No. 24-4803

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFICORP, an Oregon business corporation
Plaintiff-Appellant,

v.

LAURA WATSON, in her official capacity as
Director of the Washington State Department of Ecology
Defendant-Appellee.

Appeal from United States District Court for the
Western District of Washington
Case No. 3:23-cv-06155-TMC, Judge Tiffany M. Cartwright

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiff-appellant PacifiCorp, by and through its undersigned counsel, makes the following disclosures:

1. Appellant PacifiCorp, d/b/a Rocky Mountain Power Company and d/b/a/ Pacific Power, is a business incorporated in the state of Oregon. PacifiCorp is a subsidiary of PPW Holdings, LLC. PPW Holdings, LLC is a subsidiary of Berkshire Hathaway Energy Company, which in turn is a consolidated subsidiary of Berkshire Hathaway, Inc. ("BHI").

2. Other than BHI, there are no publicly held corporations that own any common stock of, or any other voting interest in, PacifiCorp.

DATED: October 30, 2024. MARKOWITZ HERBOLD PC

s/ Dallas DeLuca

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STATEMENT REGARDING ORAL ARGUMENT

Appellant PacifiCorp respectfully requests oral argument in this matter, given the district court's errors and the constitutional issues involved in the claim.

DATED: October 30, 2024.

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INTRODUCTION

Plaintiff-appellant PacifiCorp ("PacifiCorp") owns and operates a natural gas-fired electric power plant in Chehalis, Washington ("Chehalis"). The emissions generated by the Chehalis plant make PacifiCorp a "covered entity" under Washington's Climate Commitment Act (the "CCA"). In an effort to reduce carbon-based emissions, the CCA requires covered entities to buy expensive allowances at auction for each metric ton of carbon dioxide emissions they generate. The CCA caps overall carbon emissions, and the number of allowances available for purchase decreases over time, using market pressure to reduce emissions.

Defendant-appellee Laura Watson in her capacity as the Director of the Washington State Department of Ecology ("Ecology") is wrongly discriminating against PacifiCorp's out-of-state customers of electricity from Chehalis. Ecology discriminates by allocating no-cost CCA allowances for PacifiCorp's in-state customers of Chehalis. For electricity from Chehalis that serves PacifiCorp's out-of-state customers, PacifiCorp must purchase allowances from Ecology at auction at great cost and either absorb that cost or pass it along to out-of-state customers.

This preferential treatment of PacifiCorp's in-state customers—and the resulting discrimination against PacifiCorp's out-of-state customers—violates the dormant Commerce Clause of the United States Constitution. The district court erred when it granted Appellee's motion to dismiss and denied PacifiCorp's motion for a preliminary injunction, and this Court should reverse.

JURISDICTIONAL STATEMENT

A. Subject Matter Jurisdiction of the District Court.

Plaintiff PacifiCorp alleged claims under 42 U.S.C. § 1983, for declaratory and injunctive relief. Those claims alleged violations of the dormant Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3; *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The district court thus had subject matter jurisdiction over this claim pursuant to 28 U.S.C. § 1331, allowing review of questions arising under federal law, including the U.S. Constitution.

B. Appellate Jurisdiction.

The district court entered a judgment dismissing all of PacifiCorp's claims. (ER-4.) The Ninth Circuit Court of Appeals has jurisdiction under 28 U.S.C. § 1291, allowing review of final decisions of a district court.

C. Timeliness of Appeal.

The district court entered its order denying Plaintiff's Motion for Preliminary Injunction and granting Defendant's Motion to Dismiss on July 15, 2024, (ER-5–29), and a judgment dismissing plaintiff's claims the same day. (ER-4.) Plaintiff-Appellant PacifiCorp filed a Notice of Appeal on August 2, 2024, within the time allowed by Fed. R. App. P. 4(a)(4)(A)(v). (ER-243–45.)

STATEMENT OF THE ISSUES

1. Did the district court err when it found that PacifiCorp's out-of-state customers were not "similarly situated" to PacifiCorp's in-state customers for purposes of a claim of facial discrimination under the dormant Commerce Clause?

2. Did the district court err in granting Ecology's motion to dismiss, when PacifiCorp established that Ecology's implementation of the CCA was facially discriminatory, as well as discriminatory in purpose, and discriminatory in practical effect?

3. Did the district court err in denying PacifiCorp's motion for a preliminary injunction when PacifiCorp established that it was likely to prevail on the merits of its dormant Commerce Clause claim, it would suffer irreparable harm without an injunction, and the balance of equities were in PacifiCorp's favor?

STATEMENT OF THE CASE

A. Statutory and regulatory background of the CCA.

This statement of the case provides a basic overview of the facts. Additional facts are introduced through the brief where appropriate.

In 2021, the Washington Legislature enacted the CCA to reduce Washington's greenhouse gas emissions in response to climate change. *See* RCW 70A.65.005(1). To promote reductions in greenhouse gas emissions, the CCA creates a "cap and invest program" under which Ecology must set a declining cap on the aggregate emissions from regulated entities that are responsible for greenhouse emissions in the state, referred to as “covered entities.” RCW 70A.65.010(23); RCW 70A.65.010(58); RCW 70A.65.060–.080. “Covered entities” are those that emit more than 25,000 metric tons of carbon dioxide equivalent annually. RCW 70A.65.080(1).

Under the CCA, a covered entity may emit only as many metric tons of greenhouse gases for which it has allowances. RCW 70A.65.060(1); RCW 70A.65.310. Ecology must also enforce the declining cap on emissions by requiring covered entities to obtain emission “allowances,” to cover their actual emissions and by reducing the number of allowances made available through auction each year. RCW 70A.65.010(1); RCW 70A.65.010(18); RCW 70A.65.060; RCW 70A.65.100; RCW 70A.65.200(1). PacifiCorp’s gas-fired electric generation facility in Chehalis, Washington is a covered entity under the CCA. (ER-222–23; ER-158.)

Most covered entities will purchase their allowances at auctions that Ecology holds. RCW 70A.65.100. In crafting the CCA, and central to this litigation, the Legislature chose to grant “no-cost” allowances to some categories of covered entities including electric utilities such as PacifiCorp. RCW 70A.65.110–.130. A “no-cost” allowance is a subsidy in the sense that the entity receiving a no-cost allowance does not have to pay for it. No-cost allowances phase out by 2045. RCW 70A.65.120(2)(d).

Ecology implemented rules stating that the no-cost allowances exist to offset the costs of the CCA itself. "Allowances will be allocated to qualifying electric utilities for the purposes of mitigating the cost burden of the *program* based on the cost burden effect of the *program*." Wash. Admin. Code § 173-446-230(1) (emphases added). "Program" is defined as the CCA. RCW 70A.65.010(58); Wash. Admin. Code § 173-446-020.

Only electric utilities regulated under a specific earlier statutory scheme will receive no-cost allowances. RCW 70A.65.120(1); Wash. Admin. Code § 173-446-230(1) (both so stating and referencing RCW chapter 19.405). That earlier statutory scheme, the Clean Energy Transformation Act (RCW chapter 19.405) ("CETA"), requires all electric utilities serving Washington customers to remove from their energy assigned to Washington customers any electricity generated by fossil fuels by 2045. RCW 19.405.010(2).

Although Ecology stated in the Administrative Code that no-cost allowances exist to offset the cost burden of the CCA, in practice, Ecology has taken the position that the CCA provides for no-cost allowances to compensate for the increased cost that CETA might cause for customers in Washington only. (ER-134.) The cost of implementing the CCA, regardless of the CETA, falls heavily on out-of-state customers and out-of-state companies like PacifiCorp. (ER-158.)

B. The allocation of no-cost allowances under the CCA as implemented by Ecology is discriminatory.

Based on Ecology's application of the CCA, Ecology provides no-cost allowances to PacifiCorp for electricity generated at Chehalis for PacifiCorp's Washington customers, but not for PacifiCorp's out-of-state customers. This discriminatory allocation of no-cost allowances harms PacifiCorp's non-Washington customers and PacifiCorp in an amount that bears direct relation to the amount of Chehalis's generation that serves customers outside of Washington. Because approximately 77% of Chehalis's power goes out of state, approximately 77% of Chehalis's emissions do not receive no-cost allowances. Therefore, it falls to PacifiCorp, an out-of-state entity, or to its out-of-state customers, to pay for the Washington-mandated CCA compliance costs. (ER-224–25; ER-158.) The CCA's allocation of no-cost allowances, as applied by Ecology to PacifiCorp and its customers, violates the dormant Commerce Clause of the United States Constitution because it impermissibly discriminates against out-of-state customers and businesses.

C. Procedural history.

PacifiCorp filed its original complaint in this case in December 2023 and its amended complaint in January 2024, alleging that Ecology's application of the CCA violated the dormant Commerce Clause. (ER-222–42.) Shortly thereafter, PacifiCorp filed a Motion for Preliminary Injunction. (ER-187–221.) In response, parties agreed to a joint briefing schedule and Ecology filed a Motion to Dismiss. (ER-108–56.) The district court heard oral argument on both motions on April 22, 2024. (ER-249.)

On July 15, 2024, the district court issued a written opinion that granted Ecology's motion to dismiss the case and denied PacifiCorp's motion for a preliminary injunction as moot, (ER-5–29), and it entered a judgment of dismissal the same day. (ER-4.) This appeal followed.

SUMMARY OF ARGUMENT

1. The district court erred when it found that PacifiCorp's out-of-state customers were not "similarly situated" to PacifiCorp's in-state customers for purposes of PacifiCorp's dormant Commerce Clause claim. Under *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997), a starting point for a dormant Commerce Clause challenge is a "comparison of substantially similar entities" or substantially similar products. The relevant entities in this analysis are PacifiCorp's customers in Washington and its non-Washington customers, and the relevant product is the provision of electric service to those customers. Ecology provides PacifiCorp with no-cost allowances for its Washington customers, but not for its non-Washington customers, for the same electricity from Chehalis. That is inherently discriminatory against the non-Washington customers because it means those customers have to pay higher prices for electricity than PacifiCorp's Washington

customers pay. That constitutes impermissible facial, purposeful, and in effect discrimination under the dormant Commerce Clause.

The district court erred when it concluded that the electricity flowing from Chehalis to PacifiCorp's Washington customers and non-Washington customers are not similarly situated because only the electricity going to Washington customers is subject to the costs of decarbonization under CETA. (ER-19–21.) For Ecology to show that PacifiCorp's in-state and out-of-state customers (or the electricity serving them from Chehalis) are not similarly situated on the single basis identified by the district court (*viz.* the supposed emission and cost differential caused by CETA), Ecology would have had to compare the emissions reductions required by CETA with the emission reductions required by the other five states that PacifiCorp serves with power from Chehalis. Ecology did not and could not do that because Chehalis is not required to be part of a "greenhouse gas neutral" portfolio until 2030.

Further, many of PacifiCorp's non-Washington customers are subject to similar regulations and economic burdens that CETA will eventually impose. The trial court erred when it granted Ecology's motion to dismiss solely on the incorrect basis that PacifiCorp's Washington and non-Washington customers were not similarly situated within the meaning of the Supreme Court's decision in *Tracy*.

2. The district court erred when it failed to conclude that the CCA's treatment of PacifiCorp's non-Washington customers is facially discriminatory. Ecology has in fact admitted that the CCA is discriminatory on its face.

No-cost allowances are granted to utilities to offset the "cost burden" of the CCA on their customers. "Cost burden" is defined in RCW 70A.65.010(21) as: "the impact on rates or charges to *customers of electric utilities in Washington state* . . ." (Emphasis added.) Ecology applies the emphasized text to mean that the cost burden of expensive emission allowances are passed on only to customers not in Washington state and therefore the no-cost allowances, *i.e.*, the protection from any cost burden of the CCA, are enjoyed only by electric utility customers who are located in Washington state.

3. The district court erred in not applying the compensatory tax analysis from *Oregon Waste System, Inc. v. Dep't of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994). Ecology's application of the CCA to Chehalis is discriminatory on its face, and trying to justify that discrimination on the basis of cost differences created by CETA is not a "similarly situated" analysis but instead a "compensatory tax" analysis. Even if the district court had applied the compensatory tax analysis from *Oregon Waste System*, Ecology would have had to (1) quantify the in-state costs from CETA, (2) quantify the CCA cost imposed on out-of-state interests due to the discrimination Ecology seeks to justify in not

granting no-cost allowances, and (3) show that the costs from discrimination do not exceed the in-state costs from CETA. 511 U.S. at 103-04. No such facts were in the record, in the pleadings, or in the law—CETA applies to gas-fired facilities like Chehalis in 2030, RCW 19.405.040(1), and it is purely conjectural whether PacifiCorp's Washington customers of Chehalis power would even have CETA or CCA costs or both in 2030. Further, CETA costs are capped at two percent (2%) of costs for similar power without CETA. RCW 19.405.060(3)(a).

4. Ecology's application of the CCA is not only discriminatory on its face, it's discriminatory in its purpose and effect. As to purpose, Ecology has admitted that the purpose is to discriminate in favor of Washington customers to compensate for the supposed in-state costs of CETA. As to effect, the CCA's no-cost allowance provision (as Ecology implemented it) has a discriminatory practical effect as it "promotes a local industry" (*i.e.* local customers, both residents and businesses) by imposing the CCA compliance costs on out-of-state customers but not on Washington customers. By mandating that only out-of-state customers pay for CCA allowances, the CCA also threatens "a patch-work regulatory scheme" whereby states attempt to dictate the burdens imposed on out-of-state customers and out-of-state companies.

5. The district court erred in denying PacifiCorp's motion for a preliminary injunction. A party is entitled to a preliminary injunction if it

"establishes that [1] [it] is likely to succeed on the merits, that [2] [it] is likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in [its] favor, and that [4] an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

First, the conclusion that the CCA is discriminatory establishes that PacifiCorp is likely to succeed on the merits. That is the most important factor under *Winter*. It is also well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury.

Second, when a plaintiff who alleges a violation of a constitutional right shows that they are likely to prevail on the merits, that showing demonstrates they are suffering irreparable harm no matter how brief the violation. *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023). Further, with each metric ton of emissions allocated to non-Washington customers, PacifiCorp will face the expense of purchasing an allowance and then either passing that cost along to its customers or, if not allowed to do so by regulatory agencies, suffering those expenses itself. Irreparable injury is thus established.

Third, the balance of harms favors PacifiCorp. Because of the primacy of constitutional rights, as a matter of law "[a] plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor." *Baird*, 81 F.4th at 1042 (discussing precedent).

"Accordingly, we have held that plaintiffs who are able to 'establish a likelihood that a policy violates the U.S. Constitution . . . have also established that both the public interest and the balance of the equities favor a preliminary injunction.'" *Id.* (cleaned up, citations omitted). In addition, concerning the balance of harms, in contrast to the significant harm that PacifiCorp and its customers face, Defendant will suffer no harm from a preliminary injunction. Ecology cannot "suffer harm from an injunction that merely ends an unlawful practice[.]" *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Further, it is strongly within the public interest, both to out-of-state customers and in-state customers, to prevent further constitutional violations and enjoin Defendant from enforcing the no-cost allowance provisions of the CCA. It is also in the public interest not to encourage other states to enact similar discriminatory barriers to the interstate transmission of electricity when electric grids depend on regional integration. For all of these reasons, PacifiCorp established its entitlement to a preliminary injunction, and this Court should reverse and remand with instructions to enter PacifiCorp's requested injunction.

ARGUMENT

I. The district court erred by granting Ecology's motion to dismiss.

A. Standard of review for motion to dismiss.

This Court reviews de novo the district court's ruling on a motion to dismiss. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir.

2021) (reviewing de novo an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* at 889. Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citation omitted).

Review is generally limited to the contents of the complaint. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.").

When matters outside the pleadings are considered, the motion to dismiss under Rule 12(b)(6) is treated as one for summary judgment under Rule 56. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). "There are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201." *Id.* (explaining the two exceptions).

B. A note on PacifiCorp's standing.

Ecology vigorously challenged PacifiCorp's standing to bring its claim and the ripeness of the claim. (ER-125–30; ER-36–38.) The district court correctly concluded that PacifiCorp does have standing to bring its claim and that it is ripe. (ER-14–17.) Accordingly, PacifiCorp does not appeal any of the district court's findings or conclusions about standing and ripeness.

C. The district court erred when it found that PacifiCorp's out-of-state customers were not "similarly situated" to PacifiCorp's in-state customers for purposes of a claim of facial discrimination under the dormant Commerce Clause.

1. Brief overview of dormant Commerce Clause jurisprudence.

The Commerce Clause grants Congress the exclusive power "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. The Commerce Clause "insure[s] . . . against discriminating State legislation." *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (quotation marks and citation omitted). It places "an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n*, 550 U.S. at 338. This "negative command" is "known as the dormant Commerce Clause." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). This doctrine prevents states from "erecting taxes, tariffs, or regulations that favor local businesses at the expense of interstate commerce." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 97

F. Supp. 3d 1256, 1266 (W.D. Wash. 2015), *aff'd*, 803 F.3d 389 (9th Cir. 2015), citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980).

A state law must be struck under the dormant Commerce Clause if it fails any one of four tests, the first three of which are as follows: (1) the statute discriminates against interstate commerce "facially, [(2)] purposefully, or [(3)] in practical effect." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) ("*LensCrafters*").

When a statute is discriminatory on its face or in its purpose or practical effects, then it is subject to strict scrutiny and courts apply a "virtually *per se* rule of invalidity[.]" *Or. Waste Sys.*, 511 U.S. at 99. The United States Supreme Court has held that a discriminatory tax exemption that benefits in-state residents (similar to the CCA no-cost allowance for just in-state residents) violates the dormant Commerce Clause, stating, "Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 577-78 (1997) (quotation marks and citation omitted).

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,'" the law's proponent must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citations omitted). Justification of a discriminatory law faces a "high" bar to overcome the presumption of invalidity. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

An alternative fourth test, the so-called *Pike* test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), applies only for state laws that are not directly discriminatory.

As shown below, Ecology's application of the CCA to Chehalis is discriminatory on its face. That by itself is grounds for reversing the district court's decision to dismiss PacifiCorp's claims. PacifiCorp also shows below that Ecology's application of the CCA to Chehalis is discriminatory in its purpose and in its effect. Accordingly, there was no need for PacifiCorp to alternatively move for a preliminary injunction under the *Pike* test, and it did not do so. (ER-88.)

2. The in-state and out-of-state entities that purchase PacifiCorp's electricity—it's customers—are similarly situated within the meaning of *Tracy*, as is the electricity itself.

With those general principles in mind, the district court correctly stated that the starting point for a successful dormant Commerce Clause challenge is "a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298; (ER-6.) *See The Louisiana Hydrocarbon Processing Tax*, 61 La. L. Rev. 833, 850 (2001) (*Tracy* introduced this "'threshold question' into the analysis of whether a tax unconstitutionally discriminated against interstate commerce.") To be "not similarly situated," either the product, the sellers, or the buyers, have to be different in kind, not merely different in the quantity of costs or taxes they face. *Tracy*, 519 U.S. at 295-304; *also LensCrafters*, 567 F.3d at 526-27 (opticians not similarly situated to optometrists and ophthalmologists because only the latter two are subject to extensive education requirements and regulations applicable to medical professionals). If they are not similarly situated, the dormant Commerce Clause may not apply. *Id.* at 527-28.

The Supreme Court's decision in *Tracy*, upon which Ecology and the district court relied, underscores that PacifiCorp's in- and out-of-state customers are similarly situated. In *Tracy*, the Ohio law at issue imposed a sales tax but exempted sales of natural gas by local gas distribution companies ("LDCs"), all of whom were in-state regulated gas utilities; independent gas marketers and producers were not exempt from the tax. 519 U.S. at 282-83. Plaintiff General Motors Corp., a customer purchasing natural gas from out-of-state independent gas producers, sued for the harm it suffered from the higher prices it had to pay because Ohio applied the tax to the plaintiff when it bought gas from non-LDCs. *Id.* at 285-86. The Court explained that LDCs are subject to numerous regulatory and statutory requirements imposed on them by the State of Ohio (*e.g.*, LDCs are required to provide a fully-bundled gas product to all variety of end-users in their geographic area without exception). *Id.* at 295-97. LDCs are fundamentally different than the independent gas producers, who were exempt from Ohio utility regulations and, therefore, could pick and choose their customers. *Id.*

Further, LDCs sell a different product, a price-regulated bundled (*i.e.*, costs of gas, transmission, and distribution together) which, because the price is regulated, does not vary with market swings, while independent producers sell an unbundled product (just the gas, not transport) with a price that varies with in the market. And, the customers are different: the captive market of residences and small businesses who cannot buy from independent producers versus large customers like General Motors, who can negotiate based on a position of strength in buying large quantities of gas and who can bear the risk of price fluctuations. *Id.* at 298-304; *also id.* at 302-03 ("bulk buyers like GMC . . . have no need for bundled protection"). *See also Invenergy Thermal LLC v. Watson,* 701 F. Supp. 3d 1080, 1099 (W.D. Wash. 2023), *appeal docketed* No. 23-3857 (9th Cir., Nov. 30, 2023) (utilities and non-utility electricity generators not comparable for dormant Commerce Clause analysis).

The situation here is different in every respect from *Tracy.* Here, the sellers are the same: PacifiCorp is the seller of Chehalis power inside and outside of Washington. The item for sale is the same: bundled regulated electric service. The customers are of the same type: residences and businesses within geographic areas subject to regulated monopoly provision of electric services. Washington customers of electricity from Chehalis are thus similarly situated to non-Washington customers of that same electricity.

3. The district court erred in its application of *Tracy*.

With respect, the district court erred when it dismissed PacifiCorp's complaint based on its conclusion that, because of CETA, "the electricity PacifiCorp generates to send out of state is not substantially similar to the electricity it sells in Washington[.]" (ER-6.) There is no basis for that conclusion in the pleadings or in the law for multiple reasons. First, PacifiCorp provides the exact same services—provision of electricity from Chehalis—to both in-state and out-of-state customers; for the reasons discussed in this section, the district court erred in concluding that a different Washington statute, CETA, gives Ecology free rein to discriminate under the CCA. Additionally, the district court erred because (1) CETA's portfolio requirements, of which the Washington-allocated portion of Chehalis is a part, do not go into effect until 2030, and (2) other states have laws similar to CETA that apply to electricity from Chehalis for PacifiCorp customers in those states. These errors are discussed in the following section, *infra*, § I.C.4.

The fact that Washington's utility regulatory agency (the Washington Utilities and Transportation Commission ("WUTC")) and other state regulatory commissions may regulate electric utilities in their states differently than others, does not make PacifiCorp's electricity generated at Chehalis not substantially similar, for purposes of the dormant Commerce Clause, when it serves customers in different states.

Examples from Supreme Court cases show that a mere preexisting tax or simple regulation does not lead to conclusions of "not substantially similar." A relevant comparison point is the natural gas utility sector, which, like the electric utility sector, has long had state regulation of local distribution. *Tracy*, 519 U.S. at 288-97 (providing 150 year history of regulation of local distribution of natural gas). Louisiana imposed a discriminatory tax on the export of a certain type of natural gas from Louisiana to other states. In *Maryland v. Louisiana*, the Supreme Court stated that the effect of the discriminatory export tax on gas would put out-of-state consumers who bought that gas at a disadvantage compared to consumers within Louisiana who were exempted from the tax. 451 U.S. 725, 757 (1981) ("Louisiana consumers of OCS gas are thus substantially protected against the impact of the First-Use Tax and have the benefit of untaxed OCS gas"). The Supreme Court found the tax to be a violation of the dormant Commerce Clause and there was no mention that the in-state and out-of-state consumers were not similarly situated simply because states regulate local distribution of natural gas differently.

Further, in *Camps Newfound/Owatonna*, although Maine undoubtedly has a different tax regime on its residents than other states do (*e.g.* different income tax and sales tax rates), the Supreme Court concluded that the Maine tax which imposed a higher tax on camps in Maine that served out-of-state residents was discriminatory. Again, there was no mention that those in-state and out-of-state residents (despite being subject to different tax regimes in their home states) were not similarly situated. 520 U.S. at 580. The dormant Commerce Clause did apply, and the discriminatory law was found to violate it.

And in *Bacchus Imports Ltd.*, the Court analyzed whether the favored in-state alcohol and the discriminated against out-of-state alcohol were similarly situated on the basis of how little they competed with each other. 468 U.S. at 269 (rejecting state's argument). Importantly, the Court never entertained the argument that the dormant Commerce Clause did not apply to the tax discrimination there simply because alcohol produced in-state likely faced different manufacturing regulations than alcohol produced in other states. *Compare* HI. Rev. Stat. § 281-31(b) (license to manufacture does not include right to sell on premises, and precludes right to hold restaurant alcohol license) *with* Or. Rev. Stat. § 471.221(2)(a), (c) & (f) (holder of manufacturer license can both manufacture and sell in a retail premises and hold a retail premises license). Despite likely differences between Hawaii and non-Hawaii laws on alcohol manufacturers, the dormant Commerce Clause did apply and the law was found to violate the dormant Commerce Clause. The fact that the same products and services (local natural gas distribution; tax regimes on people attending camps; and alcohol) are regulated differently in different states did not lead to the Supreme Court to the conclusion that the district court erroneously reached here, that state-to-state regulatory differences mean that products and services are not comparable for dormant Commerce Clause purposes.

The district court relied upon *Day v. Henry*, a decision from the federal district court for the District of Arizona, to erroneously conclude that, because of CETA, the electricity that leaves Chehalis and serves Washington customers is different than the electricity that leaves Chehalis and serves non-Washington customers. (ER-21–22, citing *Day v. Henry*, 686 F. Supp. 3d 887 (D. Ariz. 2023), *appeal docketed* 23-16148 (9th Cir., Aug. 31, 2023).) In *Day v. Henry*, the plaintiffs challenged Arizona's three-tier system for regulating the sale of alcohol, a system which had the ultimate effect that out-of-state retailers could not ship alcohol directly to consumers, only Arizona retailers could. 686 F. Supp. 3d at 892. But there, the discriminatory result was merely "a byproduct of the statutes" that created the three-tier system, *id.*, and the plaintiffs were unable to point to any single statute that created that result or any statute or group of statutes that the court could enjoin to grant the plaintiffs relief. *Id.* The three tier system is similar to the level of complex and extensive regulations facing LDCs in *Tracy* but that is completely dissimilar to the specific, pointed, simple, and intentional discrimination alleged (and admitted) here under the CCA.

Second, in *Day v. Henry*, "[t]he laws that Plaintiffs challenge are not facially discriminatory, nor are they discriminatory in effect because they apply evenhandedly." *Id.* at 895. That, also, is a substantial difference from the present case. Third, that case was analyzed not just under the dormant Commerce Clause, but also with an overlay provided by Section 2 of the 21st Amendment, because it was an alcohol regulation case, with regulations enacted for the health and safety of consumers, *id.* at 894-95, which is not at issue here. Fourth, the dormant Commerce Clause analysis seems to be dicta because the court had already determined that there likely was no Article III standing and hence no subject matter jurisdiction. *Id.* at 892-93.

Fifth, even on the core issue of whether the in-state and out-of-state entities or products are substantially similar, *Day v. Henry* does not support Ecology's or the district court's position. In *Day v. Henry*, the plaintiffs sought to exempt out-of-state liquor retailers from the requirement that in-state retailers faced, a three-tier regulatory system, and thus the out-of-state retailers would have "dramatically greater rights" than in-state retailers. *Id.* at 896.

Here, in contrast, PacifiCorp seeks an injunction that puts in-state and out-of-state customers on par with each other under the CCA. The district court erred because CETA does not make either the seller, the buyer, or the product substantially dissimilar under the precedent from *Day v. Henry* or, more importantly, from the precedent under *Tracy*. *See also LensCrafters*, 567 F.3d at 526-27 (concluding opticians are not similarly situated optometrists, because the latter are "healthcare providers and, as such, have unique responsibilities and obligations to their patients").

4. The district court erred when it adopted Ecology's incorrect argument about decarbonization costs applying only to in-state customers.

Ecology argued—and the district court erroneously agreed—that PacifiCorp's Washington customers and its non-Washington customers are not similarly situated because only Washington customers are subject to costs from PacifiCorp complying with CETA. (ER-19–25.) Neither the district court nor Ecology identified any other difference caused by CETA other than costs to PacifiCorp's customers.

As the district court pointed out, CETA, which requires Washington electricity producers to completely decarbonize by 2045, was passed in 2019. When the CCA was passed in 2021, CETA already existed. The district court reasoned that when the Washington legislature enacted the CCA, it faced a situation where a certain class of emitters otherwise subject to the CCA—electricity utilities serving Washington residents—"were already regulated by a separate and more aggressive decarbonization mandate [under CETA]." (ER-19–20.) According to the district court, rather than subject utilities like PacifiCorp to "overlapping sets of requirements," and "potentially subject Washington's electric customers to unnecessary increased costs beyond what they already face under CETA," the legislature chose "to issue no-cost CCA allowances to electric utilities to the extent that their emissions were already covered by CETA's decarbonization schedule." (ER-20.)[1]

The district court further reasoned that the CCA provides "market pressure" on electricity producers by requiring them to buy allowances for carbon emissions. (*Id.*) But "electric utilities serving Washington customers don't need that market pressure because CETA already requires them to decarbonize." (ER-21.) In contrast, the district court continued, "the emissions that PacifiCorp generates within Washington's borders at its Chehalis plant, but uses to export electricity to customers in other states, are not covered by CETA at all." (*Id.*) The district court

[1] There is nothing in the CCA that actually says that. Instead, the statute says that no-cost allowances are granted to offset the cost of the CCA itself, not to offset CETA costs. RCW 70A.65.120(1) (no-cost allowances intended to "mitigate the cost burden of the program" and "program" is defined as the CCA in RCW 70A.65.010(58)).

concluded: "[t]his fundamental difference in preexisting regulation means that the two categories of emissions are not 'substantially similar' for purposes of the dormant Commerce Clause." (*Id*.)

But CETA's portfolio requirements will apply to gas-fired plants like Chehalis only in 2030, as Ecology acknowledges. (ER-121 (citing RCW 19.405.040(1)).) Under CETA, it is not until 2030 that utility portfolios including gas-fired plants like Chehalis must be "greenhouse gas neutral," compliance for which can be accomplished in a variety of ways (*e.g.*, closing the gas plant, purchasing renewable energy credits, making alternative compliance payments). RCW 19.405.040(1). Based on the erroneous conclusion that there currently are two categories of emissions, the district court granted Ecology's motion to dismiss PacifiCorp's dormant Commerce Clause claim.

Again, the threshold question under *Tracy* is whether the relevant products, services, or selling or buying entities—here, PacifiCorp's electricity from Chehalis and its customers served by that same electricity—are similarly situated. The district court misapprehends CETA when it states "that the energy [PacifiCorp] produces in Washington subject to CETA is" not similarly situated to energy that PacifiCorp produces that is not regulated by CETA. (ER-22.) CETA does not apply to portfolios including gas-fired facilities until 2030. RCW 19.405.040(1).[2] PacifiCorp's claim and the relief sought focuses solely on Ecology's discrimination concerning PacifiCorp's gas-fired generation plant in Chehalis, Washington. (ER-241–42.) There are no facts in the complaint and no law in Washington statutes or regulations that makes Chehalis's energy exported to other states regulated any differently currently and, at a minimum, until 2030.

Nor has the district court or Ecology explained how CETA makes electricity from Chehalis sent to Washington customers not similarly situated to electricity from Chehalis sent to PacifiCorp's customers in other states even in 2030 and afterwards. Already, at least some of the states in which PacifiCorp sells Chehalis power do have similar decarbonization regulatory environments. Oregon utilities must remove coal from their generation source by 2030 and reduce their greenhouse gas emissions (compared to the average from 2010 to 2012) by 80% in 2030, 90% in 2035, and 100% in 2040 (five years earlier than greenhouse gas neutrality is required by CETA). Or. Rev. Stat. § 757.518(2); Or. Rev. Stat.

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[2] The district court also erroneously stated that RCW 19.405.040(1) "*eliminate*[*s*] natural gas power by 2030[.]" (ER-20 (emphasis added).) To the contrary, utilities can continue to use gas-fired electricity in and after 2030 through 2044, because 2030 is the date only for electricity to be "greenhouse gas neutral[,]" which can be accomplished for 20% of the requirement through other means, such as making alternative compliance payments and purchasing renewable energy credits. RCW 19.405.040(1)(b)(i) to (iv) (four compliance alternatives).

§ 469A.410(1). California requires state-wide emission reductions of 40% compared to 1990 levels. Cal. Health & Safety Code § 38566 (2017). California also has, similar to Washington, a cap-and-trade emissions program to achieve emissions reductions, although it does not have a discriminatory regime between in-state and out-of-state customers of electric utilities. *See* 17 Cal. Code. Reg. §§ 95801 - 96022. Even Wyoming has carbon-related state-mandated electricity costs. Wyo. Stat. §§ 37-18-101, 37-18-102. Thus, to the extent CETA's pre-existing economic burden on Washington's customers can be considered in determining whether those customers are similarly situated to PacifiCorp's out-of-state customers, many of PacifiCorp's non-Washington customers are subject to similar economic burdens and subject to similar decarbonization requirements.

The district court did not address either of those two issues, *viz.* that CETA does not impose requirements on gas-fired facilities like Chehalis until 2030 and that other states that PacifiCorp serves have similar statutes. Instead, looking outside the pleadings and finding information contrary to the facts in the record for the preliminary injunction motion, the district court stated that "[e]ven before the decarbonization deadlines occur, the burden of CETA compliance is not insignificant." (ER-7.) The district court supports that statement with decisions from the WUTC and Washington Administrative Code provisions that require PacifiCorp to submit plans periodically to the WUTC. (ER-7–8.) Submitting plans is not burdensome compared to the tens of millions of dollars of annual CCA costs. Further, even without CETA, PacifiCorp has to submit periodic resource plans to the WUTC and to every other state regulator. *See, e.g.*, Wash. Admin. Code 480-100-620 (requirements for contents of periodic comprehensive integrated resource plans from electric utilities, including clean energy plans); Or. Admin. Rule 860-027-0400 (same). The allegations in the complaint are that PacifiCorp and its out-state-customers are subject to tens of millions of dollars of extra costs every year from the CCA starting in 2023, (ER-223; ER-237), and the evidence in the preliminary injunction motion is that the first costs that Washington residents faced from CETA started only in April 2024, and would initially last only 12 months and would total under $1 million, and that any capital costs would not be passed to customers until they actually provide energy to Washington customers. (ER-50–51; ER-69.)

The district court also erroneously concluded that the electric streams were not substantially similar because it believed there was no need for the market pressure from CCA in Washington because the stream of electricity from Chehalis to Washington customers was already subject to the market pressure from CETA. (ER-20–21.) But to the extent that the district court attempted to uphold the CCA no-cost allowance discrimination to balance out the costs imposed by CETA (*i.e.* the "market pressure"), that is not an analysis under the line of cases discussing "not similarly situated" but instead is an analysis under the "compensatory tax" line of cases, such as *Oregon Waste System* (discussed in-depth, *infra*).

Thus, there are no allegations in the complaint, no law that exists, and no evidence in the record that PacifiCorp's non-Washington customers of electricity from Chehalis are, in fact, subject to lesser regulatory costs with regard to decarbonization. Lacking any such allegations, law, and evidence, the trial court erred in granting Ecology's motion to dismiss and in denying PacifiCorp's preliminary injunction motion on this threshold question.

For all of the above reasons, the district court erred when it found that PacifiCorp's Washington customers are not similarly situated to its non-Washington customers. In summary, both sets of customers take the same electric service from the same source. CETA does not make the electricity distributed in-state substantially dissimilar from that which is distributed out-of-state, otherwise any regulation in any area could be used to justify a separate statute that discriminates, contrary to the results in *Maryland v. Louisiana*, *Camps Newfound/Owatonna*, and *Bacchus Imports, Ltd*. Even if CETA does somehow make the electricity streams different, CETA's portfolio "greenhouse gas neutrality" requirements begin only in 2030, and, even then, CETA must be compared to the regulatory regimes in other states that PacifiCorp serves from Chehalis to see if they impose substantially similar regulations. Under the facts alleged, the district court erred when it granted Ecology's motion to dismiss. This Court should reverse.

5. Ecology's argument has the same error as that of the district court.

The district court's conclusion—that the exported electricity from Chehalis is not similarly situated to that which remains in Washington because of CETA—is based on Ecology's argument that CETA's *costs* create the difference between the electricity distributed in Washington and that which is exported. That was Ecology's only argument as to why CETA created dissimilarities. (ER-134.) Ecology stated, "As a result [of CETA], there is a sharp contrast between Washington power consumers and, for example, those in Montana. Montana residents do not face increased energy costs as the result of CETA, even when consuming power generated in Chehalis.[3] For this reason, they are not similarly situated to Washington residents who, absent no-cost allowances, *could* face increased energy prices from both CETA and the CCA." *Id.* (emphasis added).

First and foremost, no cases hold that in-state and out-of-state customers are not similarly situated simply because of an added cost from a different in-state statute; that is not an argument under "not similarly situated" line of cases but instead is an argument under the compensatory tax line of cases, such as *Oregon*

[3] PacifiCorp has no customers in Montana, instead in California, Idaho, Oregon, Utah, Washington, and Wyoming. The point, though, is the same.

Waste System. Second, Ecology argues only that Washington customers "could" face both CETA and CCA costs if they are not given no cost allowances (ER-134); "could" is the most that Ecology can contend because it is unclear what will happen in 2030. CETA's "greenhouse gas neutrality" requirement can be achieved in myriad of ways, through procuring non-emitting generation, procuring renewable energy credits, making alternative compliance payments, or some combination of those. CETA costs include the cost differences between providing the energy compliant with CETA compared to providing the same energy without CETA. RCW 19.405.060(3)(a). Therefore, if those resources need to be procured regardless of CETA as necessary to serve the system, then there is no incremental cost for that. Since those resources are still being identified in the planning process, it is unclear what the costs of those resources would be.

But even ignoring those two problems with Ecology's argument, to show that PacifiCorp's in-state and out-of-state customers are not similarly situated on that cost basis—which is the basis accepted by and identified by the district court—Ecology would have had to (1) quantify the in-state costs from CETA, (2) quantify the cost imposed to out-of-state interests due to the discrimination Ecology seeks to justify in not granting no-cost allowances, and (3) show that the costs from discrimination do not exceed the in-state costs from CETA. *See Oregon Waste Sys.*, 511 U.S. at 103-05. Ecology made no effort to do that and, in any event, could not because PacifiCorp's consumers of Chehalis power in Washington do have only *de minimis* CETA costs in their rates and only for April 2024 to April 2025 because, as Ecology acknowledges, CETA does not address gas-fired generation from the portfolio until 2030. (ER-121 (citing RCW 19.405.040(1)); *also* ER-51 (declarant describing lack of CETA costs in rates); ER-65.)

6. The district court's conclusion may lead to a patch-work of state discriminatory laws that could undermine the integration of regional electric grids.

As described above and to the district court, other states that PacifiCorp serves with Chehalis power have electric generation portfolio standards similar to Washington's portfolio standards in CETA. The district court's conclusion goes too far and opens the door to states using their preexisting portfolio standards to interfere with the interstate commerce in electricity with potentially immense implications, and that is barred under the dormant Commerce Clause. *See Union Pac. R. Co. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 871 (9th Cir. 2003) (concluding state's regulation violated dormant Commerce Clause because it could lead to a "patch-work regulatory scheme" with "immense" effects). Many states have either renewable energy portfolio and emissions reduction standards like CETA's, or non-renewable energy portfolios, like in Wyoming which has a requirement for, under certain conditions, continued use of coal-fired generation (utilizing carbon-capture technology). On their own and as currently structured, courts mostly uphold portfolio standards against dormant Commerce Clause challenges.[4]

But going forward, states like Montana, which have plentiful resources for future wind generation, could pass a portfolio standard addressing wind generation and then also implement a discriminatory wind generation tax under the dormant Commerce Clause analysis from the district court here. This is not idle speculation: Wyoming already has both a portfolio standard for carbon capture and a wind generation tax (albeit non-discriminatory). Wyo. Stat. §§ 37-18-101, 37-18-102 (clean coal portfolio standard), 39-22-104 ($1/MW hour tax). Based on the district court's opinion here, Wyoming could revise the wind generation tax, increasing it from $1 per megawatt hour to, for example, $25 per megawatt hour, and also write into the law that utilities serving Wyoming customers with coal are exempt from the wind generation tax. Under the district court's analysis here, Wyoming's customers—because they are subject to the carbon capture portfolio standard regulation—would not be similarly situated to out-of-state customers and,

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[4] *See* Todd, Kevin "The Dormant Commerce Clause and State Clean Energy Legislation," *Michigan J. of Envt'l & Admin. Law*, Vol. 9, Issue 1 (2020), *available at* https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1099&context=mjeal.

hence, the discriminatory generation tax would be free from a dormant Commerce Clause analysis.

Montana, a developing source of wind power to be used in the Pacific Northwest,[5] could pass laws to enable it to have a discriminatory impact on Washington, having already done so in 2021. In the power sector, the State of Montana has already shown a willingness to engage in overt discrimination to protect its state's interests and to counteract Washington's clean energy laws. Montana passed two laws in 2021 with the specific intent of discriminating against Washington state after PacifiCorp and three other Pacific Northwest utilities began considering closing a coal-fired facility in Montana due, in part, to CETA's coal provisions and Oregon's similar coal divestment statute. *Portland Gen. Elec. Co. v. Nw. Corp.*, 567 F. Supp. 3d 1203, 1211 (D. Mont. 2021) (granting preliminary injunction and noting Montana Governor stated that the bills were to counteract "woke, overzealous regulators in Washington State"); *Portland Gen. Elec. Co. v. Nw. Corp.*, No. CV 21-47-BLG-SPW, 2022 WL 4547541 (D. Mont. Sept. 28,

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[5] *See, e.g.*, Bonneville Power Administration, "Wind win: New Montana power plant 'blows away' carbon" (Jan. 5, 2023) (noting that the 750 megawatt wind farm will supply Oregon and Washington), *available at* https://www.bpa.gov/about/newsroom/news-articles/20230105-windwin-new-montana-power-plant-blows-away-carbon.

2022), *adopting report and recommendation*, 2022 WL 11213500 (D. Mont. Oct. 19, 2022) (granting plaintiffs' motion for permanent injunction).

The district court's opinion here undermines the protections of the dormant Commerce Clause and gives a pathway to states like Montana and Wyoming to enact discriminatory laws that may interfere with the distribution of electricity and hence the development of renewable generation sources. "Avoiding this sort of economic Balkanization, and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence." *Camps Newfound/Owatonna*, 520 U.S.at 577 (citation omitted). The district court opinion should be reversed.

D. The district court erred when it failed to conclude that the CCA's treatment of PacifiCorp's non-Washington customers is facially discriminatory.

1. Ecology admits that it is applying the CCA in a manner that is discriminatory on its face.

The district court did not analyze whether Ecology's application of the CCA is facially discriminatory, or whether it discriminates in its purpose, or in its practical effect. Most of the district court's analysis ended when it wrongly concluded that PacifiCorp's electricity streams to Washington and non-Washington customers were not similarly situated. PacifiCorp shows below that Ecology discriminates in all three ways.

The discrimination between in-state and out-of-state customers of Chehalis (and the discriminatory effect against utilities serving out-of-state customers) is what violates the dormant Commerce Clause. (ER-224; ER-194–95; ER-197.) The test for a dormant Commerce Clause violation is not in dispute. Ecology acknowledges that the dormant Commerce Clause "prevents states from 'erecting taxes, tariffs, or regulations that favor local businesses at the expense of interstate commerce.'" *Int'l Franchise Ass'n, Inc.*, 97 F. Supp. 3d at 1266, citing *Lewis*, 447 U.S. at 35; (ER-88). A state law must be struck if the statute discriminates against interstate commerce facially. *Int'l Franchise Ass'n, Inc.*, 97 F. Supp. 3d at 1266. This test is subject to strict scrutiny. *LensCrafters*, 567 F.3d at 524.

PacifiCorp's complaint alleges and its motion for a preliminary injunction shows that the discrimination is facial, is discriminatory in effect, and is discriminatory in its purpose (either by the CCA itself or by Ecology's implementation of it; it does not matter which—see footnote 7). (ER-223; ER-224; ER-225; ER-229–31; ER-236; ER-237; ER-239; ER-240; ER-209–17.) Ecology acknowledges that it is applying the CCA in a manner that discriminates on its face and that it has a discriminatory purpose and effect. (ER-120–21; ER-133–35; ER-136–37.) (describing the discrimination and quoting RCW 70A.65.010(21)) as providing benefits just for customers "'*in Washington state.*'" (emphasis added by Ecology).) Ecology states that under its implementation of the CCA "allocation of no cost allowances to utilities does distinguish between in-state and out-of-state electricity customers[.]" (ER-136.)

The text and context of the CCA's operative provisions establish that it is discriminatory on its face. The definition of the "cost burden" in the CCA requires discrimination. (ER-148–49.) RCW 70A.65.120(1) states that the Washington legislature intends to allow electric utilities like PacifiCorp "to be eligible for allowance allocation . . . in order to mitigate the *cost burden* of the [CCA]." (emphasis added). "Cost burden" is defined in RCW 70A.65.010(21) as: "the impact on rates or charges *to customers of electric utilities in Washington state* . . ." (Emphasis added.) Ecology applies the emphasized words to mean that the cost burden of expensive emission allowances are passed on only to customers outside of Washington state and therefore the no-cost allowances, *i.e.* the mitigation from any "cost burden" of the CCA, are enjoyed only by electric utility customers who are located in Washington state. That is facially discriminatory against non-Washington customers.[6]

[6] PacifiCorp's interpretation is that the cost burden of the CCA is applied equally to all customers of electric utilities, as long as those electric utilities are located in Washington state. (ER-239–41.) Because the dormant Commerce Clause applies equally to both PacifiCorp's First Count of its claim (that the CCA discriminates on its face) and its Second Count (that Ecology is misinterpreting the CCA and applying it in a discriminatory way), PacifiCorp need not re-state its statutory interpretation here to prevail.

That should be the end of the argument. When a statute is discriminatory on its face or in its practical effects, then it is subject to *strict scrutiny* and courts apply a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Or. Waste Sys.*, 511 U.S. at 99; *e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute . . . favor[s] in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."). Ecology has admitted the primary element of PacifiCorp's prima facie case.

2. *Oregon Waste System* shows that Ecology's application of the CCA is discriminatory on its face.

Ecology nevertheless contended that the CCA's disparate treatment of PacifiCorp's non-Washington customers is not facially discriminatory. And it does so based on its argument that exempting Washington customers of Chehalis power from CCA eliminates duplicative costs, because those customers will face CETA costs when PacifiCorp's customers in other states do not have CETA costs. (*See, supra*, § I.C.5.) When a state attempts to justify a discriminatory law based on compensation for in-state costs that out-of-state businesses or residents do not face (i.e., the discriminatory law is justified because it is leveling the playing field), the law is still discriminatory. *See Or. Waste Sys.*

Oregon Waste System is discussed in various places in this brief, but it is important enough to warrant a focused discussion because it is dispositive here. In

Oregon Waste System, the Supreme Court analyzed the validity of an Oregon statute that imposed a $2.25 per ton surcharge on disposal of solid waste generated in other states, while only charging $0.85 per ton on disposal of solid waste generated within Oregon. 511 U.S. at 95-96. The out-of-state waste producers challenged Oregon's surcharge as violative of the dormant Commerce Clause, and both the Oregon Court of Appeals and the Oregon Supreme Court upheld Oregon's statute. *Id*. at 97-98. The Supreme Court reversed and outlined the relevant analysis for a compensatory tax scheme, as is relevant here.

The Supreme Court began by noting that in its previous decision in *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, (1992), a similar factual scenario to *Oregon Waste System*, it held that the negative Commerce Clause prohibited Alabama from imposing a higher fee on the disposal in Alabama landfills of hazardous waste from other States than on the disposal of identical waste from Alabama. 511 U.S. at 95. *Chemical Waste*, however, left open the possibility that such a surcharge might be valid and comply with the dormant Commerce Clause if legitimately based on the costs of disposing of waste from other state. *Id*.

In its dormant Commerce Clause analysis, the Supreme Court first noted that "discrimination" within the meaning of dormant Commerce Clause case law "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99. It stated that if a "restriction on commerce is discriminatory, it is virtually *per se* invalid" regardless of the justification for the law. *Id.* at 99-100. Consequently, the "strictest scrutiny" is applied to discriminatory restrictions and the state's "burden of justification is so heavy that 'facial discrimination' by itself may be a fatal defect." *Id.*

Under strict scrutiny, a facially discriminatory charge must be invalidated unless the State can show that the charge "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (citation omitted). Thus, to show that the charge is valid, the State "must come forward with other legitimate reasons to subject waste from other states to a higher charge than is levied against waste from Oregon." *Id.*

In *Oregon Waste System*, the State of Oregon contended that the higher surcharge on out-of-state waste was a "compensatory tax" that was necessary to make shippers of such waste pay their "fair share" of the costs imposed on Oregon by the disposal of their waste in the State. *Id.* at 102. The Court noted that its compensatory tax cases allow states to pass on a legitimate cost that it incurs in processing or exporting products out-of-state, but keeps states from "exacting *more* than a just share from interstate commerce." *Id.* at 102 (emphasis in original, quotation marks omitted). Given these goals, the Court said that in order for a charge to qualify as a valid compensatory tax, the State would have to: (1) identify the cost burden on the State "for which the State is attempting to compensate, (2) show that the charge is roughly approximate to—but not in excess of—the cost burden on the State, and (3) show that the "events on which the interstate and intrastate taxes are imposed are 'substantially equivalent.'" *Id.* at 103 (citations omitted).

The Supreme Court easily concluded that the Oregon surcharge on out-of-state waste did not qualify as a "compensatory tax." Oregon could not show that its surcharge of $2.25 per ton on out-of-state waste was roughly equal to any additional cost it might incur in processing out-of-state waste, compared to in-state waste. It concluded that the State's "failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to their claim." *Id.* at 104.

The same is true here. As shown above, Ecology's failure to give PacifiCorp no-cost allowances is discriminatory on its face. That policy is thus subject to the "strictest scrutiny," and thus the burden on Ecology of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Id.* at 101 (quotation marks and citations omitted).

Further, for Ecology to show that the imposition of full allocation allowances on out-of-state customers was valid as a compensatory tax under

Oregon Waste System, Ecology would have had to (1) quantify the in-state costs from CETA, (2) quantify the cost imposed to out-of-state interests due to the discrimination Ecology seeks to justify in not granting no-cost allowances, and (3) show that the costs from discrimination do not exceed the in-state costs from CETA. Ecology could not meet that burden because while PacifiCorp's out-state-customers were subject to CCA costs in the tens of millions of dollars per year starting in January 2023, PacifiCorp's consumers of Chehalis power in Washington did not (until April 2024) have any CETA costs in their rates, and the costs starting in April 2024 charged to customers are in the aggregate under $1 million for a twelve-month period. (ER-51; ER-69.) PacifiCorp likely will not incur significant costs under CETA for electricity generated at its gas plants until 2030 because, as Ecology acknowledges, CETA applies to gas-fired generation only in 2030. (ER-121 (citing statutes); *see also* ER-50–51.)

Even then, the costs of implementing CETA are capped at two percent (2%) of what the cost to provide power without CETA would be. RCW 19.405.060(3)(a); Wash. Admin. Code 480-100-660(2). And even that cost is not certain to occur, because by 2030, to comply with CETA PacifiCorp might replace the Chehalis plant with wind or solar facilities, in which case Chehalis would not be subject to the CCA and there would be no duplicative cost because CCA allowances are needed only for greenhouse gas emissions. Thus, there would be no duplicative cost to protect against.

Ecology's implementation of the CCA as applied to Chehalis is invalid under the dormant Commerce Clause because it is discriminatory on its face. Even if Ecology had tried to justify its implementation of the CCA as a compensatory tax under *Oregon Waste System*, it would have failed because there are no facts to support that claim, and certainly no such facts exist on this record. PacifiCorp alleged a valid claim under section 1983 for invalidating Ecology's implementation of the CCA under the dormant Commerce Clause. The district court thus erred in granting Ecology's motion to dismiss.

E. Ecology's application of the CCA is not only discriminatory on its face, it is discriminatory in its purpose and effect.

As mentioned above, a state law must be struck under the dormant Commerce Clause not only if it discriminates against interstate commerce on its face, but also if it discriminates "purposefully," or "in practical effect." *LensCrafters*, 567 F.3d at 525 (quotation marks and citation omitted). All three tests are subject to strict scrutiny. *Id.*

State-of-residence based discrimination in allocation of no-cost allowances for emissions related to electric service is subject to the "virtually *per se* rule of invalidity," *Or. Waste Sys.*, 511 U.S. at 99, because that discrimination is plain on the face of the CCA, it has a "discriminatory purpose" and it has a "discriminatory effect." *Bacchus Imports Ltd.*, 468 U.S. at 270 (either purpose or effect is sufficient to invalidate the law); *Invenergy Thermal*, 701 F. Supp. 3d at 1090 (any of three is enough to invalidate law). In analyzing either purpose or effect, "discrimination" means "'*differential treatment* of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010) (emphasis added in *Black Star Farms)* (quoting *Or. Waste Sys.*, 511 U.S. at 99).

1. The CCA's stated purpose is to discriminate against non-Washington customers.

As to *purpose*, as alleged in the complaint, Ecology stated in its Concise Explanatory Statement of the CCA that the "legislative intent is clear" to give a preference to in-state customers. (ER-230.) Further, Ecology stated in a brief filed with the Federal Energy Regulatory Commission that the purpose is to discriminate in favor of Washington customers to compensate for the supposed in-state costs of CETA. (ER-167.) That is an impermissible purpose. *See Int'l Franchise Ass'n, Inc.*, 803 F.3d at 401 (citing to two U.S. Supreme Court cases and stating "statutes struck down for their impermissible purpose have contained language . . . seeking to level the playing field"). Alternatively, the statute itself explicitly states the purpose of no-cost allowances is to mitigate a cost burden on only Washington customers. RCW 70A.65.120(1) and RCW 70A.65.010(21). The CCA's no-cost allowance provision, as applied by Ecology, is discriminatory.

2. The practical effect of the CCA is discriminatory.

The *effect* is also clear. Ecology's implementation of the CCA allowance provisions as applied to Chehalis have a discriminatory practical effect as they "promote a local industry" (*i.e.* local customers) by "impos[ing] a burden on" out-of-state PacifiCorp's customers (both residences and businesses) that are not borne by PacifiCorp's Washington customers. *See Bacchus Imports Ltd.*, 468 U.S. at 273 (same analysis). Unlike *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023), where California consumers would bear the cost of more expensive but ethically raised pork, Washington customers cannot bear the CCA compliance burden because utilities cannot recover in rates from Washington customers the CCA allowance costs for generation that is cost-allocated to out-of-state customers. *See* RCW 80.04.250(2) (allowing in rates to Washington customers only the costs of utility property that is used and useful for providing service to customers in Washington).[7]

[7] *See, e.g., Wash. Utils. & Trans. Comm'n. v. PacifiCorp*, Docket Nos. UE-191024, UE-190750, UE-190929, UE-190981, UE-180778 (*consol.)*, Final Order 09 / 07 / 12 ¶ 95 (Dec. 14, 2020) ("The Commission has long held that only resources that are used and useful for service to Washington may be included in rates. This standard . . . may be met only when a utility demonstrates that its resource 'provides quantifiable direct or indirect benefits to Washington commensurate with its cost.'") (footnote citations omitted). (ER-162; ER-172.) (The WUTC order approving the protocol is also available at https://www.utc.wa.gov/casedocket/2019/191024/orders.)

Instead, out-of-state customers and out-of-state companies, including PacifiCorp, will bear the cost of compliance and systems-wide increased electricity prices. This violates the Commerce Clause. *See Healy v. Beer Inst.*, 491 U.S. 324 (1989) (Connecticut law requiring out-of-state beer merchants to affirm that in-state prices were no higher than those they charged in neighboring states found to discourage consumers from crossing state lines); *Brown-Forman Distillers Corp.*, 476 U.S. 573 (New York law requiring liquor distillers to affirm that their in-state prices were no higher than out-of-state prices found to impermissibly force out-of-state distillers to surrender whatever cost advantages they enjoyed against their in-state rivals); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (New York law barring out-of-state dairy farmers from selling milk in-state for less than minimum price New York law guaranteed to in-state producers found to plainly discriminate against out-of-state producers by erecting an economic barrier protecting major local industry from competition); *Foresight Coal Sales, LLC. v. Chandler*, 60 F.4th 288, 298-99 (6th Cir. 2023) (holding differential tax based on state origin of coal unconstitutional).

By mandating that only out-of-state customers pay for CCA allowances, the CCA also threatens "a patch-work regulatory scheme" whereby states attempt to dictate the burdens imposed on out-of-state customers and out-of-state companies. *See Union Pac. R. Co.*, 346 F.3d at 871 (concluding state's regulation violated dormant Commerce Clause because it could lead to a "patch-work regulatory scheme" with "immense" effects). The CCA's discriminatory provisions not only impact out-of-state customers and PacifiCorp (an out-of-state corporation), but out-of-state regulatory agencies as well. State agencies, such as the Public Utility Commission of Oregon ("OPUC"), are charged with the dual mission of protecting Oregon consumers *and* providing a fair rate of return to utility company investors after allowing them to recover their operating expenses. Or. Rev. Stat. § 756.040(1). By statute, the OPUC has to protect "customers . . . from unjust and unreasonable exactions and practices" *and must also* "balance the interests of the utility investor and the consumer in establishing fair and reasonable rates." *Id.* By statute, rates for electricity paid by customers are supposed to provide adequate revenue to utilities to cover "operating expenses[.]" *Id.* Here, as the OPUC and the Wyoming Public Service Commission have already ordered, PacifiCorp cannot recover the operating expenses imposed by the CCA. (ER-224–25; ER-160–61; ER-162; ER-180–81.)[8]

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[8] Wyoming similarly ruled that PacifiCorp cannot recover CCA costs from Wyoming customers. (ER-224–25.) *See In Re Application of Rocky Mountain Power for Authority to Increase its Retail Electric Service Rates,* Pub. Service Comm'n of Wyo., Dkt. No. 2000-633-ER-23 ¶ 211 (Jan. 2, 2024). (Attached for the convenience of the court, ER-185.) Idaho recently ruled the same way. *In the Matter of Rocky Mountain Power's Application for Approval of $62.4 Million ECAM Deferral*, Idaho Pub. Utils. Comm'n, Case No. PAC-E-24-05, Order No. 36367 (Oct. 18, 2024), *available at*

The CCA put the OPUC in a difficult position: allow Oregon customers to face a discriminatory cost imposed by the CCA, or disallow PacifiCorp to recover some of its operating expenses. The CCA is impacting the regulatory calculus of all non-Washington states that have customers served by Chehalis, including California, Idaho, Oregon, Utah, and Wyoming.[9]

When the discriminatory extraterritorial effects of the CCA are taken in conjunction with the absolute ban on collecting compliance costs from Washington customers for the purpose of protecting those Washington customers, there is no legitimate state benefit to weigh against the heavy extraterritorial burden. Electric power is a service which is transported across state lines, and, similar to beer or milk, a state cannot cite local protectionism to institute discriminatory laws. *See Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951).

Because Ecology's implementation of the CCA and its regulations are discriminatory in both *purpose* and *effect*, and just one will suffice to invalidate

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https://puc.idaho.gov/Fileroom/PublicFiles/ELEC/PAC/PACE2405/OrdNotc/20241018Reconsideration_Order_No_36367.pdf.

[9] Under a multistate protocol approved by orders from regulatory commissions in California, Idaho, Oregon, Utah, Washington, and Wyoming, Chehalis serves customers in all six states that PacifiCorp serves. *E.g.*, *Wash. Utils. & Trans. Comm'n. v. PacifiCorp*, Dockets UE-191024, UE-190750, UE-190929, UE-190981, UE-180778 (*consol.*), Final Order 09 / 07 / 12 (Dec. 14, 2020) (attached for the convenience of the Court at ER-49–50; ER-52–63.) (The WUTC order approving the protocol is also available at https//www.utc.wa.gov/casedocket/2019/191024/orders.)

them, they are subject to a "virtually *per se* rule of invalidity" under the dormant Commerce Clause. Defendant bears the burden of demonstrating that the state's interests here could not be advanced through any non-discriminatory means, and the Court must apply the "strictest scrutiny" standard to any justification advanced by Defendant. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (stating "strictest scrutiny" requirement and holding state law barring export of minnows unconstitutional despite conservationist purpose). Even at the preliminary injunction stage, it is clear that Defendant cannot meet this near-impossible burden. The purpose of mitigating the cost burden to Washington customers, a cost burden either from CCA or from CETA or both, will not be harmed by providing no-cost allowances for emissions from Chehalis to provide electric service to non-Washington customers. The purpose of reducing emissions will not be harmed by shifting some allowances from auction to no-cost allowances for Chehalis, because the cap on the number of state-wide total program allowances could remain the same.

The district court did not address any of these arguments about Ecology's distribution of no-cost allowances being discriminatory in its purpose or in its practical effects. For all of the above reasons, the district court erred in granting Ecology's motion to dismiss. PacifiCorp has stated a valid claim under the dormant Commerce Clause.

F. Any dismissal should have been without prejudice.

The district court erred and abused its discretion in dismissing the claim with prejudice and without leave to amend. The district court did so for two reasons: 1) PacifiCorp had not asked for leave, and 2) any amendment would have been futile. (ER-29.) Concerning the first reason, PacifiCorp did not need to request leave to amend in its briefs. "In dismissing for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (internal citation omitted). Concerning the second reason, as discussed above, PacifiCorp can allege facts that Washington and non-Washington customers are similarly situated because (1) CETA's portfolio requirements, of which the Washington-allocated portion of Chehalis is a part, do not go into effect until 2030, and (2) other states have laws similar to CETA that apply to electricity from Chehalis for PacifiCorp customers in those states.

II. The district court erred in denying PacifiCorp's motion for a preliminary injunction.

A. Standard of review on denial of motion for a preliminary injunction.

A district court's decision regarding preliminary injunctive relief should be reversed if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Fed. Trade Comm'n v. Consumer Def., LLC,* 926 F.3d 1208, 1212 (9th Cir. 2019).

A preliminary injunction must be supported by findings of fact, that are reviewed for clear error. *See Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 802 (9th Cir. 2020). The district court's conclusions of law are reviewed de novo. *Id.*

B. PacifiCorp is likely to succeed on the merits.

A party is entitled to a preliminary injunction if it "establishes that [1] [it] is likely to succeed on the merits, that [2] [it] is likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in [its] favor, and that [4] an injunction is in the public interest." *Winter*, 555 U.S. at 20. "When, like here, the nonmovant is the government, the last two *Winter* factors 'merge.'" *Baird*, 81 F.4th at 1040 (reversing denial of preliminary injunction). Although not dispositive by itself, the first factor—likelihood of success—is the "most important." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. *Baird*, 81 F.4th at 1040. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation. *Id.* And his likelihood of succeeding on the merits also tips the public interest sharply in his favor because it is "always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quotation marks and citations omitted)

For all of the above reasons, PacifiCorp has shown that Ecology's implementation of the CCA as applied to Chehalis is discriminatory, and is thus invalid under the dormant Commerce Clause. That establishes not only that the district court erred in dismissing PacifiCorp's claims, but it also establishes that the first *Winter* factor is met—PacifiCorp is likely to succeed on the merits of its dormant Commerce Clause claim. As shown below, the remaining *Winter* factors are also met, and PacifiCorp is entitled to a preliminary injunction. The Court should thus reverse and remand with instruction for the district court to grant PacifiCorp's motion for a preliminary injunction.

C. PacifiCorp has established irreparable harm.

The district court dismissed PacifiCorp's case without addressing the remaining requirements of a preliminary injunction. Thus, it did not address the elements of irreparable harm or the balance of equities between the parties or the public. But again, when a plaintiff who alleges a violation of a constitutional right shows that they are likely to prevail on the merits, that showing demonstrates they are suffering irreparable harm no matter how brief the violation. *Baird*, 81 F.4th at

1040. "[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, without even looking at the monetary harms discussed below, because of the bedrock precedent that deprivation of a constitutional right constitutes irreparable injury, PacifiCorp has satisfied the second of the *Winter* factors.

Beyond infringing upon constitutional rights, even if PacifiCorp were not likely to succeed on the merits (it is), Ecology will injure PacifiCorp and its customers in at least two ways, satisfying the second *Winter* factor.

First, with each metric ton of emissions allocated for non-Washington customers, PacifiCorp will face the expense of purchasing an allowance and then either passing that cost along to its customers or suffering those expenses itself. Second, PacifiCorp may face additional costs if non-Washington regulatory agencies do not allow PacifiCorp to recover those costs,

PacifiCorp incurs both categories of damages and costs every single day it operates in Washington state and will continue to suffer these damages without an injunction. PacifiCorp faces irreparable injury where it must make the so-called "choice" whether to "continually violate the [challenged] law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

This impossible decision is precisely the case here: to comply with the CCA, PacifiCorp must purchase allowances, either bearing the cost themselves or passing it along to non-Washington customers, or, in the alternative, PacifiCorp must "violate the [challenged] law," the CCA, by paying massive penalties for not purchasing allowances.

D. The balance of harms favors PacifiCorp and its customers and the public interest factor supports injunctive relief.

As noted above, in cases concerning constitutional rights, the third and fourth *Winter* factors merge. Because of the primacy of constitutional rights, as a matter of law "[a] plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor." *Baird,* 81 F.4th at 1042 (discussing precedent). "Accordingly, we have held that plaintiffs who are able to 'establish[ ] a likelihood that [a] policy violates the U.S. Constitution . . . have also established that both the public interest and the balance of the equities favor a preliminary injunction.'" *Id.* (citations omitted, alterations in *Baird).*

Even if PacifiCorp had not established a likelihood to succeed on the merits and raises here only "serious questions going to the merits," the third and fourth *Winter* factors weigh in favor of granting an injunction. Concerning the balance of harms, in contrast to the significant harm that PacifiCorp and its customers face detailed at length above, Defendant will suffer no harm from a preliminary injunction. Ecology cannot "suffer harm from an injunction that merely ends an unlawful practice[.]" *Rodriguez*, 715 F.3d at 1145. Ecology therefore "cannot reasonably assert" that Washington is "harmed in any legally cognizable sense by being enjoined from constitutional violations." *Id.* (quotation marks and citation omitted).

Further, it is strongly within the public interest, both to out-of-state customers and in-state customers, to prevent further constitutional violations and enjoin Defendant from enforcing the no-cost allowance provisions of the CCA. "The public interest inquiry primarily addresses the impact on non-parties rather than parties." *Preminger v. Principi,* 422 F.3d 815, 826 (9th Cir. 2005) (cleaned up, citation omitted). Here, the public interest factor significantly favors a preliminary injunction: "It is clear that it would not be equitable or in the public's interest to allow [a] state to violate the requirements of federal law[.]" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (cleaned up, citation omitted).

For that reason, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres,* 695 F.3d at 1002 (quotation marks and citations omitted). As discussed above, PacifiCorp customers outside of

Washington will be heavily burdened by the implementation of the CCA no-cost allocation provisions, as they will face increased power costs due to allowances. Even Washington customers will see increases to power costs that, but for the CCA, would not have occurred. Non-Washington state regulatory agencies will be forced to confront whether to allow PacifiCorp to pass along the discriminatory CCA costs to non-Washington customers or, in the alternative, not allow PacifiCorp to recover those costs and thus have a lower profit rate than would be the normal result for a regulated utility.

E. At a minimum, the "serious question" test requires injunctive relief.

At a minimum, PacifiCorp is entitled to a preliminary injunction under the sliding-scale *Winter* standard because it has raised "serious questions going to the merits," the balance of hardships tips sharply towards it, it has shown a likelihood of irreparable injury, and the injunction is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (stating test).

CONCLUSION

Respectfully, the Court should reverse the district court's judgment of dismissal and remand with instructions to grant PacifiCorp's motion for a preliminary injunction.

DATED: October 30, 2024.

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STATEMENT OF RELATED CASES (CIRCUIT RULE 28-2.6)

Invenergy Thermal LLC v. Watson, 701 F. Supp. 3d 1080, 1099 (W.D. Wash. 2023), *appeal docketed* No. 23-3857 (9th Cir., Nov. 30, 2023), is a related case pursuant to Circuit Rule 28-2.6(b). That appeal also concerns a dormant Commerce Clause challenge to defendant's allocation of no-cost allowances under the CCA.

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BRIEF FORMAT CERTIFICATION

Pursuant to Ninth Circuit Rules 32-1(e), and 28.1-1(c) and (f), I certify that the **APPELLANT'S OPENING BRIEF** is proportionately spaced, has a typeface of 14 points or more and contains 12,926 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f).

DATED: October 30, 2024.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 30, 2024. MARKOWITZ HERBOLD PC

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