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The Dormant Commerce Clause as a Way to Combat the Anti-Competitive, Anti-Transmission-Development Effects of State Right of First Refusal Laws for Electricity Transmission Construction

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THE DORMANT COMMERCE CLAUSE AS A WAY TO COMBAT THE ANTI-COMPETITIVE, ANTI-TRANSMISSION-DEVELOPMENT EFFECTS OF STATE RIGHT OF FIRST REFUSAL LAWS FOR ELECTRICITY TRANSMISSION CONSTRUCTION

Walker Mogen[†]

To quickly decarbonize the electricity grid, new sources of renewable energy have to be connected to the grid. To connect these sources of energy to the grid, the rate of construction of new electricity infrastructure must increase quickly. The process to construct new electricity transmission infrastructure, however, is filled with chokepoints that slow its construction. State right of first refusal laws for transmission construction are one the things slowing the build out of the grid. These laws limit which companies can construct new transmission infrastructure to utilities and other companies already operating transmission infrastructure in a state. This Note, using a circuit split between the Fifth and Eighth Circuits as a jumping off point, argues that these state right of first refusal laws violate the dormant Commerce Clause because they serve as impermissible local presence requirements that prevent companies not already operating in a state from accessing and competing in a state's markets. The Note concludes by analyzing how the Supreme Court would potentially rule if they resolved this Circuit split.

† University of Michigan Law School, J.D. Candidate, 2024. I am grateful to Joe Rockwell and Tom Kloehn for their thoughtful comments and help in getting this Note across the finish line. I am also grateful to the entire MJEAL staff for their hard work on helping prepare this Note for publication. Finally, thank you to my family and to Brigid for their endless support and love.

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INTRODUCTION: THE TRANSMISSION CHALLENGE

In April 2021, the Biden administration recommitted to a campaign goal of creating a "carbon pollution-free power sector by 2035" and a "net zero emission economy by no later than 2050."[1] Over a year later, in August 2022, following much

1. FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies, THE WHITE HOUSE (April 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/; Alana Wise, Biden Outlines $2 Trillion Climate Plan, NPR (July 14, 2020), https://www.npr.org/2020/07/14/890814007/biden-outlines-2-trillion-climate-plan.

Congressional wrangling, President Biden signed the Inflation Reduction Act ("IRA") into law. The IRA seeks to bring the Biden administration's decarbonization goals to life and aims to incentivize the rapid decarbonization of the American economy and electricity grid, partially by encouraging the development of renewable energy sources through tax breaks for the development of solar energy, wind energy, and battery storage.[2] These new sources of renewable energy cannot just be built, however. Rather, they must be connected to the electricity transmission grid so that the electricity that they generate can reach consumers.[3] Such a transition will be a tall challenge. The United States must more than double "the historical pace of electricity transmission expansion over the last decade in order to interconnect new renewable resources at sufficient pace and meet growing demand from electric vehicles, heat pumps, and other electrification" initiatives.[4] Despite this need, the construction of transmission infrastructure connecting different states and regions is currently "essentially stalled."[5]

Expansion of the electricity transmission system is crucial for rapidly increasing national access to the nation's renewable energy resources, decarbonizing the economy, and creating a more durable and flexible electricity system.[6] Inter-regional transmission lines are necessary to connect power generation in states that "are rich in renewable resources" and where renewable production "far exceeds [the] population-based electricity demand" to states that are poor in renewable resources and have high population-based power demand.[7] Despite the need for new inter-regional transmission lines, the construction of these lines faces high, and "often insurmountable," regulatory barriers.[8] There are many regulatory roadblocks in transmission line construction.[9] The permitting process for transmission line

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2. *See* Emily Stewart, Li Zhou, & Rebecca Leber, The Inflation Reduction Act, Explained , VOX (Aug. 16, 2022, 4:02pm EDT), https://www.vox.com/policy-and-politics/2022/7/28/23282217/climate-bill-health-care-drugs-inflation-reduction-act.

3. Jonathan M. Moch & Henry Lee, *The Challenges of Decarbonizing the U.S. Electric Grid by 2035*, HARVARD KENNEDY CENTER BELFER CENTER (Feb. 2022), https://www.belfercenter.org/publication/challenges-decarbonizing-us-electric-grid-2035 ("Connecting to the electric grid has been and will continue to be a primary bottleneck for the buildout of renewable resources.").

4. Jesse D. Jenkins, et al., *Electricity Is Key to Unlock the Full Potential of the Inflation Reduction Act*, PRINCETON UNIVERSITY ZERO LAB REPEAT PROJECT (Sept. 22, 2022), https://zenodo.org/record/7106176.

5. LIZA REED, TRANSMISSION STALLED: SITING CHALLENGES FOR INTERREGIONAL TRANSMISSION 3–4 (Niskanen Center, 2021) (stating that "[u]nder the current system of planning and permitting, high-voltage interstate transmission lines take eight to ten years on average to complete, if they succeed at all. Four years or more of that timeline is absorbed by … regulatory hurdles").

6. *See* Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1924 (2015); Melissa Powers, *Anticompetitive Transmission Development and the Risks for Decarbonization*, 49 ENV'T. L. 885, 897 (2019).

7. Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1873 (2012).

8. REED, *supra* note 5, at 6.

9. Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 130 MINN. L. REV. 129, 131 (2015) (describing that many states consider for example need, alternatives, potential environmental impacts, and local benefits).

construction is complicated and requires the approval of every state public utilities authority through which the line passes. These "siting, permitting and cost allocation practices can all potentially impede the real-world pace of transmission expansion."[10]

Most importantly, for the purposes of this paper, several states in the middle of the country – Minnesota, North Dakota, South Dakota, and Nebraska, and Texas, among others – have recently enacted broad right of first refusal ("ROFR") laws for the construction of transmission lines.[11] These laws limit who can build new transmission infrastructure to companies already operating within the state.[12] The geographic location of these states makes them potential crossroads for high voltage transmission lines that are crucial to bringing renewably generated energy to electricity users.

ROFR laws have generated judicial disagreement. Two transmission line developers that were shut out of the market challenged two of these laws for discriminating against interstate commerce and unconstitutionally violating the Commerce Clause. LS Power Transmission (LSP), a transmission company that was shut out of the bidding process for the construction of a new transmission line in Minnesota, sued the Minnesota Public Utilities Commission in federal court claiming that the ROFR law violated the Commerce Clause.[13] In Texas, NextEra Energy (NextEra) sued the Public Utilities Commission of Texas ("PUCT") in Federal district court when the Texas ROFR law prevented NextEra from constructing a new transmission line that it had already been awarded a contract to build.[14] The district court dismissed the transmission company's complaint for failing to state a claim in both cases,[15] and both companies appealed.

On appeal, the Fifth and Eighth Circuit split on the question of whether these laws discriminated against interstate commerce. The Eighth Circuit held that Minnesota's ROFR law was not an unconstitutional violation of the Commerce Clause,[16] and the Fifth Circuit held that Texas's ROFR law was presumptively unconstitutional and remanded the case to the district court.[17]

This note argues that the Fifth Circuit reached the correct decision. In Part One, this paper explores the background of the electricity transmission and explains the place of state ROFR laws in an already complex regulatory environment. In Part Two, it explores the dormant Commerce Clause and introduces and explains two states' ROFR laws and the resulting lawsuits that sought to have them invalidated. In Part Three, this paper argues that state ROFR laws that limit new transmission

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10. Jenkins, *supra* note 4, at 4.

11. Klass & Rossi, *supra* note 9, at 193 (noting also that many other states have narrower ROFR laws); TEX. UTIL. CODE ANN. § 37.056 (West 2023).

12. *Id. See also infra* Section II.C.

13. LSP Transmission Holdings LLC v. Sieben, 954 F.3d 1018 (8th Cir. 2020)

14. NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306 (5th Cir. 2022).

15. *LSP Transmission*, 954 F.3d at 1025; *NextEra Energy*, 48 F.4th at 315.

16. *LSP Transmission*, 954 F.3d at 1027–30.

17. *NextEra Energy*, 48 F.4th at 326–28.

line construction to incumbent transmission line operators already operating within the state violate the dormant Commerce Clause of the Constitution. These laws impermissibly serve as a "residence requirement" that limits non-resident, non-incumbent transmission line builders from entering the market for transmission line construction. Furthermore, a public utilities exception that could be used to exempt these laws from dormant Commerce Clause review does not apply, and state justifications (especially for the strictest laws) likely would not hold water as legitimate justifications for the discrimination against out-of-state interests. Finally, these laws inhibit the benefits of interstate commerce in the transmission construction markets: lower costs for consumers and more participants in a market that is crucial to decarbonizing the economy quickly. Part Four then briefly explores how the current Supreme Court would likely approach and rule on this issue if it grants certiorari to an appeal in a case that confronts these issues.

I. THE AMERICAN ELECTRICITY TRANSMISSION SYSTEM

A. Historical Background

The national electricity grid grew from small, independent grids that connected consumers to local electricity sources into the large, interstate grid that today connects electricity consumers to electricity generators that are often located far away.[18] Traditionally, vertically integrated utilities, which controlled electricity generation, transmission, and delivery to consumers, dominated the electricity industry.[19] The power of these vertically integrated, monopolistic utilities began to weaken in the 1970s, and Congress passed the Public Utility Regulatory Policies Act (PURPA) in 1978 to give qualified independent electricity producers access to the grid.[20] PURPA allowed new electricity sources that had previously been shut out, including renewables, to connect to the grid.[21]

Today, over 200,000 miles of high voltage transmission lines (those with a voltage of 230kV or greater) carry electricity throughout the country and link far away electricity generators to electricity consumers.[22] On its journey to the consumer, this high voltage electricity is stepped down to a usable voltage at a substation and is then delivered to consumers on lower-voltage, local distribution power lines (generally having a voltage lower than 50 kV).[23]

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18. *See* Klass & Wilson, *supra* note 7, at 1805.
19. Klass & Wilson, *supra* note 7, at 1806.
20. *Id.*
21. *Id.*
22. *Id.* at 1805–06.
23. *Id.*

B. A Jumble of Stakeholders: Federal and State Powers in Energy Transmission & Regional Transmission Organizations

A "complex mix of federal, state, and regional laws, policies, and politics" governs the planning and siting of new electricity transmission lines and impacts the construction of new lines.[24] Each component of this mix, to varying degrees, can stop the development of a new transmission line project in its tracks. But ultimately, when it comes to transmission line siting and approval, the states and their agencies hold nearly all the cards, while the Federal Government mostly has to sit back and watch.

The Federal Government exercises its limited power over transmission through the Federal Energy Regulatory Commission (FERC). The Federal Power Act grants FERC jurisdiction over electricity transmission in interstate commerce.[25] This power is relatively limited, however. FERC has the authority to set and approve rates on generator access to interstate transmission lines and exercises this power to ensure non-discriminatory access to the grid.[26]

States retain the power over the siting and construction of transmission lines built within the state, including transmission lines that are connected to an interstate transmission network.[27] States negotiate retail electricity rates with electric companies, choose which transmission lines can be built where, which transmission lines need to be built, who gets to exercise eminent domain to build these lines, and whether each line meets the state's environmental and public welfare requirements.[28] Most states delegate these powers to state public utility boards that issue certificates of need and approve siting and routing permits for new transmission line construction.[29] In this process, states generally consider how transmission lines would impact state resource planning, the need and demand for the line, and the environmental impact of the line.[30] The regulatory hurdles that each state's extensive powers pose to transmission line construction are heightened by the fact that interstate transmission lines must be approved by every state that the line passes through, and must satisfy each state's various individual requirements prior to construction.[31]

Regional Transmission Organizations (RTOs) are another set of players in this jurisdictional web that are meant to provide for some interstate cooperation but have not alleviated the difficulties of constructing interstate transmission lines. RTOs are FERC-sanctioned "voluntary associations of utilities and other grid

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24. *Id.* at 1802.
25. Klass & Rossi, *supra* note 9, at 144.
26. Klass & Wilson, *supra* note 7, at 1816.
27. Klass & Rossi, *supra* note 9, at 144.
28. *See Id.* at 144, 193; Powers, *supra* note 6, at 917.
29. Klass & Wilson, *supra* note 7, at 1807.
30. *Id.*
31. Klass & Rossi, *supra* note 9, at 149.

participants, subject to FERC oversight, which manage the grid and regional markets for wholesale electricity."[32] When a utility or transmission line operator joins an RTO, it gives the RTO operational control of its transmission lines.[33] RTOs are supposed to work with states to plan the development of necessary interstate transmission lines.[34] Today, there are many RTOs and ISOs operating in the United States: the California Independent System Operator, Electric Reliability Council of Texas ISO, Midcontinent Independent System Operator, ISO New England, New York Independent System Operator, PJM Interconnection, and the Southwest Power Pool.[35] In parts of the United States not covered by a FERC-sanctioned RTO (mainly the Southeast, Intermountain West, and the Pacific Northwest)[36], utilities manage their own transmission grid and work together to distribute power regionally.[37] Despite the operational and planning role of RTOs, they do not have the authority to approve siting of interstate transmission lines and, as such, they have not led to the interstate transmission being constructed at the necessary pace.[38]

C. Regulatory Roadblocks, State ROFR Laws, and a Wall Against the Development of New Transmission

As a consequence of the complex system of transmission line approval and management discussed above, there are many roadblocks that prevent the efficient construction of transmission line infrastructure. First and foremost, as mentioned above, transmission lines traversing more than one state must meet the requirements of each state that it passes through. Second, state regulators can reject electric transmission line projects for "almost any reason," regardless of how necessary they are from a national perspective.[39] This is especially true for pass-through transmission projects, which do not connect to power generators in the state or bring electricity to in-state consumers — they merely carry power from a generator in one state to consumers in yet another state.[40] ROFR laws further exacerbate the problem.

A right of first refusal is typically a contractual term that gives a business or individual a right to enter into a transaction with a person, company, or other

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32. *Id.* at 141.

33. *Id.* at 141–41.

34. *See Id.* at 144.

35. *Electric Power Markets: National Overview*, FERC, https://www.ferc.gov/electric-power-markets (last visited April 13, 2023).

36. *See Id.*

37. *See* Klass & Wilson, *supra* note 7, at 1848; FED. ENERGY REGUL. COMM'N, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 61 (2020), https://www.ferc.gov/media/2020-energy-primer-handbook-energy-market-basics.

38. *See* Klass & Rossi, *supra* note 9, at 146.

39. Klass & Rossi, *supra* note 9, at 131.

40. *Id.* at 132–33 (stating that states can, and sometimes do, only consider the costs and benefits to in-state citizens and noting that since citizens in "pass-through" states do not benefit from these transmission lines, the projects are often rejected).

entity before any other individual or business can do so.[41] Increasingly, however, these rights are also being created by state statutes.[42] In states that have passed ROFR laws for transmission line construction, incumbent companies that are already operating within the state get the first opportunity to build new transmission construction and siting projects, all of which must gain state approval.[43]

FERC formerly granted a ROFR to incumbent utilities that already operated interregional transmission lines.[44] The FERC ROFR gave these incumbent utilities "preferential rights to build and profit from new regional and interregional transmission infrastructure."[45] FERC granted these rights as an exercise of its power under the Federal Power Act to regulate the transmission of electricity in interstate commerce.[46] In July 2011, FERC issued Order No. 1000 to improve interregional transmission planning and operations across the country.[47] Among many other things, Order No. 1000 revoked the Federal ROFR and required that it be removed from Commission-approved tariffs. FERC explained that it revoked the ROFR to prevent "unjust and unreasonable tariffs and rates" because the exclusion of non-incumbent transmission builders that could compete on all levels with the incumbents' diluted competition for new transmission line construction.[48] Order No. 1000, however, explicitly did not preempt state level ROFR laws.[49]

In response to Order No. 1000 and the repeal of the Federal ROFR, some states passed their own ROFR laws for transmission construction. These laws give broad rights of first refusal to incumbent utilities for the construction of high voltage transmission lines that are connected to interstate, interregional transmission grids. Minnesota, North Dakota, South Dakota, North Carolina, Nebraska, and Texas passed transmission construction ROFR laws in the wake of FERC Order No. 1000.[50]

State ROFR laws are yet another roadblock that hinders the construction of needed interstate transmission by restricting the transmission construction market within states with ROFR laws in place to utilities and transmission line operators already operating within those states. These state laws could reduce or prevent competition within the crucial high-voltage transmission construction industry. This

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41. Rishi Garg, *What's Best for the States: A Federally Competitive Solicitation Model or a Preference for the Incumbent? State Adoption of Right of First Refusal Statutes in Response to FERC Order 1000 and the Dormant Commerce Clause* 3, Briefing Paper No. 13-04, NAT'L REG. RSCH. INST. (Apr. 2013), https://pubs.naruc.org/pub/FA86B912-F8B8-74F6-AA34-4E7BCE42A234.

42. *Id.*

43. Klass & Rossi, *supra* note 9, at 193. *See also* Powers, *supra* note 6, at 889.

44. Powers, *supra* note 6, at 889.

45. *Id.*

46. Klass & Rossi, *supra* note 9, at 144.

47. FERC Order No. 1000, 76 Fed. Reg. 49,842 (2011).

48. Powers, *supra* note 6, at 889.

49. James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm*, 35 ENERGY L. J. 71, 88 (2014).

50. Klass & Rossi, *supra* note 9, at 193; TEX. UTIL. CODE ANN. § 37.056(e)–(i) (West 2023).

goes against FERC's desire to encourage competition in Order No. 1000 among transmission developers for large regional projects.[51] These laws also may violate the dormant Commerce Clause of the Constitution.

II. THE DORMANT COMMERCE CLAUSE, THE MINNESOTA AND TEXAS ROFR LAWS, AND THE RESULTING COURT DECISIONS

The dormant Commerce Clause has been used to challenge state ROFR laws. This section explores the legal background of the dormant Commerce Clause and explores how it was and was not successfully used to challenge the Texas and Minnesota state ROFR laws for transmission construction.

A. The Dormant Commerce Clause

The dormant Commerce Clause is a doctrine that may successfully impose limits on state transmission ROFR laws.[52] The Dormant Commerce Clause is a doctrine of constitutional law developed by the Supreme Court in the nineteenth century. Article I, Section 8 of the Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[53] The Commerce Clause was meant to preserve a national market in goods.[54] So, by implication, the Commerce Clause also prevents states from passing legislation that discriminates against or burdens commerce "among the several States,"[55] more commonly referred to as interstate commerce.[56] Traditionally, the dormant Commerce Clause doctrine prevented three kinds of state conduct: (1) "discrimination against interstate or out-of-state interests," (2) the placing of unreasonable burdens on interstate commerce, and (3) state regulatory burden that had an extraterritorial economic impact.[57] At its core, the dormant Commerce Clause serves as a "safeguard against state and local regulatory procedures that enable [state-level] economic protectionism."[58]

Of the three main strands of dormant Commerce Clause jurisprudence, this paper focuses on one: state laws that discriminate against out-of-state interests. State laws that discriminate against interstate commerce or out-of-state interests usually facially benefit the economic interests of in-state actors and burden out-of-state

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51. Hoecker & Smith, *supra* note 49, at 90.

52. *See generally* Klass & Rossi, *supra* note 9 (arguing that these ROFR laws are discriminatory under Dormant Commerce Clause principles).

53. U.S. CONST. art. I, § 8 cl. 3.

54. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449, 2459–60 (2019).

55. U.S. CONST. art. I, § 8, cl. 3.

56. Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 258 (2017).

57. *Id.* (emphasis omitted).

58. Klass & Rossi, *supra* note 9, at 135.

interests.[59] When a court finds that a state law discriminates against out-of-state interests, it gives the state a chance to provide a justification for the law.[60] That justification must be a legitimate regulatory objective that does not have a reasonable and less discriminatory alternative that achieves the same objective.[61] The state's justification must have "actually motivated the measure" and not have been an "ex post rationalization."[62]

Dormant Commerce Clause jurisprudence is "driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[63] Since the heyday of dormant Commerce Clause jurisprudence in the mid-to-late twentieth century, however, the Supreme Court has "dramatically eroded the dormant Commerce Clause" and left it only "a slender remnant of the traditional model."[64] It has narrowed its focus on facially discriminatory state action to only intentional state protectionism.[65] The Supreme Court has also created numerous exceptions to allow state laws to stand that would otherwise violate the doctrine.[66]

One exception that may be relevant for ROFR cases is the so-called public utilities, or *Tracy*, exception, which was touched on by both the Fifth Circuit and the Eight Circuit in their opinions discussed below.[67] The dispute in *General Motors Corp. v. Tracy* concerned an Ohio law that exempted "natural gas companies" from a sales tax on goods purchased both in and out of state for use in Ohio.[68] The exemption triggered dormant Commerce Clause concerns because the definition of "natural gas companies" employed by Ohio courts included only Ohio's traditional natural gas utilities and not newer, independent marketers of gas (many of which were out-of-state companies) that sold gas directly to large, industrial users.[69] This distinction set up a system that taxed all out-of-state providers, but none of the in-state utilities.[70] The Court ruled, however, that the noncompetitive, heavily regulated utility market was distinct from the less regulated, competitive market served by the out-of-state providers, meaning that the two kinds of providers were not similarly situated and

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59. *See* Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 99 (1994) ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'").

60. *See Id.* at 489; Francis, *supra* note 56, at 260.

61. Francis, *supra* note 56, at 260.

62. *Id.* at 265 (emphasis omitted).

63. Klass & Rossi, *supra* note 9, at 154 (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008)).

64. Francis, *supra* note 56, at 255.

65. *Id.* at 272.

66. *Id.* at 257.

67. *See* discussion *infra* Sections II.b, II.c.

68. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 282 (1997).

69. *Id.* at 285.

70. *Id.* at 288.

could be treated differently without violating the Commerce Clause.[71] Furthermore, although the utilities also provided gas to the same industrial consumers served by the independent marketers, the importance of utilities for home consumers' access to heat made the Court more willing to exempt utilities from its otherwise *per se* rule against discrimination against out-of-state companies even in markets where there was genuine competition with in-state companies.[72] The court's leniency towards differential treatment of in-state utilities is now known as the *Tracy* exception.

Most relevant for the purposes of this paper, however, is the Supreme Court's more recent approach to laws that facially discriminate against interstate commerce. Since the 1980s, the Supreme Court has generally ignored facial discrimination when there is not enough evidence of a protectionist intention by the relevant state actor.[73] Under the Roberts Court, the strong rule against discrimination has been reserved only for facial discrimination that was not subjectively "directed to legitimate local concerns."[74] Despite this whittling down of the scope of the dormant Commerce Clause, the Roberts Court has consistently refused to scrap the dormant Commerce Clause entirely.[75] The dormant Commerce Clause, despite its complications and limitations is "especially well suited to address problems in energy transportation infrastructure, insofar as it focuses on promoting a norm of coordination between states that is essential to both federalism and energy markets."[76] Courts have begun to address questions about the constitutionality of these state ROFR laws, and the Fifth and Eight Circuits have split on whether these laws violate the Commerce Clause.[77]

B. Minnesota's ROFR Law for Transmission Construction and LSP Transmission Holdings, LLC v. Sieben (2019)

Minnesota passed its transmission line construction ROFR law in 2012 in the wake of FERC's Order No. 1000,[78] which, as discussed above, removed the Federal ROFR for transmission line construction in interstate transmission projects.[79] The Minnesota ROFR law gives an incumbent electric transmission owner, which is defined as "any public utility that owns, operates, and maintains an

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71. *Id.* at 310.

72. *See Id.* at 303–10.

73. Francis, *supra* note 56, at 278–81.

74. *Id.* at 288 (emphasis omitted) (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007)).

75. Klass & Rossi, *supra* note 9, at 156 (noting that the Roberts Court has repeatedly questioned the judiciary's institutional capacity to apply the dormant Commerce Clause, but that it has refused to overturn it outright).

76. *Id.* at 157–58.

77. *See* LSP Transmission Holdings, LLC v. Sieben, 954 F.3d 1018 (8th Cir. 2020); NextEra Energy Capital Holdings, Inc. v. Lake, 48 F.4th 306, 314 (5th Cir. 2022).

78. Powers, *supra* note 6, at 924–25, note 335.

79. Powers, *supra* note 6, at 889.

electric transmission line in this state," the right to build and operate electric transmission lines that have been approved in an RTO transmission plan and "connects to facilities owned by that incumbent electric transmission owner."[80] Additionally, if an incumbent transmission line operator "indicates that it does not intend to build the [necessary] transmission line" and "gives notice of intent" that it will not build the transmission line, only then can the Minnesota Public Utility's Commission "determine whether the incumbent electric transmission owner or other entity will build the electric transmission line."[81]

In 2017, two incumbent utilities in Minnesota exercised their right of first refusal to build a new transmission line in Minnesota that the RTO that covers Minnesota, Midcontinent Independent System Operator ("MISO"), had recommended be developed to improve regional and inter-regional transmission.[82] LSP, a transmission line company that had been blocked out of the chance to build the line, sued the state alleging that the ROFR law discriminated "in favor of incumbent utilities with an existing footprint within the state of Minnesota and against utilities that lacked such presence."[83] The district court promptly rejected LSP's claims and granted the state's motion to dismiss for failure to state a claim and concluded that the ROFR law did not violate the dormant Commerce Clause.[84]

On appeal, the Eight Circuit affirmed the district court's judgment.[85] The court quickly moved to its dormant Commerce Clause analysis, reasoning that while the "public utilities exception" created by the Supreme Court in *General Motors Corp. v. Tracy* may apply it did not need to decide whether it did or not because it did not find the law in question facially discriminatory.[86] The court's analysis was based on the fact that "Minnesota's preference is for electric transmission owners who have existing facilities, and its law applies evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere."[87] The court focused its analysis on where companies were headquartered, not whether they had a presence in Minnesota.[88] It summarily dismissed the other dormant Commerce Clause claims and affirmed the dismissal of all of LSP's claims by the district court.[89]

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80. MINN. STAT. § 216B.246, subd. 1–2 (2022).

81. *Id.* § 216B.246, subd. 3 (b).

82. Powers, *supra* note 6, at 921–22.

83. *Id.* at 922.

84. LSP Transmission Holdings LLC v. Lange, 329 F. Supp. 3d 695, 710–11 (D. Minn. 2018) *aff'd sub nom*. 954 F.3d 1018 (8th Cir. 2020).

85. LSP Transmission Holdings LLC v. Sieben, 954 F.3d 1018, 1031 (8th Cir. 2020).

86. *Id.* at 1027–29.

87. *Id.* at 1028.

88. *Id.*

89. *Id.* at 1029–31.

C. Texas's ROFR Law for Transmission Construction and NextEra Energy v. Lake (2022)

Texas passed its transmission construction ROFR law in 2019 after NextEra Energy, a company that did not operate transmission lines in Texas, was awarded a MISO contract to build a high voltage transmission line in a part of Texas connected to the MISO-managed grid.[90]

Texas' ROFR law limits the state's public utilities commission to granting certificates "to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility" to companies that own the existing facility.[91] Or, in the alternative, a utility that does not exercise its right to build new transmission infrastructure may "designate another electric utility that is currently certificated by the commission within the same electric power region, coordinating council, independent system operator, or power pool. . . to build, own, or operate a portion or all of such new transmission facility."[92] Because of the peculiarities of the Texas grid, the law applies to both the intrastate grid that operates entirely within Texas by the Electric Reliability Council of Texas ("ERCOT"), an intra-state, Texas-only ISO, and to the parts of the Texas grid that connect to interstate RTOs.[93]

In November 2018, after a competitive bidding process, MISO selected NextEra energy to build a high-voltage transmission line and substation in eastern Texas that connected to MISO's interstate transmission grid.[94] MISO and NextEra entered into an agreement, a condition of which was NextEra receiving a certificate of convenience and necessity from PUCT.[95] Soon after this agreement was reached, the passage of Tex. Util. Code § 37.056(e) foreclosed NextEra's ability to receive the required certificate from PUCT.[96] In response to being shut out of the Texas power and transmission market, NextEra sued the PUCT commissioners in federal district court alleging violations of the dormant Commerce Clause and the Contracts Clause.[97] The district court quickly dismissed the case on the Commissioner's motion

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90. TEX. UTIL. CODE ANN. § 37.056(e)–(i) (West 2023); NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306, 310 (5th Cir. 2022).

91. TEX. UTIL. CODE ANN. § 37.056(e) (West 2023).

92. *Id.* § 37.056(g).

93. *See NextEra Energy*, 48 F.4th at 313 (noting that MISO and the Southwest Power Pool (SPP) operate in east Texas).

94. *Id.* at 314–15. It is also important to emphasize that only parts of Texas are connected to interstate grids. Most of Texas's transmission system in managed by the Electric Reliability Council of Texas (ERCOT), which is an entirely in-state entity. *Id.* at 313.

95. *Id.* at 315.

96. *Id.*

97. *Id.*

to dismiss for failure to state a claim and rejected all of NextEra's dormant Commerce Clause claims.[98] NextEra promptly appealed.

After quickly dispensing with some jurisdictional and standing issues, the Fifth Circuit moved to its dormant Commerce Clause analysis. First, it dispensed with PUCT's claim that *General Motors v. Tracy* controlled the case and exempted the Texas law from dormant Commerce Clause review. It differentiated *Tracy*_by noting that *Tracy* dealt with a utility market that gave "in-state businesses a preference in both captive and noncaptive retail markets."[99] The utility market for the construction of transmission lines in Texas, however, was not a captive market. It was a competitive one.[100] As such, the Texas law was "not immune from Commerce Clause scrutiny."[101]

Next, the court began its dormant Commerce Clause analysis and analyzed whether the law discriminated "against interstate commerce by its text (or 'face')."[102] It noted that transmission lines that are part of an interstate electricity grid are inherently within the realm of interstate commerce and therefore state protectionist measures run a much greater risk of "harming out-of-state interests."[103] It also noted that, despite many of the protected incumbents being incorporated or headquartered outside of Texas, the Supreme Court and other circuit courts of appeals have not allowed this to insulate state laws from Commerce Clause scrutiny.[104]

To the Fifth Circuit, "local presence" was the relevant geographical category. The Texas law prevents transmission companies without a presence in Texas from "entering the portions of the interstate transmission market that cross into Texas."[105] The opinion leaned on the Supreme Court's recent decision in *Tennessee Wine and Spirits Retailers Ass'n v Thomas*, in which the Court concluded that a state law that required two years of residency before one could apply to open a liquor store impermissibly favored in-state interests.[106] In *NextEra Energy*, the Fifth Circuit concluded that "requiring boots on the ground discriminates against interstate commerce."[107] Furthermore, the Fifth Circuit concluded that the law is "a local-presence requirement frozen in place" that prevents new entrants from building new transmission lines in Texas.[108] It ultimately held that "limiting competition

98. NextEra Energy Cap. Holdings, Inc. v. Walker, No. 1:19-CV-626-LY, 2020 WL 3580149 (W.D. Texas Feb. 26, 2020) *aff'd in part, rev'd in part sub nom*. 48 F.4th, 306 (2022) (affirmed as to its holding on NextEra Energy's Contracts Clause claim).

99. NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306, 319 (5th Cir. 2022).

100. *Id.* at 320.

101. *Id.*

102. *Id.* at 321.

103. *Id.* at 322.

104. *See Id.* at 324.

105. *Id.* at 323–24.

106. *Id.* at 324; *Tenn. Wine and Spirits Retailers Ass'n*, 139 S.Ct. 2449 (2019).

107. NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306, 325 (5th Cir. 2022).

108. *Id.*

based on the existence or extent of a business's local foothold is the protectionism that the Commerce Clause guards against."[109] It also noted that, while promoting the safety and reliability of the grid may justify the discrimination, the law was nevertheless discriminatory and fell within the scope of the dormant Commerce Clause, meaning that the case was not properly dismissed.[110]

Ultimately, after touching on how NextEra also raised issues of discriminatory intent and discriminatory effect that warranted further fact development, Fifth Circuit reversed the district court decision and remanded the case for further proceedings.[111] The Fifth Circuit released its opinion in August 2022. PUCT filed a petition for a writ of certiorari on December 28, 2022 that is still before the Supreme Court.[112]

III. STATE ROFR LAWS FOR TRANSMISSION CONSTRUCTION VIOLATE THE DORMANT COMMERCE CLAUSE

The Fifth Circuit got it right. State ROFR laws likely violate the dormant Commerce Clause. First, the public utilities exception does not exempt them from dormant Commerce Clause review. Second, these laws serve as a "residence requirement" that limits non-resident, non-incumbent transmission line builders from entering the market for transmission line construction in violation of the dormant Commerce Clause. Third, state justifications (especially for the strictest laws) are not legitimate justifications for discrimination against out-of-state interests. Finally, these laws inhibit the benefits of interstate commerce in the transmission construction market: lower costs for consumers, the most-cost efficient companies building transmission lines, and more companies in a market that is crucial to quickly decarbonizing the economy.

A. The "Public Utilities Exception" Does Not Apply Here

The Eighth Circuit, without dwelling too much on the issue, decided that it did not need to decide the *Tracy* issue, since doing so would only eliminate the need to do an overt discrimination dormant Commerce Clause analysis.[113] Since most ROFR laws are violations of the dormant Commerce Clause's facial discrimination test, however, the *Tracy* exception will be relevant to most similar cases.

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109. *Id.* at 326.

110. *Id.*

111. *Id.* at 329.

112. *Petition for Writ of Certiorari*, Lake v. NextEra Energy Capital Holdings, Inc., No. 20-601 2022 WL 18089507 (U.S. Dec. 28, 2022). The Court has invited the Solicitor General to file a brief expressing the views of the United States. Lake v. NextEra Energy Capital Holdings, Inc., 2023 WL 2357325 (Mar. 6, 2023).

113. LSP Transmission Holdings LLC v. Sieben, 954 F.3d 1018, 1026–27 (8th Cir. 2020).

The primary reason that the *Tracy* "public utilities" exception does not protect state ROFR laws is that the natural gas markets discussed in *Tracy* and the market for the construction of interstate transmission lines are situated differently. In *Tracy*, the Supreme Court allowed Ohio to treat bundled and unbundled gas providers differently.[114] It decided that striking down the Ohio law would not serve dormant Commerce Clause goals to maintain a competitive national market because the two companies were not competing in a competitive market.[115] The Court distinguished the markets served by the two companies because they provided different products to different markets.[116] Bundled gas providers provided gas and other services to captive customers in a state-sanctioned utilities monopoly and to industrial non-captive customers.[117] Nonbundled gas providers only provided gas to industrial, non-captive customers.[118] The bundled providers that provided gas to captive residential customers and non-captive industrial customers received a tax benefit for providing gas to residential customers. This market distinction is not present in the transmission construction market. Incumbent, vertically-integrated utilities that are building transmission lines and new, out-of-state companies seeking to build transmission lines both offer the same service: constructing and operating interstate transmission lines.[119]

The *Tracy* court also emphasized the importance of not interfering with federally sanctioned state regulation of the retail sale of natural gas as a reason to ignore the competitive market for non-captive industrial customers.[120] Ohio treated the two bundled and non-bundled gas providers differently because the bundled gas providers provided services beyond gas sales. Bundled gas providers built and operated natural gas delivery infrastructure, managed supply, and operated programs for low-income customers.[121] That is not the case for transmission line construction. Power over interstate transmission lines is divided between the states, which have authority over siting and certification, and federal authorities, who have general authority over interstate transmission.[122] State ROFR laws do not serve a federally sanctioned goal like the Ohio tax exemption in *Tracy*.[123] Out-of-state companies

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114. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299–310 (1997).

115. *Id.* at 310 ("Ohio's regulatory response to the needs of the local natural gas market has result 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.").

116. *Id.* at 299.

117. *Id.* at 301.

118. *Id.*

119. NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th306, 319 (5th Cir. 2023).

120. *See Tracy*, 519 U.S. at 310.

121. Powers, *supra* note 6, at 919.

122. Klass & Rossi, *supra* note 9, at 144. *See also e.g.*, *NextEra Energy*, 48 F.4th at 319.

123. *See Tracy*, 519 U.S. at 309–10 (noting that, because Congress recognized the scheme, "[p]rudence thus counsels against" invalidating the exemption "despite its noncompetitive, monopolistic character). Congress has not so recognized state electricity transmission construction ROFR laws.

seeking to compete in the interstate transmission construction market must satisfy state regulatory requirements just like companies that are already operating within the state.[124] The ROFR statutes at issue here only limit competitors in "competitive market[s]" for the construction and operation of utility lines.[125] Consequently, state ROFR laws that impact a single, competitive, mostly interstate market where electric utilities and transmission construction and operation companies compete to build and operate transmission infrastructure should not be immune from scrutiny under the dormant Commerce Clause because of the "public utilities exception."

B. State ROFR Laws Are Illegal Residency Requirements That Facially Discriminate Against Non-Resident Businesses

If a law discriminates on its face, then it falls within the scope of the dormant Commerce Clause and is likely a per se violation of the dormant Commerce Clause.[126] The Supreme Court has held that laws overtly discriminate against out-of-state companies when they serve as a local presence requirement.[127] In two particular cases, *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*[128] and *Granholm v. Heald*,[129] the Supreme Court has explored the facially discriminatory nature of local presence requirements.

In both cases, states imposed certain requirements on out-of-state businesses and individuals that served as local presence requirements to access the market. Tennessee required that people prove two-years of residency to obtain a license to operate a liquor store.[130] In *Granholm*, both Michigan and New York prohibited out-of-state wineries from selling directly to consumers but allowed in-state wineries to do so.[131] In *Tennessee Wine and Spirits*, the Court held that the 2-year residency requirement "discriminates on its face against nonresidents."[132] Likewise, in *Granholm*, the court held the rules to be violations of the dormant Commerce Clause because they were obviously discriminatory.[133] It noted "the mere fact of nonresidence should not foreclose a producer in one State from access to markets in

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124. *See* Klass & Rossi, *supra* note 9, at 131. *See also e.g.*, *Tracy*, 519 U.S. at 310.

125. *NextEra Energy*, 48 F.4th at 319.

126. Francis, *supra* note 56, 261–65.

127. *See e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (holding that an ordinance prohibiting the sale of milk unless it was bottled within five miles of the city "plainly discriminate[d] against interstate commerce); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 353 (1992) (holding that a state statute that effectively segmented the market in waste management along county lines "unambiguously discriminate[d] against interstate commerce").

128. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449 (2019).

129. Granholm v. Heald, 544 U.S. 460 (2005).

130. *Tenn. Wine & Spirits Retailers Ass'n*, 139 S.Ct. at 2457.

131. *Granholm*, 544 U.S. at 460.

132. *Tenn. Wine & Spirits Retailers Ass'n*, 139 S.Ct. at 2474.

133. *Granholm*, 544 U.S. at 473–76.

other states" and that the laws at issue "deprive citizens of their right to have access to the markets of other states on equal terms."[134]

Like the residency requirements at issue in *Granholm* and *Tennessee Wine and Spirits*, state ROFR laws discriminate against companies without a local presence. If a transmission line construction and operations company does not already have a presence as a transmission line operator within the state, it has no opportunity to establish itself as a transmission line operator and is locked out of the interstate market for transmission construction and operation within the state. In the case of the Texas law, in particular, the ROFR law locks out non-resident companies permanently from operating in the portions of Texas' electricity grid that are connected to the interstate grid. If a company is not already operating transmission infrastructure within the state, they cannot do so in the future. State transmission ROFR laws act as permanent local presence and residence requirements that the Commerce Clause prohibits.

Place of incorporation or where a company is headquartered should not matter in this analysis. The Eighth Circuit held that Minnesota's ROFR law did not violate the dormant Commerce Clause because it was facially neutral as to where companies were headquartered or incorporated and therefore did not discriminate against out-of-state companies.[135] The Fifth Circuit noted, however, pointing to opinions by the Eleventh and First Circuit Courts of Appeals that "most circuits have rejected the idea that a law survives Commerce Clause scrutiny if many of the favored interests are incorporated elsewhere" and that the idea is irreconcilable with Supreme Court rulings on physical presence requirements.[136] Beyond precedent, this makes logical sense. Place of incorporation is often not reflective of where a company's home state is and where it primarily operates. Many companies choose not to incorporate in states where they primarily operate but in states with favorable case law, favorable corporate laws, and optimal tax treatment by the state.[137] While place of incorporation should perhaps be a consideration in the dormant Commerce Clause analysis of state transmission ROFR laws because it could be indicative of an in-state presence, it should not be determinative. Place of incorporation is a poor proxy measure of which companies have meaningfully in-state interests. Whether the law acts as a local presence requirement should be determinative, however, since local presence indicates a genuine in-state interest.

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134. *Id.* at 472–73.

135. *See* LSP Transmission Holdings LLC v. Sieben, 954 F.3d 1018, 1028–29 (8th Cir. 2020).

136. NextEra Energy Capital Holdings, Inc. v. Lake, 48 F.4th 306, 323 (5th Cir. 2022) (citing Fla. Transp. Servs., Inc. v. Miami-Dade Cnty., 703 F.3d 1230, 1259 (11th Cir. 2012) and Walgreen Co. v. Rullan, 405 F.3d 50, 58 (1st Cir. 2005).

137. Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial Home for an Artificial Person*, 53 HOUS. L. REV. 631, 659 (2016).

C. There Is No Justifiable Legitimate Local Interest That Saves Facially Discriminatory State ROFR Laws

Since state ROFR laws should be considered facially discriminatory, the question becomes whether they are justified by a legitimate aim without a nondiscriminatory regulatory alternative for achieving it. While this bar is usually hard to clear, there is a subjective component. First, the Supreme Court "seems to require that the state show that the justification in question actually motivated the measure and is not an ex post rationalization."[138] In this analysis, the Court asks whether there is a legitimate reason for the discrimination, and whether the reason for the discrimination varies based on "out-of-stateness [sic]" of the entity impacted.[139] It then analyzes whether the "problem" that that state is trying to address is unique to that state or common to most states.[140] Common, evenly-shared problems are not allowed to be solved by measures that discriminate against out-of-state entities or interstate commerce.[141]

The reasons provided by Minnesota and Texas for their ROFR laws – to provide safe, reliable electricity service, at a fair price to consumers – are local interests that do not legitimately justify the laws. First, the solution of passing transmission ROFR laws is not narrowly tailored to the problem. Second, these policy considerations are not unique to Minnesota and Texas.

The reliability justification does not hold water. Non-incumbents seeking to build transmission lines can provide just as reliable service as incumbent utility companies. Similar to the process NextEra would have had to undergo in the state of Texas before the state legislature pulled the rug out from under their plans, non-incumbents would have to go through an application and approval process with PUCT to obtain a certificate of convenience and necessity before it could build a transmission line.[142] The state utility board would make sure the non-incumbent company was up for the job and had the capabilities to build and operate the transmission line. Additionally, most companies seeking to build a utility line in a state in which they do not yet have a presence are likely already operating in other states and should have the experience to build a line effectively and safely. Even new companies would have to go through the requisite state approvals discussed above to gain their certificate of convenience and necessity.

The cost justification is also not convincing. ROFR laws that limit who can build transmission infrastructure do not necessarily lower costs for consumers within the state. FERC eliminated its own ROFR for transmission construction because it believed that a more open market "would result in adequate, reliable, and cost-

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138. Francis, *supra* note 56, at 264–65 (emphasis omitted).

139. *Id.* at 265.

140. *Id.*

141. *Id.*

142. *See* TEX. UTIL. CODE ANN. § 37.051 (West 2023); tit. 16 TEX. ADMIN. CODE § 25.101 (2023); *see also* NextEra Energy Holdings, Inc. v. Lake, 48 F.4th 306, 313 (5th Cir. 2022).

effective service," while also creating a more "fair transmission development process."[143] Furthermore, the development of transmission lines by non-incumbent utilities or independent transmission construction companies would often result in construction costs not being passed along to consumers, which will save customers money on their electricity bills. This is because, as Klass and Rossi note, independent transmission line builders and operators, unlike public utilities operating within state, "do not receive any recovery at all from ratepayers but instead take on the full risk of the project's success in the market."[144]

Finally, the cost, efficiency, and safety concerns that Minnesota and Texas put forth and that purportedly justify discriminatory ROFR laws are not local problems. States that implement ROFR laws are not seeking to solve localized problems, rather, they are seeking to solve common problems. All states want to ensure that their citizens receive efficient, reliable electricity at a fair cost. State transmission ROFR laws cannot discriminate against out-of-state entities to accomplish these goals because these goals are shared by all fifty states.

D. State ROFR Laws Are Contrary to the Policy of the Dormant Commerce Clause

Finally, there are two primary policy reasons that these laws should be held to violate the dormant Commerce Clause. First, these laws inhibit the benefits of interstate commerce that the dormant Commerce Clause is meant to promote. Second, these laws challenge the preferences of FERC.

A more open transmission construction market in states with ROFR laws would allow for a more vibrant, competitive, and fast-moving transmission construction market. Limiting the pool of transmission developers is bad for energy consumers and independent renewable energy generators but not for incumbent transmission line companies. States with transmission ROFR laws "limit the pool of possible transmission developers, lower the incentives for innovation and lower cost-transmission designs, and raise the prices of transmission services for power producers and, ultimately, ratepayers."[145] The laws prevent new energy generators and transmission companies from participating in the market and keeps the incumbent transmission line companies, whether they are vertically integrated utilities or independent transmission companies, in control of the market. State ROFR laws should not be able to prevent an array of different companies from promoting the development of and access to renewable energy in a time when we desperately need to decarbonize.

ROFR laws in transmission construction also go against FERC's policy objectives in eliminating the Federal ROFR. These laws reduce the competition that

143. Powers, *supra* note 6, at 925.

144. Klass & Rossi, *supra* note 9, at 195.

145. Powers, *supra* note 6, at 926.

FERC sought to encourage with Order No. 1000.[146] FERC also determined that protection of incumbents stifled effective transmission line planning and increased costs for customers.[147] While it is important that FERC also explicitly did not ban the state-level transmission ROFR laws that impact inter-regional transmission line construction, FERC's decision to eliminate the federal ROFR is indicative of the benefits that a more open transmission market would have in the eyes of federal policy makers that look at the needs of the entire national transmission grid.

IV. THE SUPREME COURT WOULD LIKELY HOLD THAT ROFR LAWS VIOLATE THE COMMERCE CLAUSE

The dormant Commerce Clause is "alive and well" as a doctrine in the Supreme Court.[148] As a result, the Court would likely agree with the Fifth Circuit and hold that state ROFR laws for transmission construction violate the dormant Commerce Clause.[149] While the court has undoubtedly limited the reach of the dormant Commerce Clause to strike down state laws over the past half-century,[150] it has not dispensed with the doctrine entirely. Because the doctrine "has enjoyed a long history, untouched by Congress and persistently followed by judges,"[151] including current Justices of the Supreme Court, it should be an effective tool to challenge state transmission ROFR laws among the present court.

There is likely a majority of five justices who would look at state ROFR laws and see discrimination against out-of-state businesses and interstate commerce. Additionally, they would likely not find state justifications persuasive. The *Tennessee Wine and Spirits* decision discussed above may be indicative of where the court would land on the legality of state ROFR laws.[152] Justice Alito wrote the majority opinion for *Tennessee Wine and Spirits* and four other justices from this majority opinion remain on the court, including Justices Roberts, Kavanaugh, Sotomayor, and Kagan.[153] These justices are a potential majority for a decision in a case about state ROFR laws in transmission line construction along the lines of the *Tennessee Wine and Spirits* decision. If the justices see this case like they saw *Tennessee Wine and Spirits*, the same majority would likely strike down the law as a dormant Commerce

146. Hoecker & Smith, *supra* note 51, at 90.

147. FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,885 (2011).

148. Klass & Rossi, *supra* note 9, at 157.

149. *See* NextEra Energy Capital Holdings, Inc. v. Lake, 48 F.4th 306, 328 (5th Cir. 2022).

150. For a description of the full history of the dormant Commerce Clause *see* Francis, *supra* note 56.

151. Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1938 (2011).

152. *See* discussion *supra* Section III.b.

153. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449, 2452 (2019).

Clause violation. This is especially so since it is rare for the Court reverse recent dormant Commerce Clause decisions.[154]

It is also notable that, in deciding *Tennessee Wine and Spirits*, the Supreme Court invalidated a state law that existed in a highly regulated market in which states have the vast majority of regulatory control. A market in which states exercise high amounts of regulatory power in exercise of their police powers may make the Supreme Court more hesitant to find that ROFR laws violate the dormant Commerce Clause.[155] Both the 21st Amendment and the Webb-Kenyon Act allowed states to regulate alcohol within their borders pretty much however they saw fit.[156] The electricity market, including all of its many regulators and players is, as discussed above, an area in which state regulatory control is prominent, like the state alcohol markets. This high level of state regulatory control over the electricity market could leave more room for deference to states on how they choose to regulate this market.[157] Under the *Tennessee Wine and Spirits* decision, however, this likely would not prevent the Supreme Court from weighing in on the constitutionality of state transmission ROFR laws under the Commerce Clause.[158] The prominent state regulatory role in electric transmission does not mean that state action can escape the constitutional limitations of the dormant Commerce Clause.[159]

Two justices, Justices Gorsuch and Thomas, are skeptical of the dormant Commerce Clause.[160] Gorsuch would likely look for other grounds to decide the case and uphold state ROFR laws in transmission line construction. Justice Gorsuch wrote the dissent in *Tennessee Wine and Spirits*. The foundation of his dissent, however, was not based on issues with the dormant Commerce Clause. Gorsuch believed Congress had given the states authorization to violate the dormant Commerce Clause by giving the "States wide latitude to restrict the sale of alcohol

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154. Edward A. Zelinsky, *Comparing Wayfair and Wynne: Lessons for the Future of the Dormant Commerce Clause*, 22 CHAP. L. REV. 55, 55 (2019) (noting that "[i]t will continue to be rare for the Court to reverse its own dormant Commerce Clause decisions").

155. *See Tenn. Wine & Spirits*, 139 S.Ct. at 2468–69.

156. *Id.* at 2477–78 (Gorsuch, J., dissenting) (explaining how the Webb-Kenyon Act "gave the States wide latitude to restrict the sale of alcohol within their borders" and "the Twenty-first Amendment closely followed the wording of the 1913 Webb-Kenyon Act") (internal quotation marks omitted).

157. *See* LSP Transmission Holding, LLC v. Sieben, 954 F.3d 1018, 1031 (8th Cir. 2020) (finding that Minnesota's decision to implement a ROFR was a legitimate way to regulate the intrastate transmission of electricity largely because of the state's prominent police power and regulatory role in the electricity industry).

158. *See Tenn. Wine & Spirits*, 139 S.Ct. at 2477 (Gorsuch, J., dissenting) ("But precisely because the Constitution assigns *Congress* the power to regulate interstate commerce, that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents.").

159. *See Tenn. Wine & Spirits Retailers Ass'n*, 139 S.Ct. at 2469.

160. *See e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."); *Tenn. Wine & Spirits Retailers Ass'n*, 139 S.Ct. at 2477 (Gorsuch, J., dissenting) ("Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one").

within their borders" in both the Webb-Kenyon Act of 1913 and in the 21st amendment to the Constitution.[161] Justice Gorsuch, given his reluctance to directly confront dormant Commerce Clause jurisprudence in *Tennessee Wine and Spirits*, may seek to find narrow grounds to uphold the state ROFR laws without directly confronting the dormant Commerce Clause despite his skepticism of it. Justice Thomas joined Gorsuch's dissent in *Tennessee Wine and Spirits* and is openly hostile to the dormant Commerce Clause jurisprudence. He would undoubtedly uphold a ROFR law as constitutional due to his belief that the dormant Commerce Clause is a judicial creation that has no foundation in the text of the Constitution.[162]

The two remaining Justices, the newest members of the Court, Justice Brown Jackson and Justice Coney Barrett, could go either way if a case about state ROFR laws in transmission construction made it to the Supreme Court and the majority ruled against these laws. With five members of the *Tennessee Wine and Spirits* decision still on the Court, the Supreme Court would likely be willing to hold that state ROFR laws are facially discriminatory against out-of-state interests and interstate commerce and violate the dormant Commerce Clause.

CONCLUSION

The United States must build out the electricity grid quickly, both to connect clean energy sources to the grid as replacements for fossil fuel-based sources, but also to meet growing demand for electricity due to increasing electrification. To have a chance at meeting the Biden administration's goals for the decarbonization of the economy, several regulatory roadblocks need to be dealt with, either via legislation or in the courts, so that transmission infrastructure can be built at an adequate pace. State electricity transmission ROFR laws are one of these roadblocks. Luckily, the dormant Commerce Clause is a judicial tool that should likely be able to deal with the anti-competitive and anti-transmission-development effects of these laws.

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161. *Tenn. Wine & Spirits Retailers Ass'n*, 139 S.Ct. at 2477–78 (Gorsuch, J., dissenting).

162. *See* Camps Newfound, 520 U.S. at 610 (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

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