NO. 23-3857

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVENERGY THERMAL LLC AND GRAYS HARBOR ENERGY LLC,

Plaintiffs-Appellants,

v.

LAURA WATSON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

No. 3:22-cv-05967-BHS
The Honorable Benjamin H. Settle, United States District Court Judge

APPELLEE'S ANSWERING BRIEF

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I. INTRODUCTION

Climate change poses a threat to human existence, and Washington stands at the vanguard of a growing number of states attempting to address this threat. To those ends, Washington's Clean Energy Transformation Act and the Climate Commitment Act form a complementary set of decarbonization statutes that together work to eliminate greenhouse gas emissions from Washington's electricity sector in the coming years. The Clean Energy Transformation Act requires all power sold to Washington consumers be carbon neutral by 2045. And the Climate Commitment Act requires covered entities to purchase a decreasing number of available allowances for every metric ton of greenhouse gasses they emit—drastically reducing Washington's contribution to climate change by 2045.

Because of the Clean Energy Transformation Act's existing in-state decarbonization mandate on Washington utilities, however, the Climate Commitment Act largely exempts utilities from its scope. Instead, the Climate Commitment Act seeks to cover those electricity sector emissions that the Clean Energy Transformation Act does not reach. So it applies to *all* power facilities in Washington, regardless of whether they are owned by a utility.

Invenergy Thermal LLC, via two subsidiaries including Grays Harbor Energy LLC (collectively "Invenergy"), owns the Grays Harbor Energy Center, a natural gas-powered electric plant in Elma, Washington, that is one of the largest single sources of greenhouse gas emissions in the state, surpassed only by Washington's sole coal-fired power plant and two of Washington's five petroleum refineries. It is also Washington's only independent (i.e., not vertically integrated with a utility) natural gas power facility. Unlike utilities—which are highly regulated, profit-limited entities that by law must provide consistent, price-stabilized retail power to consumers—independent facilities like Invenergy's are for-profit operations that sell wholesale power to the grid only when market forces make it profitable.

After lobbying for, but failing to receive, a legislative carve-out for their in-state emissions under the Climate Commitment Act, Invenergy challenged the Act's grant of allowances to utilities under the dormant Commerce Clause and Equal Protection Clause of the United States Constitution. The district court dismissed Invenergy's suit for lack of standing and based on the merits. Although the State did not seek dismissal below based on Article III standing, this Court should affirm dismissal on the merits because it is clear that each of Invenergy's claims should be rejected as a matter of law.

Invenergy's claim of Commerce Clause discrimination fails on every conceivable measure. Invenergy cannot establish that it is similarly situated to utilities for constitutional purposes, as affirmed by binding Supreme Court precedent. Nor can Invenergy show that the law makes any distinction—on its face, purpose, or in effect—between in-state and out-of-state interests for reasons of economic protectionism. Indeed, the law falls equally on in-state and out-of-state interests alike, and granting Invenergy the relief it seeks would effectively render it the *only* power plant in Washington not required to account for its greenhouse gas emissions.

Invenergy's claims of a "substantial burden" on commerce under *Pike* fare no better. Invenergy cannot satisfy even the threshold *Pike* requirement of pleading specific facts establishing a discriminatory effect on commerce. Invenergy essentially complains only that the Climate Commitment Act now makes it less profitable to operate a fossil fuel power plant in Washington. That is not enough. And, even if a balancing test was warranted, Invenergy fails to show, as required, that the Legislature's policy choices here were "irrational."

Finally, Invenergy's equal protection claim—an even higher bar to surmount—fails for similar reasons. Invenergy utterly fails to show discrimination and, even if it could, cannot meet its burden to negate every

conceivable basis Washington policy makers had for granting allowances based on pre-existing burdens under the Clean Energy Transformation Act.

These flaws cannot be cured via amendment. The Court should affirm dismissal with prejudice.

II. STATEMENT OF THE ISSUES

1. Whether dismissal of Appellants' dormant Commerce Clause discrimination claim should be affirmed where Appellants are not similarly situated to the entities they assert receive beneficial treatment and the challenged statute does not discriminate between in-state and out-of-state economic interests.

2. Whether dismissal of Appellants' claim under *Pike* should be affirmed where the claim falls well outside of *Pike*'s "core" function of rooting out hidden discrimination and where Appellants fail to identify any impacts on interstate commerce, much less the significant burdens required to raise a Commerce Clause concern.

3. Whether dismissal of Appellants' equal protection claim should be affirmed where the law is not discriminatory and Appellants cannot show that Washington's stated basis for the statutory scheme is rational.

III. STATEMENT OF THE CASE

A. The Washington Climate Commitment Act

In 2021, the Washington Legislature enacted the Climate Commitment Act to substantially reduce Washington's greenhouse gas emissions in response to the existential threats posed by anthropogenic climate change. *See* Wash. Rev. Code (RCW) § 70A.65.005; *see generally* Climate Commitment Act, 2021 Sess. Laws, ch. 316. To effectuate reductions, the Act creates a "cap and invest program" whereby the Washington Department of Ecology ("Ecology") must set a declining cap on the aggregate emissions from regulated entities that are responsible for greenhouse emissions in the state. RCW 70A.65.010(23), .010(58), .060-.080. The Act directs Ecology to enforce this declining cap by requiring regulated entities to obtain sufficient emissions allowances to cover their actual emissions, then reducing the number of allowances made available through auction each year. RCW 70A.65.010(18), .060, .100, .200(1).

Invenergy owns the Grays Harbor Energy Center, currently the fourth largest stationary source of greenhouse gasses in Washington. SER 37. For individual stationary sources, Grays Harbor Energy Center is surpassed in greenhouse gas emissions only by TransAlta's coal-fired power plant, the BP Cherry Point refinery, and the Puget Sound Refinery in Anacortes. *Id.* Because

of its substantial emissions, the Grays Harbor facility is subject to regulation under the Climate Commitment Act.

In crafting the Climate Commitment Act, and central to this case, the Legislature chose to grant "no-cost" allowances to three categories of covered entities, including electric utilities. *See* RCW 70A.65.110-.130. With regard to electric utilities, the Legislature's intent is clear: a separate statute, the Washington Clean Energy Transformation Act (Chapter 19.405 RCW), requires all Washington utilities to rid their portfolios of fossil fuel power by 2045—a significant and expensive obligation on the utilities. RCW 19.405.010(2). Thus, the Climate Commitment Act provides that all electric utilities subject to the Clean Energy Transformation Act are eligible for no-cost allowances "in order to mitigate the cost burden of the program on electricity customers." RCW 70A.65.120(1). The amount of allowances utilities receive is based on the amount of power the utility is forecasted to supply to Washington consumers. RCW 70A.65.120(2). Utilities do not receive allowances for power they export out of state and must purchase allowances at auction or on the secondary market to cover greenhouse gas emissions associated with exported power generation. *Id*.

No-cost allowances can either be used to cover compliance obligations or consigned to auction; but, if consigned to auction, proceeds must be used "for the benefit of ratepayers, with the first priority the mitigation of any rate impacts to low-income customers." RCW 70A.65.120(4). The provision of no-cost allowances to electric utilities phases out over time and sunsets completely in 2045—the same year that the Clean Energy Transformation Act requires all electric utilities in Washington to rid fossil fuel sources of electricity from their portfolios. RCW 70A.65.120(2)(d); RCW 19.405.010(2). The Climate Commitment Act also expressly allows utilities to transfer their no-cost allowances to others in the power market, and Ecology adopted rules facilitating such transfers from utilities to any electric generating facility from which it procures power. RCW 70A.65.120(6); Wash. Admin. Code § 173-446-425(2).

Because Invenergy is not an electric utility, it is not subject to the obligations established by the Clean Energy Transformation Act. *See* RCW 19.405.020(14), .040. As a result, while Invenergy is authorized to receive no-cost allowances via transfer from a utility, it does not receive them directly. *See* Wash. Admin. Code § 173-446-425.

B. Washington's Electricity Market

As Invenergy acknowledged in its complaint, "[e]lectric utilities and electricity generating facilities occupy distinct positions in electricity markets." ER 36, ¶ 7. Electric utilities exist to provide retail power to consumers and come in two forms in Washington: consumer-owned and investor-owned.[1] Consumer-owned utilities are non-profit government entities either organized as a Public Utility District (e.g., Clark Public Utilities), operated directly by a city (e.g., Tacoma Power), or established by a cooperative association pursuant to Chapter 23.86 RCW (e.g., Peninsula Light Co.). As public entities, consumer-owned utilities are directly accountable to the consumers within their boundaries because they are governed either by elected officials—a commission in the case of Public Utility Districts (PUDs) or the associated governing bodies of cities or operating agencies—or directly by the ratepayers themselves.

Investor-owned utilities are private corporations, and in Washington there are three: Avista Corporation (as Avista Utilities), PacifiCorp (as Pacific Power & Light Company), and Puget Sound Energy. SER 35. Investor-owned utilities

[1] Washington's utilities, both consumer- and investor-owned, get the power they sell at retail to consumers from a variety of sources. Many own and operate their own generation facilities, largely from hydropower but also some natural gas. Utilities also purchase power from the wholesale market from independent power plants such as Invenergy's facility. ER 36, ¶ 7.

are governed pursuant to their corporate structures, but they are subject to significant regulation and oversight by the Washington Utilities and Transportation Commission (UTC) pursuant to Chapter 80.28 RCW. Most significantly, investor-owned utilities are profit-limited by law. They earn a fixed return on infrastructure investments as set by the UTC. But, with regard to retail power, investor-owned utilities essentially can only recover their costs. *See* RCW 80.28.425(6). The UTC, not the utilities, sets the rates that investor-owned utilities can charge for retail power, and any return more than 0.5% above that set rate must be refunded to customers. *Id*. In all cases, Washington law provides that investor-owned utilities must provide power that is "safe, adequate and efficient, and in all respects just and reasonable." RCW 80.28.010(2).

Invenergy does not sell retail power directly to Washington consumers and, thus, is not regulated by the Washington UTC. Instead, Invenergy's facility is an independent power plant selling power on the wholesale market to customers all over the country, including utilities. The interstate wholesale market is governed by the Federal Power Act and administered by the Federal Energy Regulatory Commission (FERC). Pursuant to that system, Invenergy in 2007 petitioned for—and received—authorization from FERC to negotiate market-based (instead of cost-based) rates for wholesale electric sales. 72 Fed.

Reg. 35,045 (June 26, 2007). Invenergy, thus, is free to set any rates established by agreement with a purchaser. *See id.* Invenergy is not profit-limited in that regard and is not beholden or accountable to retail ratepayers or the UTC. When Invenergy believes it can make a profit off of running its facility, it runs; if not, it sits idle. ER 42, ¶¶ 40-41.

C. Procedural Background

1. Ecology's motion to dismiss

In December 2022, Invenergy challenged the Climate Commitment Act's no-cost allowance allocation to utilities, alleging "dormant" Commerce Clause and Equal Protection Clause violations. ER 34-74. On February 17, 2023, Ecology filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(c) asserting that Invenergy failed to state a claim under either constitutional theory as a matter of law. SER 38-61.

With regard to the Commerce Clause, Ecology pointed out that Invenergy, as an independent power plant that exists to serve the wholesale power market, is not similarly situated for constitutional purposes to electric utilities, who exist first-and-foremost to supply power to retail customers and are subject to a completely separate regulatory universe because of their unique status as limited monopolies. SER 50. Ecology argued that the Supreme Court's decision in

General Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997) (*Tracy*)—where the Court held that utilities serving retail customers were not similarly situated to wholesale suppliers of the same commodity—was virtually dispositive of Invenergy's Commerce Clause claim.

With regard to Invenergy's "excessive burden" Commerce Clause and equal protection claims, Ecology asserted that Invenergy failed to plead sufficient facts to establish that no-cost allowances create any impacts on interstate commerce, much less the substantial impacts required to raise a Commerce Clause concern. Ecology also pointed out that Invenergy's excessive burden argument failed because Invenergy could not establish that no-cost allowances—a direct subsidy to electric utilities for the benefit of their customers—would have only an illusory impact on mitigating a rise in consumer energy prices. Invenergy's equal protection claim similarly failed because Invenergy could not meet the high burden to negate every conceivable basis the Washington Legislature could have for providing no-cost allowances to utilities, but not to independent power plants.

Shortly after briefing on Ecology's motion to dismiss was complete, the United States Supreme Court issued its decision in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). Because it bears significantly on

Invenergy's "excessive burden" Commerce Clause claim under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Ecology submitted the *Pork Producers* decision as supplemental authority. ER 89. Specifically, the Supreme Court unanimously re-affirmed that antidiscrimination "lies at the very core" of the dormant Commerce Clause inquiry. So, however articulated, "the Commerce Clause prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Pork Producers*, 598 U.S. at 369 (internal quotations omitted) (quoting *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008)). A majority of the Court went on to agree that *Pike* and its progeny do not depart from this core antidiscrimination purpose. *Id.* at 377. Specifically, the Court held that virtually all claims under *Pike* still turn " 'in whole or in part on the discriminatory character of the challenged state regulations.' " *Id*. (citing *Tracy*, 519 U.S. at 298).

2. District court decision

On November 3, 2023, the district court issued an order granting Ecology's motion to dismiss. The district court first noted the extent to which the majority opinion in *Pork Producers* re-affirmed the principle that *Pike*, while not completely a dead letter, remains narrowly focused on "smok[ing] out hidden

protectionism." ER 15 (citing *Pork Producers*, 598 U.S. at 379). The district court noted that, "with very few exceptions, a state law violates the dormant Commerce Clause only if it 'discriminates against out-of-state entities on its face, in its purpose, or in its practical effect … unless it serves a legitimate local purposes, and this purpose could not be served as well by available nondiscriminatory means.'" ER 15-16 (quoting *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013)).

The district court next determined, *sua sponte*, that both Invenergy Thermal LLC and Grays Harbor LLC lacked standing. The district court found that Invenergy Thermal LLC, as a parent company three degrees separated from the actual ownership of the Grays Harbor facility, did not have constitutional standing. ER 18. The district court found that Grays Harbor LLC failed to establish an invasion of a legally cognizable interest protected under the dormant Commerce Clause because it is an in-state entity. ER 19.

Despite finding that Invenergy lacked standing, the district court went on to analyze Invenergy's claims in detail, separately dismissing those claims on the merits. ER 20. First, the district court found "not plausible" Invenergy's claim that the Climate Commitment Act discriminated against out-of-state economic interests. ER 21. The district court concluded that Invenergy was not

similarly situated to public utilities for Commerce Clause purposes, including the fact that it serves a separate market and is subject to significantly distinct regulatory requirements. ER 21-22. The district court, thus, found that "because the [Climate Commitment Act] does 'not discriminate on the basis of a company's business contacts with the state, but rather on the basis of its status' as either an electric utility or electric generating facility, 'the statute d[oes] not offend the dormant Commerce Clause.'" ER 24. The district court similarly found no discriminatory purpose or effect in the Climate Commitment Act's no-cost allowance system. The district court held that the utilities' obligations under the Clean Energy Transformation Act confirms the Act's no-cost allowance system had a "plainly" non-discriminatory purpose. ER 25. Most significantly, because the Climate Commitment Act treats both in-state and out-of-state utilities exactly the same, the district court found that Invenergy "fail[ed] to plausibly allege that the [Climate Commitment Act's] allocation of no-cost allowances to electric utilities, but not to electricity generating facilities, discriminates against out-of-state economic interests." ER 30.

Next, with regard to Invenergy's *Pike* claim, the district court likened Invenergy's argument to that of the plaintiffs in *Pork Producers*, explaining that it "overstate[s] the extent to which *Pike* and its progeny depart from the

antidiscrimination rule that lies at the core of [its] dormant Commerce Clause jurisprudence." ER 20-21 (quoting *Pork Producers*, 598 U.S. at 377). Because Invenergy's arguments on burdens to commerce failed to fall within the narrow range of cases where non-discriminatory laws were found to constitute a Commerce Clause concern, the district court rejected Invenergy's *Pike* claim. ER 20-21 (referencing ER 14-15).

Finally, the district court also rejected Invenergy's equal protection claim. The district court concluded that the fact utilities and independent power plants are not similarly situated renders any claim of discrimination a nullity. ER 32. The district court also agreed that Invenergy failed to plausibly allege that the challenged statute bore no rational relationship to a legitimate purpose, finding "no debate" that allocating no-cost allowances to utilities to help mitigate consumer energy price increases is rationally related to the Legislature's stated purpose. ER 33.

This appeal followed.

IV. SUMMARY OF ARGUMENT

As noted, the State did not move below for dismissal based on Article III standing and does not defend the district court's dismissal on those grounds.[2] Because Invenergy's constitutional claims are meritless, however, this Court should affirm the dismissal of Invenergy's dormant Commerce Clause and equal protection claims, with prejudice and without leave to amend.

a. Invenergy concedes that the Climate Commitment Act does not discriminate facially or in purpose, instead arguing that it discriminates "in effect" by granting no-cost allowances to utilities subject to the Clean Energy Transformation Act, but not to independent generating facilities like Invenergy's Grays Harbor facility. This claim fails as a matter of law on multiple grounds.

First, for discrimination to exist under the Commerce Clause, there must be differential treatment between similarly situated entities. Yet, here, Invenergy is not similarly situated to the utilities it claims receive favorable treatment. As limited monopolies, utilities are highly regulated entities subject to a host of statutory and regulatory systems not applicable to an independent facility like

[2] Despite Invenergy's suggestion otherwise, Dkt. 8.1 at n.1, the State does not concede Invenergy has prudential standing and raised prudential standing as an affirmative defense in the State's answer. SER 82. To the extent this Court remands to the district court, the State has not waived prudential standing arguments.

Invenergy. Most critically, utilities are largely exempted from the Climate Commitment Act (via no-cost allowances) because they are already required to decarbonize Washington power under the Clean Energy Transformation Act.

Second, Invenergy is not similarly situated to utilities under the controlling precedent of *General Motors v. Tracy*, 519 U.S. 278 (1997). There, the Supreme Court upheld a tax break to natural gas utilities, but not to independent natural gas suppliers, because they are not similarly situated for purposes of the Commerce Clause. *Tracy* is on all fours with this case, and Invenergy's efforts to attempt to differentiate it are unavailing.

Third, Invenergy is simply incorrect that utilities receive any unfair advantage in the wholesale market where they compete with Invenergy. Like Invenergy, utilities must purchase allowances to cover any emissions associated with their sales on the wholesale market because utilities, not their generating facilities, receive allowances based only on the retail power they provide to consumers every year. Because utilities exist on a level playing field with regard to the very market Invenergy insists it is discriminated in, Invenergy cannot prove discrimination even if it was similarly situated to utilities.

Finally, Invenergy cannot show that the Climate Commitment Act draws any distinction between in-state and out-of-state entities. In fact, one of the three

utilities Invenergy claims is unfairly benefitted, PacifiCorp, is an Oregon company that conducts the majority of its operations *outside* of Washington. The law is neutral in both purpose and effect and applies equally regardless of where an entity is located.

b. Invenergy also fails to make a cognizable claim under *Pike v. Bruce Church*'s "substantial burden" test. As recently confirmed by the Supreme Court, *Pike* and its progeny only apply to nondiscriminatory laws in extremely narrow circumstances—almost all of which involve burdens to the arteries or instrumentalities of commerce. Those circumstances are not present here. Invenergy fails to establish the substantial burden on commerce required to meet the threshold requirement of showing *Pike* balancing is even necessary.

But even if Invenergy could meet *Pike*'s threshold, Invenergy's claim still fails because it cannot meet the high burden set by *Pike*'s balancing test: i.e., that the burdens on commerce so outweigh the putative benefits as to make the statute unreasonable or irrational. Invenergy's claim that no-cost allowances will increase emissions and fail to stop energy prices from increasing ignores the fact that no-cost allowances are not intended to do either of those things. Their purpose is only to "*mitigate*" the otherwise duplicative increase in energy costs from the Climate Commitment Act on utilities that are already subject to

decarbonization under the Clean Energy Transformation Act. Further, it takes Herculean leaps in logic to accept as true Invenergy's claim that what amounts to a direct subsidy to utilities—in close to the exact amount they are burdened by the Climate Commitment Act's requirements—will completely fail to curb a rise in energy prices.

c. Invenergy's equal protection claim fares no better. Just as with its Commerce Clause claim, Invenergy cannot establish discrimination because: (1) it is not similarly situated to utilities; and, (2) even if it were, there is no dissimilar treatment. Moreover, Invenergy cannot clear the high hurdle required to show that Washington's policy choice is irrational. That standard requires Invenergy, against a strong presumption of statutory validity, to negate every conceivable basis Washington may have supporting the treatment of utilities under the Climate Commitment Act.

d. Invenergy's claims are properly dismissed with prejudice and without leave to amend. Such dismissal is appropriate where, as here, it is clear on de novo review that the complaint cannot be saved by amendment. All of the additional facts Invenergy requests leave to provide on remand do nothing to salvage its claims. There are *no* sets of facts under which Invenergy's claims survive. Final dismissal as a matter of law is required and should be affirmed.

V. STANDARD OF REVIEW

The parties agree that the appropriate standard of review for both dismissal for failure to state a claim and dismissal for lack of standing is de novo.[3] Thus, this Court may affirm dismissal on any basis supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008).

With regard to dismissal for failure to state a claim, courts must "accept all material allegations in the complaint as true and construe them in the light most favorable to the [non-moving party]." *Kotrous v. Gross-Jewett Co. of N. Cal.*, 523 F.3d 924, 929 (9th Cir. 2008) (internal quotations omitted) (quoting *Deveraturda v. Globe Aviation Sec. Services*, 454 F.3d 1043, 1046 (9th Cir. 2006)). Affirmation of dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998) (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993)). That said, a claim must be "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "a plaintiff's obligation to provide the 'grounds' of

[3] The motion below was brought pursuant to Federal Rule of Civil Procedure 12(c). Federal Rules of Civil Procedure 12(b)(6) and 12(c) are "functionally identical," and the same legal standard applies to both. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Indeed, "naked assertion[s]" and "labels and conclusions" need not be accepted as true, *Iqbal*, 556 U.S. at 678, and leave to amend is not proper where "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

Finally, while there is a strong policy permitting amendment, denial of leave to amend a complaint is subject to an abuse of discretion standard. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). Denial of leave to amend is not an abuse of discretion "where the pleadings before the court demonstrate that further amendment would be futile." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987).

VI. ARGUMENT

A. This Court Should Affirm Dismissal Because Invenergy's Commerce Clause Discrimination Claim Fails as a Matter of Law

In addition to establishing congressional power to regulate commerce between the states, the Commerce Clause contains a "negative command" that prohibits enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Pork Producers*, 598 U.S. at 368

(quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc*., 514 U.S. 175, 179 (1995)). At its core, this "dormant" Commerce Clause prevents states from engaging in "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) (quoting *Davis*, 553 U.S. at 337-38). But "'extreme caution' is warranted before a court deploys this implied authority." *Pork Producers*, 598 U.S. at 390 (quoting *Tracy*, 519 U.S. at 310). Thus, "[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" *Id*. (quoting *Conway v. Taylor's Executor*, 1 Black 603, 634 (1862)). Moreover, public health concerns unrelated to economic protectionism justify even overt discrimination. *See Tracy*, 519 U.S. at 306-07.

A statute violates the dormant Commerce Clause if it is discriminatory "on its face, in its purpose, or in its practical effect" unless the statute "serves a legitimate local purpose" that could not be addressed by nondiscriminatory means. *Rocky Mountain Farmers Union*, 730 F.3d at 1087. Here, Invenergy disavows any argument that the Climate Commitment Act is discriminatory on

its face or in its purpose, instead arguing that it discriminates "in effect" by granting no-cost allowances to utilities, but not to independent generating facilities like Invenergy's Grays Harbor facility. Dkt. 8.1 at 44. Thus, Invenergy must plausibly allege that the law discriminates in practice and that it does so for reasons of in-state economic protectionism. *See Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1231-32 (9th Cir. 2010).

Invenergy's efforts fail. There is no infraction here, clear or otherwise, and the Court should affirm dismissal of Invenergy's Commerce Clause discrimination claim.

1. There is no discrimination because Invenergy is not similarly situated to Washington's utilities

Invenergy's claim of discrimination fails out of the gate. Because "any notion of discrimination assumes a comparison of substantially similar entities," the differential treatment lying at the heart of any dormant Commerce Clause claim must be between similarly situated entities. *Tracy*, 519 U.S. at 298-99; *see also Black Star Farms*, 600 F.3d at 1230. But Invenergy is an independent power facility serving the wholesale market and is not similarly situated to Washington's utilities, which are highly regulated and serve the captive retail market.

First, when it comes to their purposes, regulatory obligations, and customer base, utilities in a regulated energy market such as Washington's exist in a separate legal universe from independent energy generators. *See generally* Title 80 RCW; Title 54 RCW. All electric utilities in Washington, whether the fully non-profit publicly-owned utilities or the profit-limited investor-owned utilities, operate under a limited, "regulated" monopoly. RCW 54.16.040; RCW 80.01.040(3); RCW 80.28.80. But the grant of that monopoly comes with extensive limitations. Investor-owned electrical utilities in Washington fall within the jurisdiction of the UTC, while publicly-owned utilities are municipal entities accountable directly to the communities they serve.

In both cases, utilities—by law—exist to furnish electricity directly to Washington consumers that is "safe, adequate and efficient, and in all respects just and reasonable." RCW 80.28.010(2); *see also* RCW 54.24.080 (requiring PUDs to provide rates that are "fair" and "nondiscriminatory"). Pursuant to this requirement, profits from sales to retail customers are restricted by law. RCW 80.28.425(6). Thus, forecasted power costs are passed through to customers *at cost*, subject to regulatory control and subsequent review. *Id*.; *see also* ER 40, ¶ 29.

By contrast, Invenergy's independent power plant is not subject to this same regulatory scheme because such facilities do not supply power directly to Washington consumers. *See* RCW 80.04.010(12). In fact, they exist in the *deregulatory* environment created by the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645, and can make opportunistic profits by selling energy to a wide variety of entities on the wholesale energy market. ER 41-42, ¶¶ 33, 40-42. While regulated by FERC's authority over energy tariffs, independent generating facilities are not subject to Washington regulation. *See* RCW 80.01.040(3); RCW 80.04.010(12). As a result, and unlike utilities, independent generating facilities are not directly accountable to either Washington or its consumers when it comes to the cost of end-user power.

Second, all electric utilities in Washington are subject to a host of other requirements not placed upon independent facilities like Invenergy's. Most importantly here, the Clean Energy Transformation Act requires electric utilities serving customers in Washington to have portfolios that are greenhouse gas neutral by 2030 and 100% renewable or non-emitting by 2045. RCW 19.405.010(2). This is no small task that will require significant investment on the part of the utilities. Those investments will be passed along to each utility's ratepayers as the required change-over to all renewable and non-

emitting resources is ultimately reflected in rates. Adding Climate Commitment Act compliance on top of these existing obligations would create a duplicative mandate on utilities, further increasing costs to consumers absent legislative intervention.

As a result, the Legislature made the policy decision in the Climate Commitment Act to ensure that compliance with the Act would not interfere with clean energy obligations or result in duplicative consumer energy costs from these burdens. RCW 70A.65.120(1). Specifically, the Act provides that those utilities subject to the Clean Energy Transformation Act are eligible for no-cost allowances "in order to mitigate the cost burden of the program on electricity customers." *Id*. Both on its face and in practice, this policy extends to all qualifying utilities, whether located in-state (like Puget Sound Energy) or out-of-state (like PacifiCorp). *Id*. Because Invenergy is not subject to the same regulatory and statutory requirements, and are at least a step or more removed from the retail market to Washington consumers, granting no-cost allowances to generating facilities such as Invenergy's would fail to address the problem the Legislature targeted in providing allowances to utilities.

Indeed, forcing Ecology to grant Invenergy the no-cost allowances they seek would be nonsensical and would, in fact, undermine the purposes of the

Climate Commitment Act and its goal of weaning Washington off fossil fuels. Because the Clean Energy Transformation Act requires utilities and the generating facilities they own to phase out natural gas by 2045, providing no-cost allowances to facilities such as Invenergy's would put utilities at a disadvantage in future years as they are forced to convert or shutter their natural gas generation facilities. Invenergy, meanwhile, would never be subject to the Clean Energy Transformation Act (because it is not a utility) and would be effectively exempt from a large portion of their compliance obligation under the Climate Commitment Act via no-cost allowances. Invenergy would thus be placed at an unfair *advantage* by being able to provide power directly to large facilities in Washington or provide wholesale power to the regional grid for export out of Washington—all while steadily marching even higher up the list of Washington's largest individual greenhouse gas emitters while other facilities are phased out.

2. *Tracy* compels a finding that Invenergy is not similarly situated to utilities

Invenergy is also not similarly situated to utilities because it serves a completely separate market. The Supreme Court's decision in *Tracy* controls and firmly establishes that Invenergy is not similarly situated for purposes of the Commerce Clause. There, independent suppliers of natural gas challenged an

Ohio law providing a tax break on the sale of natural gas from regulated in-state utilities to consumers, while all other natural gas sales were subject to the full tax. *Tracy,* 519 U.S.at 282-83. The Court rejected the out-of-state independent suppliers' dormant Commerce Clause discrimination arguments as a threshold matter. *Id*. at 300-01. Despite the fact that both provided natural gas to many of the same customers in the same geographic area, the Court found that the state-regulated utilities were not similarly situated to the independent suppliers and rejected the independent suppliers' Commerce Clause claims on that basis. *Id*. at 301-02.

The Court did so because of the different markets each primarily served and the public health and safety component of the market forming the core of the utilities' user base. Specifically, while there was direct competition between utilities and independent suppliers for the "noncaptive" (i.e., non-retail) customer base, the utilities primarily served a captive, residential core of smaller consumers who relied on price stability provided by highly-regulated utilities. *Id*. In contrast, the independent suppliers in *Tracy* tended to serve larger, more sophisticated entities purchasing in larger volumes and for whom the transactional costs of individual purchases on the open market were economically feasible. *Id*. Thus, the local utilities' price-stabilized, bundled

product "reflect[ed] the demand of a market neither susceptible to competition by the interstate sellers nor likely to be served except by [the utilities] historically suppl[ying] its needs." *Id*. at 303. These differences—despite the fact that utilities and independent suppliers were in direct competition in some respects—justified treating them as dissimilar for Commerce Clause purposes.[4] *Id*. at 307, 310.

Tracy applies with force here. Washington's vertically integrated utilities are directly analogous to the utilities in *Tracy*: they are highly-regulated public utilities primarily providing bundled energy services to a "captive" market of largely residential customers, where price stability in retail energy is a public health and safety concern. Invenergy is thus directly analogous to the independent suppliers in *Tracy*. It is undisputed that Invenergy does not directly serve a "captive" market or that price stability in retail energy is a public health and safety concern. Even taking as true Invenergy's naked assertion that the majority of energy the Grays Harbor facility supplies to the grid is "sold to entities in Washington," ER 42 ¶ 38, Invenergy provides that power *at wholesale*

[4] The Court was also extremely hesitant to risk "weakening or destroying" a regulatory scheme blessed by a legislative branch of government attempting to effectuate policy in an area as critical as public utility service. *Tracy*, 519 U.S. at 309–10. That hesitation should be no less compelling here.

to larger, more sophisticated entities (including the utilities)—not directly to Washington consumers. ER 40-41 ¶¶ 32-33.

While the generating facilities owned and operated by the vertically integrated utilities may also directly compete with Invenergy in the wholesale market, the fact that utilities primarily exist to serve the captive market renders them categorically dissimilar for purposes of the Commerce Clause. *See Tracy*, 519 U.S. at 310.

Invenergy's efforts to differentiate *Tracy* are unconvincing. Invenergy claims that *Tracy* does not control because the Climate Commitment Act regulates utilities' activities—i.e., utilities' greenhouse gas emissions—unrelated to their service of the captive market. Dkt. 8.1 at 47-48. This is nonsense. Invenergy does not challenge the Climate Commitment Act's efforts to reduce greenhouse gas emissions, it challenges the Act's allocation of no-cost allowances to utilities. Those allowances are provided to utilities *based on the power they provide to their captive retail customers* and are given expressly because of concerns over increasing *retail* energy costs (due to otherwise duplicative mandates between the Clean Energy Transformation Act and the Climate Commitment Act). They effectively exempt the retail energy market from the Climate Commitment Act. Indeed, by its very terms, this aspect of the

Climate Commitment Act is not concerned with regulating greenhouse gasses. RCW 70A.65.120(1).

Thus, no-cost allowances relate directly—indeed, *solely*—to utilities' activities in servicing the captive retail market, a market Invenergy concedes it does not participate in.[5] No-cost allowances are no different than Ohio's choice to regulate its captive retail market for natural gas via tax breaks to entities serving that market. Invenergy's efforts to differentiate *Tracy* are meritless, and the outcome in *Tracy* should govern here: there is no discrimination between similarly situated entities.

3. Utilities are not unfairly advantaged in the wholesale market

In addition to misconstruing *Tracy*, it is also clear that Invenergy fundamentally misconstrues both how the Climate Commitment Act applies to utility-owned generating facilities and how no-cost allowances are allocated. Specifically, Invenergy bases its theory of discriminatory effect on the mistaken assumption that utility-owned power plants will receive no cost allowances for

[5] Because no cost-allowances only regulate the captive retail market, Invenergy's reliance on the Fifth Circuit's decision in *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022), is similarly unavailing. There was no question in *NextEra* that the Texas law regulated the construction of power lines, a competitive market that both in-state and out-of-state entities participated in. *Id*. at 319-20.

sales on the wholesale market made in competition with Invenergy's independent facility. *See, e.g.*, Dkt. 8.1 at 44; ER 36, 41, 43-44. This assumption, however, is wrong as a matter of law and fatal to Invenergy's discrimination claims.

No-cost allowances are provided to utilities themselves, not their generating facilities. And the amount of allowances given is based only on the estimated retail load those utilities will serve to their own customers. RCW 70A.65.120; Wash. Admin. Code § 173-446-230. Because the supply of no-cost allowances is finite and directly tied to the power a utility supplies to its retail customers, any power created by a utility's generating facilities that does not serve this load—i.e., bulk power sold on the wholesale market—does not increase a utility's allocation of no-cost allowances. RCW 70A.65.120; Wash. Admin Code § 173-446-230. Thus, the Climate Commitment Act requires those facilities to purchase allowances to cover any emissions from that power.

In that regard, utilities are no different than Invenergy when it comes to the wholesale market: like Invenergy, they must secure Climate Commitment Act allowances to cover emissions associated with their wholesale sales of power. It is only where utilities are selling on the wholesale market—where they are not serving their retail load and, thus, not receiving no-cost allowances—that

they are competing with Invenergy. Indeed, Invenergy conceded below that the wholesale market is the only market that matters when it comes to its discrimination claims. SER 21-22.

Where, as here, discrimination is based on an alleged unfair advantage in-state interests are given when in direct competition with out-of-state interests, the fact that those in-state interests are treated the same within that very market *destroys* any assertion of discriminatory effect. *See, e.g., Or. Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 99 (1994) (discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). This is another death knell for Invenergy's claim of discrimination.

4. Invenergy fails to establish that the Climate Commitment Act draws any distinction between in-state and out-of-state entities

Even if Invenergy was similarly situated to utilities *and* competed against utilities in all markets, it still could not establish its Commerce Clause claim. As noted, antidiscrimination lies at the core of the dormant Commerce Clause analysis. *Pork Producers*, 598 U.S. at 377. For that reason, those claiming a statute has a discriminatory effect must plausibly allege that the law discriminates in practice and that it does so for reasons of in-state economic protectionism. *Black Star Farms*, 600 F.3d at 1230. This is an impossible

showing for Invenergy because the Climate Commitment Act's no-cost allowances—facially, purposefully, and in effect—treat in-state and out-of-state interests equally and exist for the valid regulatory purpose of mitigating a duplicative increase in energy prices to consumers, not in-state economic protectionism.

To illustrate this lack of a protectionist effect, this Court need only look to one of the three investor-owned utilities Invenergy claims to be a benefitted in-state economic interest, PacifiCorp, which is actually headquartered in Oregon and conducts the bulk of its operations in other states.[6] Moreover, the University of Washington and Washington State University (agencies of the State itself) must purchase no-cost allowances related to emissions from their natural gas steam plants used to generate power and heat. SER 48.

In its opening brief (pp. 50-54) and in its pleadings below, Invenergy cites the Fifth Circuit's decision in *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022) to claim that PacifiCorp should qualify as a "local"

[6] PacifiCorp's Washington presence is small compared to other Washington utilities, comprising a portion of the Yakima and Walla Walla areas. https://www.pacificpower.net/community/service-area.html. Most PacifiCorp operations occur in Oregon and California and, via Rocky Mountain Power, Utah, Wyoming, and Idaho. *Id*.; https://www.rockymountainpower.net/community/service-area.html.

interest—despite the fact that it is an Oregon corporation and the majority of its operations occur outside Washington. Invenergy also takes issue with the district court's judicial notice of the universities' steam plants. But Invenergy is wrong on all fronts.

To begin, *NextEra* is readily distinguishable. *NextEra* involved a Texas statute that restricted the construction, ownership, and operation of electricity transmission lines to electric entities that already operated within the state. *Id*. at 310. Indeed, under the statute "the only way a company without a Texas presence can build, operate, or own transmission lines is to buy a utility that already owns a power facility" in Texas. *Id*. at 314. In reviewing the statute, the Fifth Circuit found irrelevant the fact that most of the in-state utilities were headquartered outside of Texas; instead, the Court focused on the fact that the law "prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas." *Id*. at 324. Referencing a line of cases invalidating such "in-state presence" requirements, the Court invalidated the Texas law. *Id*. at 324-25.

But *NextEra* is of little value here because this is not an in-state presence case. The Climate Commitment Act does not limit "the ownership of electric utilities or electricity generating facilities to entities with an existing presence in

Washington, or otherwise impose a burden on entities without an existing presence in the State." ER 28.

Although Invenergy claims the Climate Commitment Act creates an unequal playing field for in- and out-of-state entities, it is unclear how so. There is no dispute that the Climate Commitment Act would create no obstacles whatsoever for an out-of-state company, with zero existing presence in Washington, to purchase Puget Sound Energy or petition the UTC to create a new utility. Conversely, a Washington company (say, Microsoft) could commission an independent natural gas power plant, and it would be subject to the very same regulatory structure Invenergy complains about. The law is neutral in both its purpose and its effect.

Nor is Invenergy correct that *NextEra* requires PacifiCorp to be viewed as a "local" interest. For one, Invenergy's selective read of *NextEra* improperly ignores the clear context of the decision itself, i.e., that the Texas law was akin to a residency requirement not at issue in this case. Moreover, *of course* under those circumstances there is a discriminatory effect on commerce regardless of the size or corporate location of the interests already operating in-state because the competing interests will necessarily have no presence in the state at all. *See NextEra*, 48 F.4th at 324.

That is certainly not the case here. Indeed, to the extent that *NextEra* counsels treating PacifiCorp as "local" to Washington, surely so is Invenergy under that standard. Invenergy obviously has a substantial presence in Washington. The Grays Harbor Energy Center is the largest by megawatt of Washington's natural gas power plants,[7] employs dozens of people, and Invenergy admits to substantial lobbying efforts on behalf of its Washington interests. *See* ER 45, 51-54. In fact, how powerless can an energy firm with a nationwide footprint like Invenergy be? Invenergy itself indirectly provides that answer. This past legislative session, Invenergy succeeded in getting bills introduced in both the Washington House and Senate that would have statutorily granted Invenergy the allowances it seeks in this lawsuit.[8] But, in any event, even if it were true that PacifiCorp employs more Washingtonians or spends more on lobbying, nowhere does Invenergy cite a case purporting to make the Commerce Clause inquiry hinge on parity between two "local" interests.

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[7] https://en.wikipedia.org/wiki/, List_of_power_stations_in_Washington (compiling information from the U.S. Energy Information Administration).

[8] The bills were House Bill 1965, 68th Leg., Reg. Sess. (Wash. 2024) (https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1965.pdf?q=20240328104910) and Senate Bill 5918, 68th Leg., Reg. Sess. (Wash. 2024) (https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Senate%20Bills/5918.pdf?q=20240328105041).

Moreover, Invenergy continues to grossly overplay the "benefit" to utilities and their power plants. No-cost allowances are not provided to *any* power plant in Washington, regardless of whether owned by a utility or by some other entity. *See* RCW 70A.65.120; Wash. Admin. Code § 173-446-230. Although utilities receive them, utilities are free to transfer them to power plants from which they procure power, including Invenergy. RCW 70A.65.120; Wash. Admin. Code § 173-446-230. Further, any proceeds derived from the transfer of allowances accrue to the ratepayers, not the utilities themselves. *Id*. What is more, no-cost allowances are provided to utilities specifically because it is utilities—not power plants—that are already forced to phase out fossil fuel power by the Clean Energy Transformation Act.

Finally, the fact that Washington's flagship universities must also procure allowances hammers home just how non-protectionist the Climate Commitment Act is. The district court properly took notice of these facts, which are not subject to reasonable dispute. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (citing Fed. R. Evid. 201(b)). Here, the universities each operate natural gas-fired electricity/steam plants that provide both power and heat to

various university facilities—power that would clearly otherwise need to be procured from the market.[9] *See id*.

In sum, between the Clean Energy Transformation Act and the Climate Commitment Act, it should be abundantly clear that Washington has all but declared war on fossil fuel power plants writ large, regardless of who owns them.[10] This is the antithesis of economic protectionism of "local" power plants. Invenergy's claim otherwise fails as a matter of law, and this Court should affirm dismissal.

B. Invenergy Fails to Plausibly Allege a Claim Under *Pike*

Invenergy's *Pike* claim falls well outside of *Pike*'s core purpose of rooting out hidden, purposeful discrimination. Nor does it implicate the extremely limited number of cases invalidating genuinely nondiscriminatory laws that affect the arteries of commerce.

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[9] Invenergy is also incorrect that the University of Washington facility does not generate electricity. *See* Dkt. 8.1 at 55, n.7. For well over 100 years, the University of Washington has utilized a steam plant both for electricity generation and to provide heat to buildings. *See* University of Washington, *The History of UW's Power Plant*, https://sustainability.uw.edu/energy-transformation/history (last visited Apr. 4, 2024).

[10] In fact, Washington's only coal-fired plant, TransAlta, is carved out of the Climate Commitment Act entirely because the Washington Legislature is forcing TransAlta to shut down its coal boilers for good by 2025. *See* RCW 80.80.040(3)(c)(i); RCW 80.82.010.

Invenergy nevertheless argues that, even if the Climate Commitment Act's no-cost allowances are nondiscriminatory, they should still be invalidated under the "substantial burden" balancing test first set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Dkt. 8.1 at 35-40. But Invenergy's *Pike* claim still fails. Under the *Pike* balancing test, courts have overturned state laws that place a "significant" burden on interstate commerce where the law's effect on commerce "clearly outweighs [its] local benefits." *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019). Here, Invenergy presents nothing but pure speculation regarding alleged impacts to commerce from the Climate Commitment Act's no-cost allowances, and it fails to establish how any such impacts overcome the State's goal of stabilizing consumer energy prices. The Court should affirm dismissal of this claim.

1. The Supreme Court recently confirmed the limited reach of *Pike* Commerce Clause claims

Invenergy's *Pike* claim begins on shaky ground with claims under *Pike* operating in an extremely narrow lane, and there are serious questions over whether claims such as Invenergy's even exist under *Pike* following *Pork Producers*. At least since *Tracy*, the Supreme Court recognized that there is no clear line separating "the *Pike* line of cases from [the Supreme Court's] core antidiscrimination precedents." *Pork Producers*, 598 U.S. at 377 (citing *Tracy*,

519 U.S. at 290 n.12). This concept was reinforced by *Pork Producers*, where a majority of the court affirmed that purposeful discrimination remains *Pike*'s "heartland." *Id.* at 377-80.

Although the Supreme Court did acknowledge that the courtroom door remains open to "even nondiscriminatory burdens," *id*. at 379; *see also id.* at 392 (Sotomayor, J. concurring), that door is only open a sliver. As the majority recognized, only "a small number" of cases "have invalidated state laws … that appear to have been genuinely nondiscriminatory," and all those cited by the Court involved burdens on an artery or instrumentation of commerce, like trucking. *See id*. n.2 (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945)).

Claims that neither involve purposeful discrimination or implicate an artery of commerce are "further from *Pike*'s core." *Id*. at 392 (Sotomayor, J. concurring). Indeed, the Court acknowledged that it "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede *the flow* of interstate goods." *Id*. at 379 n.2 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978)).

As set out above, the Climate Commitment Act does not discriminate against out-of-state interests. And, to paraphrase the Supreme Court, "[no-cost allowances] are not trucks or trains." *See id*. We are far from *Pike*'s heartland indeed.

2. Invenergy fails to allege a substantial burden to interstate commerce as required by *Pike*

Against this headwind, Invenergy asserts that its two brief, conclusory paragraphs adequately alleged that granting no-cost allowances to utilities, but not to independent power plants, burdens interstate commerce by dis-incentivizing out-of-state investment in Washington fossil fuel power plants. *See* ER 70-71 (¶¶ 175-76). But this fails to show any cognizable impact to interstate commerce, much less the "substantial" burden on commerce that is required for a *Pike* claim.

First, federal pleading standards require sufficient *non-conclusory* factual allegations. *Iqbal*, 556 U.S. at 680. Thus, to adequately plead an excessive burden claim, Plaintiffs must show as a threshold matter "specific facts" supporting their claim that the challenged statutory scheme "has a discriminatory effect on interstate commerce." *Rosenblatt*, 940 F.3d at 452 (quoting *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 503 (7th Cir. 2017)). Invenergy falls well short of this mark. It produces no claim at all—much less specific facts—

of its own or others' intent to invest in fossil fuel power in Washington that have been impacted by the Climate Commitment Act's no-cost allowance system. *See* ER 70-71. It cites to no projects cancelled, no expansions curtailed, no impacts to the price of power elsewhere. *See id*.

Next, and more critically, even if Invenergy had produced specific facts alleging such impacts, Invenergy still does not plausibly plead a substantial burden on interstate commerce. Again, "[o]nly a small number of … cases invalidating laws under the dormant Commerce Clause have involved laws that were genuinely nondiscriminatory but still imposed a clearly excessive burden on interstate commerce." *Rosenblatt*, 940 F.3d at 452 (internal quotations omitted). Even then, "[t]hese cases address state 'regulation of activities that are inherently national or require a uniform system of regulation'—most typically, interstate transportation." *Id*.

That is not what we have here, where Invenergy cannot assert any impacts to the arteries of commerce or any other inherently national systems. Indeed, while the electricity grid itself is interconnected, power markets and their regulation are decidedly local affairs, with the federal government repeatedly refusing to impose nationwide standards. As a result, individual states remain free to regulate how, by whom, and at what rates electricity is provided to their

residents.[11] And there is certainly nothing "inherently national" about business investments, including whether and how states choose to attract or dis-incentivize such investments.[12]

The most Invenergy can possibly show is what is obvious: *of course* Washington has made things more difficult for fossil fuel electricity within its borders. That is a clear goal of both the Climate Commitment Act and the Clean Energy Transformation Act. This policy applies across the board to both utilities and independent power plants like Invenergy's, and regardless of whether they are owned by in-state or out-of-state interests. As a result, Washington is, presumably, a less attractive place for *anyone* to invest in fossil fuel power infrastructure.

But the fact that it may now be more attractive for a company like Invenergy to invest in fossil fuel infrastructure in Texas as opposed to Washington does not constitute a "substantial" burden on interstate commerce.

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[11] Washington's Clean Energy Transformation Act is a prime example of state autonomy in the power sector, with Washington making the clear policy choice to exclude fossil fuel power from public consumption by 2045. *See* Ch. 19.405 RCW.

[12] Indeed, it is beyond dispute that all manner of legislative enactments, be they environmental regulations or taxes, may increase the cost of doing business in a state—sometimes substantially so. It would be a "strange place" indeed if this Court were to determine that those efforts implicate the dormant Commerce Clause. *See Pork Producers*, 598 U.S. at 374.

It is simply Washington's exercise of regulatory prerogative related to wholly *intra*state activity. And, as this Court has recognized, local regulation of in-state activities is "inherently local" even when it impacts out-of-state interests. *Rosenblatt*, 940 F.3d at 452; *see also Pork Producers*, 598 U.S. at 374 (noting, in the context of an alleged extraterritorial dormant Commerce Clause violation, that "many (maybe most)" state laws have out-of-state impacts). The fact that this policy impacts Invenergy's profits does not, and cannot, constitute the substantial burden on interstate commerce that is required. Invenergy cannot meet *Pike*'s threshold requirement.

3. Even if balancing was warranted, Invenergy fails to show that any burden on commerce "clearly" outweighs the benefits

Even if Invenergy could show impacts to interstate commerce, their claim still fails. "[T]he Supreme Court has frequently admonished that courts should not second-guess the empirical judgements of lawmakers concerning the utility of legislation." *S.D. Myers, Inc. v. City & Cnty. of San Francisco,* 253 F.3d 461, 471 (9th Cir. 2001) (quoting *Pac. NW Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994)). Thus, "[f]or a facially neutral statute to violate the [C]ommerce [C]lause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991). This sets an

exceptionally high bar for plaintiffs. A challenge to legislative judgment under *Pike* must establish that the legislative facts on which the classification is based "could not reasonably be conceived to be true by the governmental decisionmaker." *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005).

Invenergy wholly fails to meet this standard. In its complaint and briefing, Invenergy asserts only that providing no-cost allowances to utilities will increase emissions and fail to prevent increased energy costs to Washington consumers. ER 71; Dkt. 8.1 at 37. Invenergy then claims that this assertion is enough to erase the Legislature's policy choice and justify invalidating the statute. *See* ER 71; Dkt. 8.1 at 37.

But, even if Invenergy's factual claims were true, this argument still fails as a matter of law because Invenergy ignores both the plain text and import of the statute. That statute provides:

> The legislature intends by this section to allow all consumer-owned electric utilities and investor-owned electric utilities subject to the requirements of chapter 19.405 RCW, the Washington clean energy transformation act, to be eligible for allowance allocation as provided in this section in order to mitigate the cost burden of the program on electricity customers.

RCW 70A.65.120(1).

Thus, the express purpose of providing no-cost allowances to utilities is not to reduce emissions. *Id*. In fact, this section exempts utilities from the

Climate Commitment Act because of the utilities' pre-existing obligations to decarbonize that power under the Clean Energy Transformation Act. *Id*. Nor is the goal to eliminate increased energy costs to consumers; it is to "*mitigate*" those increases. *Id*. (emphasis added).

Again, to be "illusory," a putative benefit must be non-existent; i.e., it "[cannot] reasonably be conceived to be true." *Spoklie*, 411 F.3d at 1059. Under that metric, Invenergy's argument is patently absurd. It requires this Court to believe that a direct subsidy to electric utilities—in close to the exact amount they are burdened by the Climate Commitment Act's requirements—will *completely fail* to make the rise in consumer energy costs less severe than in the absence of that subsidy. This Court need not (and should not) accept such an illogical supposition. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (citing *Twombly*, 550 U.S. 544) (complaints must be dismissed where they do not allege "enough facts to state a claim to relief that is plausible on its face").

Finally, there should be no dispute here that the local interests are compelling. As noted above, the concern over stabilizing consumer energy prices is heightened because of the utilities' obligations under the Clean Energy Transformation Act, which requires utilities to expend significant resources between now and 2045 to completely phase out non-renewable energy sources.

Thus, no-cost allowances effectuate retail price stabilization by ensuring that utilities are not hit with duplicative statutory mandates and to minimize impacts consumers see from the utilities' compliance obligations, especially for low-income customers. This goal—ensuring that consumers have an affordable and reliable supply of power—is unquestionably a public health and safety concern, over which state authority is at its highest ebb in relation to federalism and where courts have exercised the utmost caution before upsetting that authority. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("[i]t is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens'" (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

In short, under *Iqbal* and *Twombly*, courts are required to separate facts from conclusions. *Iqbal*, 556 U.S. at 681; *Twombly*, 550 U.S. at 570. Invenergy must, therefore, plausibly allege that no-cost allowances constitute a substantial burden on interstate commerce *and* that the Washington Legislature had no basis to believe that granting allowances to utilities would mitigate a spike in consumer energy prices. Invenergy's conclusory hypothesizing fails to do either. This Court should affirm dismissal of Invenergy's *Pike* claim.

C. Invenergy's Equal Protection Claim Similarly Fails as a Matter of Law

Invenergy's equal protection claim faces an even steeper hurdle than its Commerce Clause attack. "Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). As a result, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes on fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id*. Under this standard, statutes bear "a strong presumption of validity" and those challenging a statute's rationality must "negate every conceivable basis" supporting the legislative classification." *Id*. at 314-15.

As long as there are plausible reasons for the legislative action, the Legislature's actual reasoning for the statute in question is "irrelevant." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Rather, a legislative choice may even be based on rational speculation unsupported with evidence or empirical data. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the

legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (citing *Carmichael v. S. Coal Co.*, 301 U.S. 495 (1937)).

Here, dismissal of Invenergy's equal protection claim should be affirmed. As a threshold matter, there is no discrimination to begin with. As set out in detail in Section VI.A above, Invenergy's independent generating facility is not similarly situated to the local utilities and their vertically integrated generating facilities—a fact that is as fatal to Invenergy's equal protection discrimination claim as it is to Invenergy's Commerce Clause claim.

But, even if Invenergy were similarly situated and differentially treated, Invenergy still cannot meet their burden to negate the Legislature's policy choices. The Climate Commitment Act's provision of no-cost allowances to utilities rather than generating facilities is based on the Legislature's determination that: (1) it is necessary to prevent duplication of utilities' substantial obligations under the Clean Energy Transformation Act; and (2) doing so is an effective means of ensuring that Washington consumers do not see dramatically increased energy costs from that duplication.

Far beyond merely being conceivable, providing utilities with relief from the additional costs they may face due to the Climate Commitment Act will clearly have at least some impact on utilities' ability to absorb those costs and protect Washington consumers. This is true regardless of whether the costs are incurred at generating facilities the utilities themselves own, or from purchasing power from independent operators or from out-of-state. Moreover, while the State does not concede that there is no evidence or empirical data to confirm the wisdom of that decision, it is irrelevant to the constitutional question if there were indeed no such evidence. *See Vance*, 440 U.S. at 111.

The State's rational explanation is all that is required, and Invenergy cannot overcome the presumption that the statute satisfies rational basis review.

D. Dismissal of Invenergy's Causes of Action With Prejudice Is Appropriate

In four separate sections of its brief, Invenergy also claims that, even if it had failed to plead plausible claims, the district court should have provided leave to amend. *See* Dkt. 8.1 at 33, 40, 56, 62. Not so.

As Invenergy points out, dismissal with prejudice and without leave to amend is appropriate where it is clear on de novo review that the complaint cannot be saved by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Here, and as set out in detail above, Invenergy

can put forth no set of facts that salvage either its Commerce Clause or its equal protection claims.

First, with regard to its dormant Commerce Clause discrimination claim, Invenergy asserts that it could have alleged "additional facts" explaining utilities' participation in the wholesale markets. Dkt. 8.1 at 57. But to what end? As set out above, Section VI.A.3, Washington's utilities do not receive no-cost allowances for their wholesale sales. Just like Invenergy, they are required to acquire allowances to cover the greenhouse gas emissions associated with that power, thus nullifying any claim Invenergy could possibly make with regard to discrimination on the wholesale market—the only market Invenergy concedes it is in direct competition with utilities. SER 21-22. Same with Invenergy's offer to take another stab at recasting PacifiCorp as a Washington company or denying that the University of Washington has a power plant. Neither of these things change the fact that Invenergy is not similarly situated to utilities or that no-cost allowances have nothing to do with economic protectionism.

Next, amendment is also futile with regard to Invenergy's *Pike* claim. Invenergy asserts that leave to amend is appropriate because it claims the district court failed to explain its reasoning. This is factually incorrect. The district court spent nearly three pages explaining the difficulties *Pike* plaintiffs face,

analogized Invenergy's claims to that of the plaintiff in *Pork Producers*, then dismissed the claim as similarly meritless. ER 14-16, 20-21. This renders Invenergy's reliance on *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109 (9th Cir. 2018), misplaced.

Invenergy's offers to provide additional factual materials similarly would not change the outcome of its *Pike* claim. Indeed, Invenergy's assertion, Dkt. 8.1 at 37-38, 41, that its expert report would have shown that the Climate Commitment Act makes its operation of a Washington fossil fuel power plant more expensive simply states the obvious. It is also no different than Invenergy's existing argument that the Climate Commitment Act stifles out-of-state investment in Washington fossil fuel power. Neither make the required case for a "significant" burden on interstate commerce necessary to justify *Pike* balancing.

Finally, for these same reasons, Invenergy's request to shore up its equal protection claim would also be futile. Invenergy's claim that it could produce a "lack of a relationship between no-cost allowances and retail electricity prices," Dkt. 8.1 at 62, flies in the face of reason. As discussed above, Invenergy's assertion that a direct subsidy to utilities—in the exact amount of their Climate Commitment Act compliance costs—would fail to move the needle on the Act's

costs to consumers is sheer fantasy. If this Court determined that Invenergy can revise its complaint based on a bald assertion that it can prove two plus two equals five, *no* dismissal under Civil Rule 12(b)(6) or Civil Rule 12(c) could be with prejudice.

VII. CONCLUSION

This Court should affirm dismissal of Invenergy's constitutional claims as a matter of law. Invenergy fails to establish that it is similarly situated to utilities for purposes of its discrimination claim and, in any event, fails to show discrimination. Invenergy's claim under *Pike* also fails. Invenergy cannot show a cognizable burden on interstate commerce period, much less the substantial one that is required. It also fails to meet *Pike*'s balancing test even if it could satisfy threshold requirements. Finally, Invenergy's equal protection claim is meritless. There is no discrimination, and Washington's basis for providing no-cost allowances to only those entities already subject to decarbonization under

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the Clean Energy Transformation Act is sound. These dismissals should be with prejudice and without leave to amend, which would be futile in this case.

RESPECTFULLY SUBMITTED this 10th day of April 2024.

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FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-3857

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