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

BRIEF FOR INTERVENOR-RESPONDENT SOUTHWESTERN PUBLIC SERVICE COMPANY IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Whether the Interstate Commerce Clause prohibits States from granting comprehensively regulated, vertically integrated electric utilities a monopoly over the generation, transmission, and distribution of electric power in their respective service territories.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, counsel for Intervenor-Respondent Southwestern Public Service Company certify that Southwestern Public Service Company is not a publicly held company; that its parent corporation is Xcel Energy Inc., a publicly held company; and that no publicly held company owns 10% or more of the stock of Xcel Energy Inc.

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INTRODUCTION

This dormant Commerce Clause suit should have been resolved at the threshold based on two straightforward principles applied by this Court in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

The first is that when an out-of-state challenger claims that a protectionist measure favors in-state entities, it must show that if the allegedly discriminatory measure were removed, it would then participate against the incumbents in an existing market. *See Tracy*, 519 U.S. at 299. The challenge here fails this test because the only market in which Respondents NextEra Energy Capital Holdings, Inc., and the related entities (collectively, NextEra) wish to compete—the market for transmission of electric power, unbundled from the generation and distribution of that power—simply does not exist. The reason that market does not exist is because Texas has made the policy determination that, in the portion of the State interconnected with the interstate grid, having vertically integrated utilities that provide a bundled and highly regulated service best ensures that customers will reliably receive energy.

The second dispositive principle is that, in order to claim discrimination violative of the dormant Commerce Clause, the allegedly favored entities must be "similarly situated" to the allegedly burdened entity. *Tracy*, 519 U.S. at 299; *see, e.g.*, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part). And this Court has held, in a case remarkably similar to this one, that extensively regulated public utilities are not similarly situated to entities that seek to compete in only a portion of the

market served by the utilities and which are therefore not subject to the same state regulatory scheme. *See Tracy*, 519 U.S. at 303-10.

The court of appeals reached its conclusion that NextEra had stated a claim for discrimination under the dormant Commerce Clause only by ignoring the first principle and distorting the second. Its decision—which significantly broadens the reach of the dormant Commerce Clause—threatens States' police powers by taking away their ability to decide that the health and welfare of their citizens are best served by bundling essential services with protective regulation.

This Court should grant the petition.

STATEMENT

Intervenor-Respondent Southwestern Public Service Company (SPS) is a vertically integrated electric utility serving parts of the Panhandle and South Plains regions of Texas and eastern New Mexico. As a vertically integrated utility, SPS is responsible not only for building high-voltage transmission lines, but also for generating and distributing electricity to homes and businesses within its service territory. SPS is part of the Southwest Power Pool regional transmission organization (RTO).[1]

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[1] Transmission providers like SPS "transfer operational control of their facilities" to RTOs "for the purpose of efficient coordination," thereby "reduc[ing] technical inefficiencies caused when different utilities operate different portions of the grid independently." *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008). The Federal Energy Regulatory

A. Regulation of Electric Utilities in Texas

"[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Texas exercises that police power by comprehensively regulating "utility rates, operations, and services as a substitute for competition." Tex. Util. Code § 11.002(b). Like many other States, Texas has chosen not to leave the provision of vital public services to the uncertainties inherent in a competitive market, and it has instead opted to make public utilities vertically integrated "monopolies in the areas they serve." *Ibid.*[2]

1. To effectuate its policy choice, Texas grants vertically integrated electric utilities like SPS certificated service areas in which they alone are responsible for generating electric power, transmitting it over high-voltage lines, and distributing it to end users. *See Lamb Cnty. Elec. Coop., Inc. v. Pub. Util. Comm'n*, 269 S.W.3d 260, 265 (Tex. App. 2008). Accordingly, electric utilities

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Commission "has encouraged the management of those entities by 'Independent System Operators' [ISOs], not-for-profit entities that operate transmission facilities in a nondiscriminatory manner." *Id.* at 536-37. "In addition to coordinating transmission service, [RTOs] perform other functions, such as running auction markets for electricity sales and offering contracts for hedging against potential grid congestion." *Id.* at 537.

[2] This is the situation in the portions of Texas connected to the interstate grid. In the portion of the State that is not connected to the interstate grid, and which is therefore subject to the control of the Electric Reliability Council of Texas (ERCOT), Texas has experimented with competition. The ERCOT region of Texas is not at issue in this case. *See* Pet. App. 18a, 23a n.6.

operate as monopolies in Texas, which—like many other States—has eschewed competition when it comes to the provision of vital public services like electricity. *See* Tex. Util. Code § 31.001(b) ("Electric utilities are by definition monopolies in many of the services provided and areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not always operate."); *see also id.* § 11.002(b) (same for public utilities in Texas generally).

As monopolies not subject to market competition, SPS and other electric utilities are instead subject to a "comprehensive . . . regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers." Tex. Util. Code § 31.001(a). That system is administered by the Public Utility Commission of Texas (PUCT), which has "exclusive original jurisdiction over the rates, operations, and services" of SPS and other electric utilities. *Id.* § 32.001(a).

Among the duties imposed on SPS and other electric utilities in exchange for their monopolies are the obligations to "serve every customer in the utility's certificated area"—which, in SPS's case, is sparsely populated—and to "provide continuous and adequate service in that area." Tex. Util. Code § 37.151(1)-(2). The conditions under which electric utilities may "discontinue, reduce, or impair service to any part of [the] certificated service area" are limited by statute and PUCT regulation. *Id.* § 37.152(a). PUCT can also require electric utilities "to provide transmission service at wholesale" to other providers and "may require . . . the construction or enlargement of a facility" to facilitate

transmission. *Id.* § 35.005(a)-(b). This combination of benefits and burdens creates a regulatory compact: a "monopoly on service in a particular geographical area . . . is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (en banc) (Starr, J., concurring).

In contrast to the vertically integrated public utilities that generate, transmit, and distribute electric power, NextEra seeks to provide transmission service only, unbundled from generation and distribution, and only on lines it chooses to build. Pet. App. 11a. As such, it would not be subject to the comprehensive regulatory obligations that govern SPS and other vertically integrated public utilities in Texas.

2. Senate Bill 1938 (S.B. 1938)—the law at issue in this case—gives existing certificated electric utilities the right to obtain certificates of convenience and necessity to build, own, or operate new transmission lines that will directly interconnect with their own facilities. *See* Tex. Util. Code § 37.056(e). S.B. 1938 thus protects Texas's policy to have regulated monopolies provide bundled generation, transmission, and distribution service to all customers in their service territories by protecting the utility certificated to serve a particular area against *all* competitors, both in-state and out-of-state.

B. Procedural History

SPS moved to intervene as a defendant in the district court, D. Ct. Doc. 54 (Aug. 8, 2019), but the district denied that motion at the same time it granted the State's

motion to dismiss, Pet. App. 47a-49a, 47a n.1. SPS noticed an appeal of that ruling. D. Ct. Doc. 154 (Mar. 19, 2020).

Upon expediting NextEra's appeal from the dismissal of its claims, the court of appeals granted SPS (and others who sought to intervene in the district court) leave to file briefs as *amici curiae*. C.A. Doc. 44 (Mar. 13, 2020). SPS filed such a brief in support of the State. C.A. Doc. 99 (Apr. 22, 2020).

After the court of appeals issued the decision below, SPS moved to intervene in that appeal for the purposes of seeking certiorari. C.A. Doc. 190 (Sept. 7, 2022). On December 7, 2022, the court of appeals issued a decision in SPS's appeal, reversing the district court's denial of intervention. *NextEra Energy Cap. Holdings v. D'Andrea*, No. 20-50168, 2022 WL 17492273 (5th Cir. Dec. 7, 2022). The next day, the court of appeals granted SPS's motion to intervene in NextEra's appeal. C.A. Doc. 235 (Dec. 8, 2022). Because the time to seek certiorari had elapsed before SPS became a party, SPS is a Respondent in this Court despite being aligned with Petitioners. *See* this Court's Rule 12.6; Pet. II.[3]

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[3] Pursuant to this Court's Rule 12.6, SPS notified counsel of record for all parties of its intent to file a brief supporting certiorari within 20 days after this case was docketed.

ARGUMENT

THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S DECISION IN *TRACY* AND POSES A THREAT TO STATES' POLICE POWERS.

A. There Is No Transmission-Only Market, and the Commerce Clause Does Not Require Texas to Create One.

NextEra seeks to compete on equal footing in a standalone market for the transmission of electric power. The problem, however, is that no such market *exists* in the portions of Texas at issue here. That is because the State, pursuant to its police powers, has decided that there ought not be an independent market for building, owning, and operating transmission services, but instead that such responsibility should lie with vertically integrated public utilities that provide a bundled—and comprehensively regulated—service. NextEra's fundamental submission, therefore, is that the federal courts should *create* the market NextEra desires so that it can then compete in that new market against the utilities. The dormant Commerce Clause does not require such a result.

1. This Court made that point abundantly clear in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). *Tracy* involved a dormant Commerce Clause challenge to an Ohio law that exempted natural-gas utilities from the State's sales and use taxes. *Id.* at 282-83, 285. Like here, the natural-gas utilities were highly regulated monopolies in their respective service areas. *See id.* at 288-97. Their tax exemption was challenged by General

Motors, a large industrial user of natural gas that purchased its gas from out-of-state sellers rather than the utilities. *Id.* at 285. Those out-of-state sellers did not enjoy the tax exemption, and General Motors claimed that this differential treatment violated the dormant Commerce Clause. *Ibid.*

Tracy stated the relevant principle clearly: "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." 519 U.S. at 300. That is because "the dormant Commerce Clause protects markets" that exist and "participants in [those] markets"; it does not require States to construct markets that they have chosen, pursuant to their police powers, to foreclose. *Ibid.*

Nor was *Tracy*'s holding a novelty. In applying it, *Tracy* hewed to this Court's longstanding recognition that while the dormant Commerce Clause protects against state laws aimed at "simple economic protectionism," *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), it does not "protect[] the particular structure or methods of operation in a retail market," *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) ("The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.").

2. The same is true here. NextEra seeks to compete against vertically integrated utilities in a market

for transmission of electric power unbundled from the production and distribution of that power, and unbundled from the regulatory requirements that the State imposes on utilities. But *there is no such market.* Public utilities like SPS sell a single product: bundled generation, transmission, and distribution of electric power, all governed by a host of consumer-protective regulations. NextEra does not sell that product, "and would continue [not] to do so even if the supposedly discriminatory burden were removed." *Tracy*, 519 U.S. at 299. That should be the end of the matter.

Of course, some States have made the different policy choice to permit a transmission-only market. Indeed, Texas itself has done so in the region of the State subject to the authority of the Electric Reliability Council of Texas (ERCOT). *See* p. 3 n.2, *supra*. But whether to have such a market is a policy decision left to the States—and one that the Federal Energy Regulatory Commission has not preempted them from making. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (per curiam). As this Court has explained, States are free to opt for a monopoly scheme instead of a competitive scheme, and "nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344-45 (2007).

3. The court of appeals understood *Tracy* to apply only "if the challenged law provided vertically integrated utilities with the same benefit in both the monopolistic distribution market and the competitive transmission market." Pet. App. 21a. And it thought

there was no such problem here because S.B. 1938 is "a law addressing a single market (transmission)—one that is undoubtedly competitive." *Ibid.*

The court of appeals' fundamental error was its failure to ask as a threshold matter whether that "single market" for transmission, which it believed was the sole target of S.B. 1938, *actually exists under Texas law*. Pet. App. 21a. It does not. Properly understood, S.B. 1938 is simply one component of an overarching regulatory framework intended to preserve a regulated monopoly for all three phases of electric-power delivery—generation, transmission, and distribution. Because NextEra does not seek to compete in that integrated market, and the State in any event has no obligation to create a market that regulation forecloses, the dormant Commerce Clause "has no job to do." *Tracy*, 519 U.S. at 303.

B. Vertically Integrated Utilities Are Not Similarly Situated to Transmission-Only Entities.

1. In addition to holding that the dormant Commerce Clause does not compel States to open regulated markets to competition, *Tracy* further concluded that there was no discrimination against the out-of-state sellers even in the competitive market for noncaptive customers, notwithstanding the regulated utilities' favored tax treatment relative to the out-of-state sellers competing in that market. *See* 519 U.S. at 297-310. The Court explained that a plaintiff bringing a dormant Commerce Clause challenge predicated on discriminatory treatment must, as a threshold matter, show that it is "similarly situated" to the allegedly favored in-state

entities. *Id.* at 298-99. And the Court concluded that the regulated utilities were not similarly situated to the out-of-state sellers—even in the noncaptive market for industrial purchasers—because every aspect of public utilities' business was inextricably tied to their regulatory compact with the State and their duty to provide reliable service to smaller, retail consumers. *See id.* at 303-10.

2. The court of appeals instead interpreted *Tracy* as turning on the fact that "the utilities and out-of-state sellers were not similarly situated for all, or even most applications, of the statute." Pet. App. 20a. In other words, the court understood *Tracy* to have concluded that the competing entities *were* similarly situated with respect to the noncaptive wholesale market, but that the noncaptive market could be *ignored* because "the local, captive market was the utilities' 'core market.'" *Ibid.* (quoting *Tracy*, 519 U.S. at 302). The court thought that S.B. 1938, by contrast, *only* applies in the noncaptive transmission market—in which it viewed the utilities as similarly situated to NextEra—and therefore concluded that dormant Commerce Clause principles apply in full force with respect to that market. *See id.* at 20a-23a.

The court of appeals' interpretation of *Tracy* is incorrect. What *Tracy* actually held was that the local utilities and the out-of-state wholesalers were not similarly situated for *any* applications of the statute, even in the competitive, noncaptive market. The primary basis for that conclusion was that removing the utilities' tax preference in the noncaptive market would have broader effects on the utilities' business, affecting not only their sales to the industrial buyers but also to the smaller, retail consumers who were most in need of the regulatory

protections. *See Tracy*, 519 U.S. at 307 ("[A]ny decision to treat the [utilities] as similar to the interstate marketers would change the [utilities'] position in the noncaptive market in which (we are assuming) they compete, at least at the margins, by affecting the overall size of the [utilities'] customer base."). Treating the utilities and the competitors as similarly situated in the noncaptive market—and thus imposing the dormant Commerce Clause's equal-treatment requirement there—would thus disrupt States' important and longstanding power to control public utilities' conduct in the captive market. *See id.* at 307-10.

In support of that determination, the *Tracy* Court also invoked "the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." 519 U.S. at 306. The Court explained that allowing completely free "competition for the largest consumers" would necessarily affect the stability of the utilities' operations in the captive market. *Ibid.* And this would in turn implicate "important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months." *Ibid.*

The Court in *Tracy* further noted that the dormant Commerce Clause is not, and has never been, a tool for "cut[ting] the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." 519 U.S. at 306 (quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440,

443-44 (1960)); *see Sherlock v. Alling*, 93 U.S. 99, 103 (1876). Instead, this Court has long understood that "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

Accordingly, in light of the hard-to-predict effects on the captive market that would result from disturbing the nature of the competition in the noncaptive market, *Tracy* found that "[p]rudence . . . counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection . . . despite its noncompetitive, monopolistic character." 519 U.S. at 309. The Court therefore concluded that "Ohio's regulatory response to the needs of the local natural gas market has resulted in a noncompetitive bundled gas product that distinguishes its regulated sellers from independent marketers to the point that the enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause." *Id.* at 310.

In short, and as *Tracy* would be described by a member of its majority just a few months later, the Court held that the local utilities "are not 'similarly situated' to other fuel distributors" and that "their insulation from out-of-state competition does not violate the negative Commerce Clause because it 'serves important interests in health and safety.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 602 (1997) (Scalia, J., dissenting) (quoting *Tracy*, 519 U.S. at 306). Contrary to the court of appeals' view, the Court in *Tracy* did *not* just conclude that the utilities and the out-of-

state sellers were dissimilarly situated for purposes of the captive market—it held that they *were not similarly situated at all, for any purposes*.

3. With *Tracy* properly understood, this case is an easy one—even under the erroneous assumption that there is an existing market in Texas for transmission-only services. That (hypothetical) market is akin to the noncaptive market for large-scale, industrial natural-gas purchasers in *Tracy*. Like in *Tracy*, the utilities here also serve a captive market that receives a bundled service encompassing a slate of regulatory protections. And as in *Tracy*, requiring competition in the market for transmission of electric power would have ripple effects on the public utilities' operations in generating and distributing that power, disturbing the carefully wrought regulatory scheme that the State has erected for the protection of its citizens. That fact means that, under *Tracy*, electric utilities like SPS and transmission-only entities like NextEra are not similarly situated for dormant Commerce Clause purposes. *See* 519 U.S. at 297-310.

C. The Fifth Circuit's Expansion of the Commerce Clause Is a Threat to States' Police Powers.

The Fifth Circuit held that the dormant Commerce Clause will sometimes require States to allow markets for a good or service that they have chosen, as an exercise of their police powers, not to allow. That is a dangerous assertion, both for its consequences for the safe and reliable provision of electric power to individuals who rely on it, and for its broader ramifications in other

areas in which States may choose to limit what services may be unbundled from others.

Start with the provision of electric power. Under the court of appeals' view of the dormant Commerce Clause, a State would have no right to declare that the *retail supply* of electric power is a job that can only be undertaken by highly regulated, vertically integrated monopolies. An out-of-state entity seeking to sell the electricity that powers consumers' homes in what is now a captive market can claim that any state rule precluding it from breaking into that market constitutes favoritism toward incumbents and thus violates the dormant Commerce Clause. That would be so even if the State had decided as a policy matter that it would endanger its citizens' welfare to detach the retail supply of electric power from the generation and distribution of that power and the concomitant regulatory burdens that apply to the utility generally. While this litigation is only about transmission lines, it has the potential to disrupt the entire chain—from generation to distribution—on which consumers rely for receiving electricity and unsettle regulatory structures in a large number of states.

If the decision below were adopted more broadly, the dormant Commerce Clause would become a threat to States' police powers in various other areas, too. Imagine that a State legalized a recreational drug (that was legal and unregulated under federal law) but made the policy choice to allow only licensed physicians and pharmacists to sell it. *Cf. Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 544 (1st Cir. 2022) (holding that a state law requiring dispensers of medical marijuana to be residents of the State

is unconstitutional under the dormant Commerce Clause). In other words, the State—though it has chosen to allow a market for the drug—has also decided to bundle sale of the drug with the regulatory assurances associated with its medical and pharmaceutical licensing regimes.

That law would disproportionately burden out-of-state sellers, who would be far less likely to have the necessary credentials, and for whom it would be far more burdensome to obtain them. But it strains credulity to think that a State lacks the ability to protect its citizens by structuring the market in this way. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (explaining that "protect[ing] the lives, health, . . . comfort and general welfare of [its] people" is a core sovereign prerogative of a State). Yet, under the reasoning of the court of appeals, it is difficult to see why such a law would be permissible.

In truth, the dormant Commerce Clause does not disrupt States' police powers in this way. States have the sovereign authority to require that a good or service be bundled with a scheme of regulatory protection. And this Court emphatically held in *Tracy* that when an out-of-state entity seeks to compete in a way that would disrupt the comprehensive regulatory scheme binding incumbents, the dormant Commerce Clause "has no job to do." 519 U.S. at 303.

CONCLUSION

The petition for a writ of certiorari should be granted.

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