g.*, Posner et al., *Natural Monopoly*, Penn. St. Univ.[2] Because of this economic reality, *laissez-faire* utility markets experienced a brief period of competition followed by inevitable monopolization. Neither benefitted consumers. Wasteful overlapping electrical wires and gas lines yielded little benefit to consumers in that era of competition. See *Tracy*, 519 U.S. at 289-290. And when the markets became monopolized, customers paid even higher costs. See *ibid.*

States and local governments responded to this problem by enacting what is sometimes called the "traditional" model of vertically integrated local monopolies. Under

[2] https://www.e-education.psu.edu/ebf200/print/book/export/html/139.

this model, a single local franchise receives the sole right to provide electricity generation, transmission, distribution, and sales within a defined area. But that boon is balanced by various statutory obligations. The government regulates the utilities' rates, and utilities are generally obligated to serve every customer within their territory without discrimination. Twenty-eight states retain the vertically integrated model today. S&P Global Market Intelligence, *RRA Regulatory Focus: Quarterly Regulatory Evaluations—Energy* (RRA) 28 (Oct. 15, 2022). Florida, NextEra's home state, is among them. *Ibid.*

Other states have opened up one or more aspects of electrical service to competition. In so-called "deregulated" states, electricity generation, transmission, distribution, or sales are unbundled from the other services, and competition is allowed with respect to certain of those services. But the "deregulated" label is "a misnomer, as retail electricity providers and other parts of the industry remain highly regulated." U.S. Dep't of Energy, *Transforming The Nation's Electricity System: The Second Installment of the Quadrennial Energy Review* (QER) App. at A-13 (2017). For example, even in states where electricity generation and retail sales are subject to full competition, transmission services remain a franchised monopoly, and the incumbent utility must serve as the provider of last resort if the market fails to provide power. See, *e.g.*, Tex. Util. Code §§ 39.106(b)-(c).

Texas is unique in that parts of the state fall within different power grids. Most of the state is served by the purely *intrastate* Electric Reliability Council of Texas (ERCOT) grid. But other parts of the state are within the *interstate* territory of the Midwest Independent System Operator (MISO) and the Southwest Power Pool (SPP). While ERCOT is considered "deregulated," the areas in

Texas served by MISO and SPP continue to use the vertically integrated model. RRA at 28. In all areas of the state, however, ROFRs ensure that local franchises remain intact—whether that franchise provides all stages of electricity generation and delivery, or just transmission and distribution. Texas law thus precludes *any entity*, whether based in-state or out-of-state, from building new transmission lines until the incumbent transmission owner is offered the chance to accept that project.

This freedom from competition provides incumbents a necessary counterbalance against statutory obligations to provide service to all without discrimination and to serve as the provider of last resort. Without ROFRs, market entrants could cherry-pick the most profitable projects, leaving the incumbent with the obligation to build projects it deems undesirable. The result would be discrimination *against* incumbent utilities that would threaten their economic viability and, along with it, the stability of the power grid.

In light of these economic realities, this Court in *Tracy* rejected a dormant Commerce Clause challenge and reaffirmed states' power to regulate utilities "even if such regulation result[s] in an outright prohibition of competition." 519 U.S. at 306. That greater power to enact a ban on *all* competition among electrical utilities necessarily includes the lesser power to restrict competition in one phase of electrical service—transmission. But the Fifth Circuit did not honor *Tracy*'s central teaching in the decision below. While its holding is limited to striking down ROFRs—creating a circuit split in the process—the logical consequences of its reasoning extend much further. If, as the Fifth Circuit held, states cannot confer any benefit on incumbents not available to other companies, then every

state's utility regulatory regime may well be rendered unconstitutional. That cannot be the law.

The decision below thus threatens to reset the Nation's utility-regulatory regime to where it stood over a century ago, when unbridled competition produced damaging consequences. Without this Court's intervention, the resulting regulatory uncertainty will undermine stability of the Nation's power grid, to the detriment of all.

ARGUMENT

I. RIGHTS OF FIRST REFUSAL SERVE AN IMPORTANT, NONDISCRIMINATORY PURPOSE IN PROMOTING A STABLE POWER GRID AND PROTECTING CONSUMERS

A. Governments have sharply limited competition in electricity transmission and distribution markets for more than a century because they are natural monopolies

Utilities are subject to extensive regulation in every state. Competition is sharply limited, and utility companies face pervasive oversight of nearly every aspect of their business.

This Court in *Tracy* chronicled the reasons for this current system of utility regulation. In the early days of electrification, an unfettered utilities market led to a period of ruinous competition followed by monopoly. 519 U.S. at 289. "Many * * * municipalities honored the tenets of laissez-faire to the point of permitting multiple gas franchisees to serve a single area and relying on competition to protect the public interest." *Ibid.* "The results were both predictable and disastrous"—public streets had to be continually torn up to lay competitors' pipes, electrical wires crisscrossed in a wasteful web, and the costs for these redundant systems were passed onto consumers. See *id.* at 289-290.

And because utilities are typically natural monopolies, destructive competition was quickly followed by "massive consolidation and the threat of monopolistic pricing." *Ibid.* In Chicago, for example, "45 mostly overlapping franchises were granted for electric utility operation * * * between 1882 and 1905. By 1905, however, a single monopoly entity had emerged from the chaos, and customers ended up paying monopoly prices." *Id.* at 289 n.7.

Faced with this threat of wasteful competition followed by inevitable private monopoly, "[i]t seemed virtually an economic necessity for States to provide a single, local franchise with a business opportunity *free of competition from any source*." *Id.* at 290 (emphasis added). But that benefit was balanced by various burdens. While state-sanctioned utility monopolies faced no competition, they were subject to pervasive regulation and extensive obligations to the public. *Ibid.* Most importantly, utilities were generally required to serve every customer without discrimination, and their rates were either set by the government or subject to government supervision. See *id.* at 296-297.

Some states have moved away from that traditional, vertically integrated model, choosing instead to "unbundle" electricity generation, transmission, distribution, and retail sales from each other. But even comparatively deregulated markets still restrict competition in certain ways. In general, these jurisdictions require previously integrated utilities to "sell their power generation assets and keep only the 'wires' component of the business." See QER at A-32. This pattern reflects the fact that electricity transmission and distribution are still seen as natural monopolies, even if generation is not. See *Morgan Stanley Cap. Grp. Inc.* v. *Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008) (plurality op.) (transmission

remains a natural monopoly); Tuttle et al., *The History and Evolution of the U.S. Electricity Industry* 12 (2016) (Transmission and distribution (T&D) "is still viewed as a natural monopoly * * * . As such, the grid operations and T&D infrastructure have remained monopolies in almost all jurisdictions that experienced restructuring.").[3]

Texas is typical in this regard. The "wires" component of electrical service—transmission and distribution—remains bundled throughout the state, across the areas served by ERCOT, MISO, and SPP. And even though ERCOT is widely considered to be the most competitive energy market in the country, see Tuttle at 12, Texas still considers transmission and distribution to be a natural monopoly, exempting transmission-and-distribution companies from the market reforms the state implemented in 2002, see Tex. Util. Code § 39.001 ("[E]lectricity is not a monopoly * * * except for transmission and distribution services * * * .").

One transmission project in which NextEra wished to participate was in an area overseen by MISO.[4] The other project is in an area overseen by SPP. Transmission and distribution's monopoly status is firmly established in these MISO- and SPP-managed areas, where utilities remain vertically integrated. See *Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg'l Transmission Org. & Indep. Sys. Operator Mkts.*, 168 FERC ¶ 61,040, ¶ 45 (July 18, 2019) (MISO and SPP "mostly consist[] of vertically-integrated utilities[.]").

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[3] https://energy.utexas.edu/sites/default/files/UTAustin_FCe_History_2016.pdf.

[4] MISO later cancelled this project. Cook, *Miso Cancels Hartburg-Sabine Competitive Project*, RTO Insider LLC (Aug. 31, 2022), https://www.rtoinsider.com/articles/30725-miso-cancels-hartburg-sabine-project.

B. Congress and federal agencies have consistently recognized broad state authority over the siting and construction of electrical transmission lines

The federal government has consistently supported states' powers over electric utilities, and particularly over siting and construction of electrical transmission lines. Before 1927, utility regulation was the domain of state and local governments. But in that year this Court held that Rhode Island could not regulate the rates charged by an in-state plant selling electricity to customers in Massachusetts. See *New York* v. *FERC*, 535 U.S. 1, 6 (2002) (citing *Pub. Util. Comm'n of R.I.* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927)). Only Congress has that power. See *ibid.* To fill this vacuum of authority, known as the "*Attleboro* gap," Congress passed the Federal Power Act (FPA) in 1935. *Ibid.* A few years later, Congress likewise began regulating the natural-gas industry by passing the Natural Gas Act (NGA). See *Ark. Elec. Co-op. Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 378-379 (1983).

The two acts "are in all material respects substantially identical," with one important exception. *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981). While the NGA gives FERC the authority over siting and constructing interstate gas pipelines, 15 U.S.C. § 717f(c)(1)(A), the FPA leaves states in charge of siting and constructing interstate transmission lines. See *New York* v. *FERC*, 535 U.S. at 24. Consistent with the FPA's plain text, FERC has "expressly and repeatedly disclaim[ed] authority over" "siting and construction * * * matters." *S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41, 62 (D.C. Cir. 2014) (per curiam); see also *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 139 FERC ¶ 61,132, ¶ 48 (May 17, 2012) (Order 1000-A).

FERC's Order 1000 did not disturb that balance. See *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 76 Fed. Reg. 49,842, 49,884 (Aug. 11, 2011) (Order 1000). Among other things, Order 1000 abolished federal ROFRs for regional projects. See Order 1000, 76 Fed. Reg. at 49,895-49,896; *LSP Transmission Holdings, LLC* v. *Sieben*, 954 F.3d 1018, 1031 (8th Cir. 2020). FERC believed that doing so would result in increased competition without jeopardizing grid reliability. See Order 1000, 76 Fed. Reg. at 49,886-49,888. Nevertheless, FERC made clear that ROFRs "based on a state or local law or regulation would still exist under state or local law even if removed from [FERC]-jurisdictional tariffs or agreements." Order 1000-A, 139 FERC ¶ 61,132, ¶ 381. That is because "nothing in Order No. 1000 * * * [was] 'intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'" *Ibid.* (quoting Order 1000, 76 Fed. Reg. at 49,885 n.231). The Seventh Circuit upheld FERC's decision to recognize state ROFRs against a challenge, reasoning that regulation of the siting and construction of transmission facilities was a part of "the traditional role of the States." *MISO Transmission Owners* v. *FERC*, 819 F.3d 329, 336 (7th Cir. 2016).

C. Rights of first refusal ensure the solvency of utilities and the stability of the power grid

States have long employed ROFRs as part of the regulatory "compact"—*i.e.*, the mix of benefits and obligations that utilities receive. See, *e.g.*, *Jersey Cent. Power & Light Co.* v. *FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring). While utilities benefit from their monopoly status, that benefit is balanced against various duties, including the duty to serve everyone in their geographical region—not just the most profitable customers. See Tex.

Util. Code § 37.151 (obligating incumbent utilities to serve "every consumer in the utility's certificated area" and "provide continuous and adequate service in that area"). Without ROFRs, would-be competitors could compete only for profitable transmission projects while leaving incumbent utilities with the obligation to build less profitable or unprofitable distribution lines. See Order 1000, 76 Fed. Reg. at 49,884 (summarizing comments voicing this concern). Removing the most profitable projects from incumbent utilities could jeopardize their solvency, disrupt the regulatory regime that has governed for more than a century, and imperil service to consumers.

ROFRs introduce efficiencies as well. First, they eliminate the complex and expensive competitive-bidding processes. See *Bldg. for the Future Through Elec. Reg'l Transmission Plan. & Cost Allocation & Generator Interconnection*, 87 Fed. Reg. 26,504, 26,564 (proposed May 4, 2022) (to be codified at 18 C.F.R. pt. 35) (listing this as a potential negative consequence of eliminating ROFRs). Second, ROFRs promote economies of scale. Once built, transmission lines must be maintained for decades. Effective maintenance requires constant on-site physical presence to clear vegetation. Utilities that already own transmission lines in the area are able to maintain new lines more affordably than a competitor could. Similarly, transmission owners must comply with continually evolving federal and state reliability and security rules. Utilities with local experience are able to do so more affordably and effectively. Those considerations support states' conclusions that preserving the traditional model of utility regulation, in whole or in part, is economically efficient.

ROFRs also promote the stability of electricity grids. As the district court below explained, the Texas ROFR "was enacted to avoid jeopardy or disruption to the service

of electricity to Texas electricity consumers and to allow for the provision of a reliable supply of electricity to those consumers." Pet. App. 58a. While incumbent utilities generally have state statutory duties to ensure that the grid safely and reliably serves retail customers, new entrants do not. See, *e.g.*, Edison Electric Institute, Comment Letter on Proposed Rule Regarding Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils. 24 (Sept. 29, 2010) (raising these concerns to FERC).[5] That asymmetry is yet another reason incumbent utility providers are not similarly situated to would-be market entrants. The electricity grid is an interconnected, interdependent network. A single weak link can jeopardize it all. A failed transmission line imposes costs and risks on not just the owner of the transmission line, but also on the owners of connected transmission and distribution lines. See *id.* at 23-24. Additionally, transmission operators also face increased challenges when they must coordinate with many transmission providers, each of whom owns a small part of the transmission system. See *id.* at 24; Order 1000, 76 Fed. Reg. at 49,882-49,885 (listing these concerns raised in comments to proposed rule). Finally, "[d]elays will be inevitable if companies outside the service area are permitted to bid for the project, since competitive bidding takes time and may get bogged down in litigation." *MISO Transmission Owners*, 819 F.3d at 335. In sum, multiplying the number of transmission providers creates negative externalities, whereas minimizing the number of market participants ensures that these costs and risks are internalized and mitigated.

In light of these economic realities, several states, including Texas, have passed ROFR laws. See *LSP*

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[5] https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20100929-5462&optimized=false.

Transmission Holdings, LLC, 954 F.3d at 1030-1031.[6] Texas, like FERC, has a long history of giving utilities the right to construct transmission facilities that connect to their existing facilities. Before Order 1000 was issued, Texas's policy and FERC's regulations were aligned. But after Order 1000 eliminated the federal ROFR, transmission-only companies argued that they were eligible to build transmission projects in non-ERCOT areas—something that they had never been permitted to do before. The state regulator agreed. See *Joint Pet. of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order*, 341 P.U.R. 4th 195 (Oct. 26, 2017). The state regulator's conclusion was doubtful as a matter of Texas law, and Texas immediately appealed. See *Entergy Tex., Inc.* v. *Pub. Util. Comm'n of Tex.*, No. 03-18-00666-CV, 2019 WL 3519051, at *1 (Tex. App.—Austin Aug. 2, 2019, no pet.). That appeal became moot when SB 1938 codified the Texas ROFR. See *ibid.*

Thus, SB 1938 did not so much reshape the regulatory environment as preserve the status quo. In MISO- and SPP-served areas, SB 1938 has been vital to maintaining the traditional, vertically integrated utility model. And in ERCOT areas, the law preserves local monopolies in transmission and distribution, even as electricity generation and sales have been unbundled.

FERC's about-face on the federal ROFR provides yet more evidence for ROFRs' value. When FERC issued Order 1000, it predicted that eliminating ROFRs would result in more "efficient or cost-effective [transmission]

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[6] See also Minn. Stat. § 216B.246, subd. 2; Mich. Comp. Laws §§ 460.591-.593; Iowa Code § 478.16; N.D. Cent Code § 49-03-02.2; S.D. Codified Laws § 49-32-20; Neb. Rev. Stat. § 70-1028; 17 Okla. Stat. § 292; Tex. S.B. 1938, Act of May 7, 2019, 86th Leg., R.S., ch. 44, 2019 Tex. Gen. Laws 90.

solution[s]." Order 1000, 76 Fed. Reg. at 49,885. FERC was also concerned that ROFRs "discourage new entrants from proposing new transmission projects in the regional transmission planning process." *Ibid.* But the benefits that FERC anticipated from eliminating federal ROFRs have largely not materialized. While there has been increased investment in transmission projects overall, most of that investment has been in local transmission projects not affected by Order 1000. See 87 Fed. Reg. at 26,563. Investment in regionally planned transmission projects has not noticeably increased since Order 1000 was issued—to the contrary, in many regions these projects have declined, likely due to the expenses and complications that inhere in the competitive selection process. *Id.* at 26,563-26,564.

These disappointing results prompted FERC to recently announce that it may reinstate federal ROFRs for regionally planned projects, albeit in a modified form. See generally *ibid.* FERC's reevaluation of federal ROFRs is strong evidence that such rights are economically beneficial and are not merely protectionist. But even if FERC reinstates federal ROFRs, the Court's guidance is still required because the new federal ROFRs proposed by FERC would be subject to limitations that current state ROFRs are not. See *id.* at 26,567 (proposing to reinstate federal ROFRs conditioned on joint ownership with non-incumbents). More importantly, as discussed below, the Fifth Circuit's sweeping reasoning calls into question the constitutionality not only of state ROFRs, but of state utility regulatory regimes in general.

II. The Fifth Circuit's Decision Is Bad Law And Bad Economics

The Fifth Circuit's decision directly jeopardizes the validity of state ROFR laws around the country. But its

reasoning cuts even more broadly than that. Applied consistently, the Fifth Circuit's rule that states and municipalities cannot favor incumbent utilities by restricting competition would invalidate countless laws regulating utilities. And its effects would be felt in other industries as well, for state laws around the country grant exclusive franchises to gas, telephone, and cable companies.

Any rule that calls into question a state's power to grant exclusive utility franchises runs headlong into this Court's decision in *Tracy*, which repeatedly praised the virtues and importance of the traditional model of utility regulation. And, in any event, the Eighth Circuit was right in *LSP Transmission Holdings* that ROFR laws permissibly discriminate only based upon incumbency status, not against interstate commerce. The Fifth Circuit's dangerous deviation from this Court's precedent, the Eighth Circuit's decision, and well-established economic principles should be corrected before it does more harm to this vital part of the Nation's economy.

A. The Fifth Circuit's holding cannot be reconciled with *Tracy*

Under the Fifth Circuit's ruling, any state law that favors incumbent transmission providers necessarily facially discriminates against interstate commerce. See Pet. App. 32a (describing laws benefitting incumbents as "a more anticompetitive version of the in-state presence requirements held unconstitutional in cases like *Granholm* or *Dean Milk*"). The Fifth Circuit's reasoning is directly contradicted by this Court's decision in *Tracy*. *Tracy* involved an Ohio statute that imposed a five-percent tax on sales of natural gas made by most companies, but exempted sales made by the incumbent, regulated domestic utility. 519 U.S. at 281-282. The plaintiff purchased most of its gas from out-of-state competitors who were subject

to the tax and argued that Ohio had violated the dormant Commerce Clause "by granting the tax exemption solely to [the regulated utilities], which are in fact all located in Ohio." *Id.* at 288-289. This Court disagreed, holding that while the incumbent utility and the out-of-state competitor both operated in a competitive market, they were not "similarly situated." *Id.* at 310. And because they were not similarly situated, their differential treatment did not trigger dormant Commerce Clause scrutiny. *Ibid.*

This Court gave several reasons why the two entities were not similarly situated, all of which apply with equal or greater force here. First, the Court noted that the benefits traditionally given to incumbent utilities come with concomitant obligations. See *id.* at 295-296. While incumbents receive a monopoly within a defined area, they are also generally subject to special "accounting, reporting, and disclosure rules," are obligated to "serve all members of the public, without discrimination," and are unable to set prices freely. *Id.* at 296-297. These features are shared by Texas's system of utility regulation. Texas law subjects electric utilities to "pervasive[]" oversight, "regulat[ing] even the particulars of a utility's operations and accounting." *ERCOT* v. *Just Energy Tex., L.P.* (*In re Just Energy Grp., Inc*), 57 F.4th 241, 252 (5th Cir. 2023) (quoting *In re Entergy Corp.*, 142 S.W.3d 316, 323 (Tex. 2004)). A state agency regulates the utility's "rates, operations, and services as a substitute for competition." Tex. Util. Code § 11.002(b). The state also designates one incumbent as a "provider of last resort" for each area within the state. That provider must provide service "to any requesting customer in the territory" at a "fixed, nondiscountable rate approved by the commission." *Id.* § 39.106(b)-(c).

Market entrants—whether in-state or foreign—are not similarly situated to incumbents because they are not

subject to the same obligations. Allowing market entrants to benefit from building the most profitable transmission projects while leaving incumbent utilities with the burden of being the "provider of last resort" would amount to discrimination *against* incumbent utilities. Even more importantly, it could risk the financial wellbeing of the incumbent utilities and, along with it, "service of the state-regulated captive market." *Tracy*, 519 U.S. at 305. Simply put, the dormant Commerce Clause does not vest market entrants with the "right to compete for the cream of the volume business without regard to the local public convenience or necessity." *Ibid.*

Second, scuttling the carefully calibrated balance of benefits and burdens placed on incumbent utility providers poses grave risks to the public. Most consumers "live on sufficiently tight budgets to make the stability of rate important, and * * * cannot readily bear the risk of losing a fuel supply in harsh natural or economic weather." *Id.* at 301. Yet an unstable utility market could mean gas outages and price spikes, leaving "individual buyers of gas for domestic purposes * * * frozen out of their houses in the cold months." *Id.* at 306. There is no reason why the analysis should be any different for the electricity industry in Texas. To the contrary, the Fifth Circuit should have been even more cautious before tinkering with regulations governing Texas's electrical grid. The risk of disrupted electrical service during freezing weather is not purely theoretical—it happened in Texas in 2021. Perhaps not coincidentally, the power grid only failed in 2021 in the more deregulated ERCOT area, not in the MISO or SPP areas that continue to use the traditional model of utility regulation. See, *e.g.*, Limón et al., *You might have heard that Texas has its own power grid. Did you know not all parts*

of the state use it?, Texas Tribune (Feb. 18, 2021).[7] *Tracy* preached caution and deference. The Fifth Circuit should have heeded *Tracy*'s warning.

Third, *Tracy* reasoned that courts should be particularly reluctant to intervene in an area where Congress and federal agencies have regulated frequently and extensively without displacing state law. 519 U.S. at 304. That reasoning applies even more powerfully here than it did in *Tracy*.

Federal regulation of the natural-gas industry began in 1938, and far from disapproving of state-regulated monopoly arrangements, Congress recognized their value by "explicitly exempt[ing] 'local distribution of natural gas' from federal regulation, even as the NGA authorized the Federal Power Commission (FPC) to begin regulating interstate pipelines." *Id.* at 291-292 (quoting 15 U.S.C. § 717(b)). And while the natural-gas regulatory regime had undergone significant changes, "Congress did nothing to limit the States' traditional autonomy to authorize and regulate local gas franchises, and the local franchised utilities." *Id.* at 293-294.

As for electricity, although interstate transmission of electricity is regulated by FERC, states regulate the siting and construction of the fixed physical infrastructure that transmits electricity. See *New York*, 535 U.S. at 24. This stands in marked contrast to the NGA, which vested federal regulators with authority over the siting and construction of interstate pipelines. See 15 U.S.C. § 717f. Texas's regulation of who may build transmission lines falls squarely within the authority left to it by the FPA.

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[7] https://www.texastribune.org/2021/02/18/texas-power-grid-outage-ercot/.

FERC has gone even further in respecting states' authority in this area, for it has explicitly recognized that states may create ROFRs. While FERC eliminated federal ROFRs, it rejected a request to prohibit states from passing ROFR laws. See *MISO Transmission Owners*, 819 F.3d at 336. The Seventh Circuit rejected a legal challenge to that decision, reasoning that "'avoid[ing] intrusion on the traditional role of the States' * * * was a proper goal." *Ibid.* The consistent history of federal respect for state ROFRs lends them additional support.

Likewise, this Court's recognition in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, that Congress may create dormant Commerce Clause exceptions for certain industries further buttresses ROFRs. 520 U.S. 564, 588 (1997) ("If there is need for a special exception [from the dormant Commerce Clause] for nonprofits, Congress * * * has the power to create it * * * ."). That is exactly what Congress has done, both by leaving jurisdiction over the siting and construction of transmission facilities to the states and through its delegation of authority to FERC—a delegation that FERC used to bless state ROFR laws.

In sum, the Fifth Circuit's decision striking down ROFRs under the dormant Commerce Clause cannot be reconciled with *Tracy*'s reasoning.

B. Favoring incumbent utilities does not facially violate the dormant Commerce Clause

Even if *Tracy* did not completely shield ROFRs from scrutiny under the dormant Commerce Clause, they would survive any such analysis because favoring incumbent utilities in transmission construction does not facially discriminate against interstate commerce. The Eighth Circuit concluded as much in rejecting a recent ROFR challenge. See *LSP Transmission Holdings*, 954 F.3d at

1027. ROFRs draw a facially neutral distinction "between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state." *Ibid.* Indeed, both here and in *LSP Transmission Holdings*, most of the favored incumbents are incorporated outside the state and have substantial holdings outside the state. ROFRs derive from the unique history and nature of utility regulation—not from a protectionist impulse to favor domestic businesses.

Missing this fundamental point, the decision below rejected the Eighth Circuit's reasoning because this Court has never held that a company's place of incorporation is relevant for purposes of dormant Commerce Clause scrutiny. See Pet. App. 26a. Instead of following *Tracy* and the Eighth Circuit, the Fifth Circuit chose to rely on three of this Court's other precedents, all of which are readily distinguishable. First, it relied on *Granholm* v. *Heald*, which struck down a statute that required out-of-state wineries to establish "a branch factory, office, or storeroom within the state" if they wished to sell to customers directly. 544 U.S. 460, 470 (2005). Second, the court looked to *Dean Milk Co.* v. *City of Madison*, which invalidated an ordinance requiring that milk be processed at a plant within five miles of the city square. 340 U.S. 349, 350 (1951). And third, it cited *C & A Carbone, Inc.* v. *Town of Clarkstown*, which held unconstitutional a local ordinance requiring that all solid waste be processed at a single approved transfer station located within the city. 511 U.S. 383, 386-387 (1994). The Fifth Circuit reasoned that, under these precedents, "where a company is 'based' is not controlling," and the analysis instead turns on whether a law benefits companies with an existing presence in the state. Pet. App. 26a-31a.

The Fifth Circuit erred because ROFRs are not like the laws in those cases for at least two reasons. First, incumbency requirements are not equivalent to in-state-presence requirements. In many industries, companies can be incumbents without any in-state presence (online-only companies that ship goods into another state, for example). Conversely, a company could have a physical presence in a state without doing business there (for example, a company could have support staff physically located in a state where it does not do business). Incumbency and presence are simply not the same thing. While this Court has issued numerous opinions considering the constitutionality of presence requirements, it has never addressed the constitutionality of incumbency requirements. Lacking any definitive guidance, courts of appeals have reached conflicting conclusions on the propriety of laws that benefit incumbents. Compare *LSP Transmission Holdings*, 954 F.3d at 1028, and *Colon Health Ctrs. of Am., LLC* v. *Hazel*, 813 F.3d 145, 154 (4th Cir. 2016) ("incumbency bias" is "not a surrogate for" unconstitutional discrimination against interstate commerce), with Pet. App. 26a-31a, and *Fla. Transp. Servs., Inc.* v. *Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012).[8]

Second, the economic realities of the utility industry are different from the dairy or alcohol industry, as Judge

[8] The Fifth Circuit cited one additional case to support its conclusion that incumbency requirements are facially discriminatory. Pet. App. 27a (citing *Walgreen Co.* v. *Rullan*, 405 F.3d 50 (1st Cir. 2005)). *Walgreen Co.* held that a law benefitting incumbents and disadvantaging would-be competitors, regardless of place of incorporation, violated the dormant Commerce Clause because it had a discriminatory *effect*. 405 F.3d at 60. But the First Circuit conceded that the law was facially neutral. *Id.* at 59. ("We thus find that, on balance, the Act, though facially neutral, discriminates against interstate commerce."). Thus, if anything, *Walgreen Co.* supports Texas—not NextEra.

Elrod noted in her partial dissent. Pet. App. 42a-44a (Elrod, J., dissenting in part). "Without the discriminatory laws in *Granholm* and *Dean Milk*, the goods at issue—wine and milk, respectively—could readily be supplied by providers without any physical presence in the state. Wineries could ship wine directly to consumers in New York and Michigan, and milk producers could send their dairy products into Madison from Chicago." Pet. App. 43a. Similarly, it was wholly unnecessary for individuals to reside in Tennessee for two years to open a new liquor store—let alone for every shareholder of an alcohol store to do so. Pet. App. 43a (citing *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2458 (2019)). Those statutes were motivated by blatant economic protectionism because they added physical-presence requirements unrelated to any legitimate health or safety rationale. Not so with transmission lines, for as detailed above, there are substantial and well-documented benefits for states in having incumbent local monopolies construct transmission lines within their territory.

The Fifth Circuit missed these important economic and historic conditions when it concluded that "[w]hat is true for alcohol and milk under the dormant Commerce Clause must be true for electricity transmission." Pet. App. 31a. To the contrary, the economics of distributing milk and alcohol are nothing like those underlying the naturally monopolistic electric-transmission industry. The Fifth Circuit erred in concluding otherwise and upending a century of state utility regulation.

C. The remaining authorities relied on by the Fifth Circuit are distinguishable

The remaining cases invoked by the Fifth Circuit are also distinguishable. The first two dealt with laws that favored in-state goods over imported goods. In *Wyoming* v.

Oklahoma, an Oklahoma statute required domestic utilities to buy 10% of their coal from Oklahoma, even though they had previously purchased almost all their coal from mines in Wyoming. 502 U.S. 437, 444-445 (1992). Similarly, in *American Trucking Associations, Inc.* v. *Scheiner*, Pennsylvania gave trucks registered in the state a credit against registration fees, while out-of-state registrants "bore the 'full brunt of the tax.'" 483 U.S. 266, 278 (1987).

Those cases are inapposite. SB 1938 does not discriminate against products imported across state borders. True, the electricity flowing *through* transmission lines travels interstate. But the transmission lines are planted firmly in Texas. Like the physical-presence requirements at issue in *Granholm* and *Dean Milk*, the laws in *Wyoming* and *American Trucking* were not supported by any important state economic interest—much less one rooted in a century of history and blessed by the federal government. And neither case involved utility regulations which, at minimum, are analyzed differently under the dormant Commerce Clause. See generally *Tracy*, 519 U.S. at 306; see also *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 607 (Scalia, J., dissenting) (*Tracy* "effectively create[d] what might be called a 'public utilities' exception to the negative Commerce Clause").

That leaves *Buck* v. *Kuykendall*, 267 U.S. 307, 316 (1925). In *Buck*, this Court held that an Oregon law limiting who could travel on a state highway was unconstitutional. See *ibid.* The Court rejected Oregon's argument that the highway regulation did not implicate interstate commerce because it was "a regulation, not of the use of [Oregon's] highways, but of interstate commerce." *Ibid.* But unlike Oregon, Texas does not deny that transmission lines are an instrument of interstate commerce—the state

simply denies that SB 1938 discriminates against interstate commerce. Furthermore, SB 1938 puts no restrictions on who may use the transmission lines—lines that function as something akin to a "highway" for electricity.

In short, nothing in this Court's case law supports woodenly applying dormant Commerce Clause analysis to pro-incumbency regulations that stem from the unique, natural-monopoly context of electricity transmission. This Court should grant review and correct the Fifth Circuit's detour from established principles before it upsets the Texas electrical system and generates further uncertainty throughout the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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January 2023