Case No. 16-01234

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

State of Franklin,

Appellant,

v.

Electricity Producers Coalition,

Appellee,

On Appeal from the United States District Court for the Eastern District of Franklin

BRIEF OF APPELLANT

Team 2
Counsel for Appellant

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Jurisdictional Statement

The final judgment of the District Court for the Eastern District of Franklin was entered on November 7, 2016 and ruled in favor of Electricity Producers Coalition ("EPC") on all issues. R. at 12. Appellant, State of Franklin, gave timely notice of appeal on December 16, 2016. R. at 13. Subject matter jurisdiction in the District Court's was invoked via federal question jurisdiction under 28 U.S.C. § 1331 (1980), based on alleged violations of the Supremacy Clause and Commerce Clause of the U.S. Constitution. U.S. Const. art. VI, cl. 2; U.S. Const. art. I, § 8, cl. 3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 (1982) as an appeal from a final decision of a district court.

Statement of the Issues Presented

1. Whether Section 1 of the Energy Diversification and Expansion Act ("EDEA"), as enacted by Franklin and administered by the Franklin Public Service Commission ("PSC"), is "field preempted" under the Supremacy Clause of the U.S. Constitution, given the exclusive jurisdiction of Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA") with respect to the sale of electricity energy and the sale of capacity at wholesale in interstate commerce.
2. Whether Section 1 of EDEA, as enacted by Franklin and administered by the Franklin PSC, is "conflict preempted" under the Supremacy Clause of the U.S. Constitution, given that FERC—the agency charged with administering the FPA—has determined that market-based processes approved and overseen by FERC are the preferred means of achieving a reliable and reasonably priced electricity supply within the United States.
3. Whether Section 2(a) of EDEA, as enacted by Franklin and administered by the Franklin PSC, is invalid under the dormant Commerce Clause of the U.S. Constitution, given the

geographic limitation of "certified biomass feedstock" under EDEA to areas primarily located within the State of Franklin.

4. Whether Section 2(b) of EDEA, as enacted by Franklin and administered by the Franklin PSC, is invalid under the dormant Commerce Clause of the U.S. Constitution, given the geographic limitation of "eligible facilities" to customer-sited generation connected to the grid of electric distribution utilities serving retail customers within the State of Franklin.

Statement of the Case

This appeal follows the District Court's final judgment holding that the issuance of the Energy Diversification and Expansion Act ("EDEA") Implementation Order and the Biomass Eligibility Determination Order are unconstitutional violations of both the Supremacy Clause and the dormant Commerce Clause.

Electricity Producers Coalition ("EPC"), the national trade association representing electric power suppliers, filed their complaint against the State of Franklin on July 1, 2016. R. at 12. EPC sought a declaratory ruling that (1) the Carbon Assistance Payments ("CAPs") Program violated the Supremacy Clause due to the Federal Energy Regulatory Commission's ("FERC's") authority over interstate sales of electricity at wholesale, and (2) the modifications to Franklin's Renewable Portfolio Standard ("RPS") violated the dormant Commerce Clause due to its effects on interstate commerce. R. at 12. Additionally, EPC sought injunctive relief to prevent EDEA from being implemented on September 1, 2016. *Id.* Thereafter, EPC and Franklin filed cross-motions for summary judgment. *Id.*

On November 7, 2016, the District Court entered its final judgment in favor of EPC, without consideration of the dormant Commerce Clause argument related to Section 1 of EDEA. *Id.* Specifically, it held that Section 1 of EDEA was field preempted under the Supremacy Clause because the CAP Program would, in effect, interfere with FERCs exclusive jurisdiction under the

Federal Power Act ("FPA") over the interstate sale of electric energy at wholesale. R. at 12. Further, the District Court held that Section 1 of EDEA was conflict preempted under the Supremacy Clause because the CAP Program would interfere with FERC's ability to bring efficient, lower cost power to electricity customers. R. at 13. Additionally, the District Court ruled Sections 2(a) and 2(b) invalid under the dormant Commerce Clause. *Id.* According to the District Court, Section 2(a) impermissibly discriminated against biomass produced outside of Franklin, and Section 2(b) impermissibly excluded the portion of energy providers outside of Franklin. *Id.*

The State of Franklin appeals this final judgment to the Twelfth Circuit Court of Appeals, arguing that neither the Supremacy Clause nor the Dormant Commerce Clause were violated by EDEA. R. at 13. EPC supports the District Court's findings and maintains those claims. R. at 14.

Statement of the Facts

The State of Franklin is the third-largest coal producing state in the country and derives 82% of its electricity generation from coal and 2% from biomass. R. at 3. However, recently, Franklin has suffered a massive downturn in their coal industry due to the availability of cheaper natural gas, the declining prices of renewable resources, and more stringent regulations promulgated by the U.S. Environmental Protection Agency. *Id.* These market forces have financially distressed many of the State's coal-fired plants, five of which are now faced with premature retirement. *Id.* Should these market trends continue and Franklin's coal-fired power plants shut down, Franklin will lose a significant amount of tax revenue, many of its residents will likely lose their jobs, and Franklin's ability to attract and retain industrial and manufacturing jobs. *Id.* Prior to enactment of EDEA, Franklin's economic downturn resulted in several counties disproportionately suffering from layoffs associated with coal mine closures. R at 9.

Further, Franklin is confronted with threats to the integrity and reliability of its electricity generation system. *Id.* Franklin, like most surrounding states, has distribution utilities that purchase power through either bilateral contracts or through the PJM Auction ("Auction"). The distribution utilities then sell the electricity through retail sales to consumers. The Auction process is handled by the PJM Interconnection, which is regulated by FERC. PJM covers many states and is divided into 21 locational marginal pricing ("LMP") zones, which are geographic areas within the PJM region that use market-based prices to account for more local variances like transmission congestion. *Id.* Transmission congestion is the inability of energy to move throughout PJM territory, due to a lack of capacity to fully meet the demand for space on transmission lines. In other words, in areas where the demand is great but the supply of electricity is low, transmission lines can be overburdened, which results in varying prices across the LMP zones, often correlated to transmission infrastructure. R. at 6.

Three LMP zones cover Franklin: (1) Franklin East, which is located entirely within the State of Franklin; (2) Vandalia South, about one-quarter of which is located within Franklin and the rest in the adjoining State of Vandalia; and (3) Allegheny North, about one-half of which is located within Franklin and the rest in the adjoining State of Allegheny. *Id.* Electricity generation companies bid into the Auction at cost and PJM accepts bids based on demand. Bids are accepted from lowest cost to highest cost until demand is met. Every company whose bid was accepted is then paid the amount of the company with the highest cost bid accepted.

With the goal of bolstering its coal industry, Franklin enacted the Energy Diversification and Expansion Act ("EDEA"). *Id.* EDEA was created to provide financial incentives for coal-fired power plants serving Franklin, to modify Franklin's Renewable Portfolio Standard ("RPS") to promote biomass fueled energy, and also to create a carve-out in the RPS for customer-sited, biomass fueled generation.

First, Section 1 of EDEA created financial incentives for eligible coal-fired power plants serving Franklin through the Carbon Assistance Payments ("CAPs") Program. *Id.* CAPs are determined by the Public Service Commission ("PSC") in accordance with Section 1(a)(2), which requires the PSC to account costs associated with coal-fired generating units compared with competing sources of electricity, the extent to which existing revenues are insufficient to allow such plants to continue operating, the impacts of this program on ratepayers within Franklin, and the public interest. R. at 7. Eligible coal-fired power plants must be located within Franklin East, Vandalia South, or Allegheny North zones within the PJM region and at least 10% of the coal upon which the facility relies as its primary fuel source must originate from coal mines located at least partially within the State of Franklin. *Id.* Additionally, the PSC must determine that eligible coal-fired power plants require financial assistance to continue operations. *Id.*

Using this criterion, the PSC determined that there are five eligible coal-fired generation companies, three operating in the Franklin East zone, one operating in the Vandalia South zone (outside of Franklin), and one operating in the Allegheny North zone (within Franklin). *Id.* These five eligible facilities were to be given ten-year contracts administered by the Franklin State Energy Office ("SEO"). *Id.* The PSC set the CAPs at $18.50 per megawatt hour, based on analysis of relative bids for capacity bid into the PJM market for coal-fired generating units versus non-coal fired generating units. R. at 7-8. The CAPs program is not, however, in any way conditioned on the ability of the coal-fired power plant to successfully bid into the PJM auction.

Second, Section 2(a) of EDEA modified Franklin's RPS to require that electricity distribution companies procure no less than 15% of their fuel supply from certified biomass feedstock. R. at 4. This is an expansion of the already existing RPS requirement that utilities must generate a specific percentage of its electricity supply from renewable sources. R. at 8. Co-

firing biomass provides environmental benefits because utilizing biomass, rather than firing coal alone, results in reduced greenhouse gas emissions. R. at 4. Section 2(a) specifies that certified biomass feedstock be harvested from a "Designated Biomass Growing Region,"—an area within Franklin or an adjoining state that has been identified as containing suitable biomass, which comes from an economically depressed area. R. at 8-9. Two Designated Biomass Growing Regions were identified, which logically encompassed a majority of Franklin because 77% of Franklin is covered by forests, as it is the third most forested state in the country. R. at 3, 9. The first, Franklin-Allegheny State Forest, covers 756 acres that straddle the Franklin-Vandalia state line, with 506 acres within Franklin and 256 acres within Vandalia. R. at 9. The second, Central Appalachian forest, covers 422 acres, located entirely within Franklin. *Id.*

Finally, Franklin's existing RPS was modified to include a carve-out for customer-sited combined heat and power ("CHP") or cogeneration facilities fueled with biomass. Section 2(b) of EDEA requires that by 2020, .5% and by 2031, 1.0% of the renewable energy be procured from custom-sited, biomass-fueled CHP facilities. R. at 10. The fuel eligible for CHP facilities does not have to be from certified biomass feedstock. *Id.* However, because CHP facilities are required to be located on the customer side of the meter and to be connected to the distribution grid of an electric distribution company serving customers in Franklin, eligible facilities are by definition located within Franklin. *Id.*

Summary of the Argument

Franklin's actions are not preempted by the Supremacy Clause because Franklin was clearly operating within the realm of authority left to the States under the Federal Power Act ("FPA"). The FPA created a statutory scheme wherein the federal government, specifically Federal Energy Regulatory Commission ("FERC"), and the States share the responsibility of regulating responsibilities relating to regulating the electricity market. The suggestion that

Franklin's Energy Diversification and Expansion Act ("EDEA") violated the Supremacy Clause on the basis of field preemption is incorrect because EDEA does not encroach on FERC's authority to set a wholesale market rate through PJM. Rather, Franklin created the Carbon Assistance Payments ("CAPs") Program to bolster and support the businesses of coal-fired power plants, not to interfere with FERC's price-setting. Further, Franklin's actions did not violate the Supremacy Clause through conflict preemption because any effect on FERC or on wholesale rates are incidental effects that are not significant enough to preempt EDEA.

Sections 2(a) and 2(b) of EDEA do not run afoul of the dormant Commerce Clause. Violations of the dormant Commerce Clause occur when a statute is overtly discriminatory, creates an extraterritorial regulation, or fails the *Pike* balancing test by over burdening state commerce compared to putative local benefits. *See Pike v. Bruch Church, Inc.,* 397 U.S. 137, 147 (1970).

Both Section 2(a)'s "Designated Biomass Growing Region" and Section 2(b)'s carve-out for customer-cited biomass fueled generators treat in-state and out-of-state actors equally. R. at 9. Because of this equal treatment, out-of-state interests are not disparately impacted. Furthermore, an intent to engage in this discriminatory treatment was not present, rather, these Sections ensure the ability to meet electricity demand and stabilize power prices, increase resistance of the utility grid, reduce transmission and distribution costs, and create greater opportunities for employment within Franklin. Thus, these Sections do not overtly discriminate facially, in effect, or in purpose. Even if Appellee's claims that the Sections are discriminatory are true, Franklin's narrowly tailored, legitimate state interest in protecting access to the electricity grid would justify such discrimination.

Additionally, neither Section constitutes an extraterritorial regulation because neither Section directly controls commerce outside of Franklin. Section 2(a)'s certified biomass

feedstock is not defined according to state borders, but rather to factors tied to the suitability of the feedstock for co-firing with coal. Similarly, Section 2(b) is not defined by state borders and provides distributors with the autonomy in deciding where to procure the remaining portion of biomass fueled energy.

Finally, Section 2 survives intermediate scrutiny under the *Pike* balancing test because it confers the local benefits of sufficient capacity and stabilized power prices, which are traditionally matters left to the states' discretion. These putative local benefits are not outweighed by any type of burden on interstate commerce from either Section 2(a) or 2(b).

Argument

I. FRANKLIN DID NOT VIOLATE THE SUPREMACY CLAUSE BECAUSE FRANKLIN'S ACTIONS IN SECTION 1 OF ENERGY DIVERSIFICATION AND EXPANSION ACT WERE FIRMLY SITUATED WITHIN THE PERMISSIBLE SCOPE OF ACTIONS LEFT TO THE STATES IN THE FEDERAL POWER ACT.

A. Standard of Review for the Supremacy Clause

When examining whether a state's action is preempted by federal law, a court must begin with the assumption that the state's action is not preempted unless it "was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Further, when a federal agency claims that a state's action is preempted, a court must ensure that the agency was expressly authorized by Congress to exercise authority over the matter. *Solid Waste Agency of Northern Cook Cty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (stating that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."). Of course, preemption does not have to be expressly contained in the language of a statute for a state's action to be preempted, it can also be implied. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). Implied preemption can occur via field preemption or conflict preemption. *Id.*

Field preemption occurs in areas of law where the federal scheme of regulations is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (quoting *Fidelity Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)). In other words, states are prevented from "regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012). The Supreme Court has expressed a reluctance to find a state action field preempted based on "the comprehensiveness of regulations" because "infer[ing] pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough Cty. v. Automated Medical Lab., Inc.*, 471 U.S. 707, 717 (1985).

Conflict preemption occurs where a state law conflicts with a federal law, whether because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, or because the state law is interfering with the full accomplishment and execution of federal objectives. *Arizona*, 132 S.Ct. at 2501. Determining whether a state law sufficiently detracts from the ability of the federal government to accomplish its goals "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

Circuit Courts review a district court's grant of summary judgment de novo. *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). This Court should review the District Court's rulings de novo as to the Constitutional concerns, but should

defer to the District Court's finding of facts unless such a finding was clearly erroneous. *United States v. Grimmond*, 137 F.3d 823, 827-31 (4th Cir. 1998).

B. Franklin was operating within the scope of jurisdiction explicitly reserved to the States by the Federal Power Act and therefore, Section 1 is not field preempted by FERC.

The Federal Power Act ("FPA") does not field preempt Franklin from creating the Carbon Assistance Payments ("CAP") Program to benefit coal-fired power plants under Section 1(a)(6) of the Energy Diversification and Expansion Act ("EDEA"), because Franklin was exercising its powers explicitly reserved to the States by the FPA. Federal Energy Regulatory Commission ("FERC") was expressly granted jurisdiction of "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," under the FPA. 16 U.S.C. § 824(a) (2016). However, the FPA restricts FERC's jurisdiction "only to those matters which are not subject to regulation by the States." *Id*. Further, FERC does not generally have jurisdiction over "generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* at § 824(b). The States, therefore, are explicitly authorized to regulate "any other sale of electric energy," meaning that states retain jurisdiction of retail sales and all intrastate sales. *Id.*

Because the FPA deliberately created a system where the federal and state governments share power, proving that Franklin's actions are field preempted is a heavy burden that EPC must meet. It is inevitable that state actions will have incidental effects on FERC's policies, which is why such incidental effects are not be sufficient to preempt state actions. *See Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1298 (2016) ("States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain.").

The FPA paints a bright-line distinction between wholesale and retail transactions, as well as interstate and intrastate transactions. Indeed, the Supreme Court held that Congress intended for there to be a bright-line distinction between *inter*state wholesale transactions and *intra*state wholesale and all retail sales, rather than require a case-by-case analysis of the issue. *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). Although FERC's jurisdiction includes "any rule or practice 'affecting' [wholesale] rates," *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 766 (2016), incidental effects on "areas within FERC's domain" are not subject to preemption on that basis alone. *Hughes*, 136 S.Ct. at 1290-91.

In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), the Court held that the Utilities Commission of North Carolina was preempted from a rate for Nantahala's retail customers because it interfered with the rate set by FERC. *Id.* at 955. While FERC had ruled that Nantahala and Tapoco were not to be treated as a single entity, the Utilities Commission disagreed. *Id.* at 960. Because of the Utilities Commission's contrary decision, the rate the Commission set for Nanatahala's retail customers did not allow Nanatahala to recover all of the costs FERC determined it could recover. *Id.* In concluding that the Utilities Commission's decision was preempted, the Court cited the fixed rate doctrine, concluding that FERC "alone is empowered to make that judgment [of reasonableness], and until it has done so, no rate other than the one on file may be charged." *Id.* at 964 (citation omitted). Altering FERC's rate, even in the context of retail rate setting, the Court concluded, was interfering in the field of interstate wholesale rate setting, explicitly reserved to the federal government by the FPA. *Nantahala Power*, 476 U.S. at 971.

However, in *Public Util. Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), the Supreme Court created what became known as the *Attleboro Gap*. *State ex rel. Util. Comm'n v. Carolina Power & Light Co.,* 359 N.C. 516, 532 (2005). In essence, the

Attleboro Gap meant that neither the States nor the Federal Government had the authority to regulate wholesale sales of electricity in interstate commerce. Congress filled this gap by passing the FPA, creating a bright-line division of jurisdiction, giving authority of interstate wholesale transactions to FERC and intrastate sales of electricity to the States. It is imperative that the division of jurisdiction intended by Congress to be a bright-line distinction is maintained today. Here, the District Court's decision threatens to create another significant gap in jurisdiction by holding that Franklin exceeded its authority in creating the CAP Program to bolster struggling coal-fired power plants, something that would also fall outside of FERC's authority. If Franklin's actions are considered field preempted, it begs the question, who precisely has the authority to encourage electricity generators to remain in business? It is not something that is currently within FERC's authority, because it was never intended by Congress that they should have such authority. Rather, Congress intended for the States to continue to play their historic role in attracting and promoting various businesses to their respective states.

Thus, Section 1 of EDEA is not field preempted by the Supremacy Clause because Franklin's actions in creating the CAPs Program are fully within the field of jurisdiction explicitly reserved to the States. Franklin, acting well-within its rights accorded by the division of power in the FPA, took steps to preserve local electricity generation. By placing the costs for the CAPs program on Franklin's retail customers, Franklin did not infringe upon the field of wholesale rate setting. Franklin's actions are distinguishable from the facts in *Nantahala* because Franklin did not question the reasonableness of FERC's rate setting. While FERC's obligation is to set a reasonable rate in the wholesale setting, FERC is limited in its jurisdiction as to what it can do to protect the residents of Franklin and other states. Thus, rather than interfere with FERC's rate-setting, Franklin acted to prevent power shortages for its citizens by enacting the CAP Program. The CAP Program ensures that companies disadvantaged by the economy would

be able to remain operational for ten years. R. at 7-8. Therefore, this Court should hold that Section 1 of EDEA is not field preempted under the Supremacy Clause.

C. Franklin's actions are not conflict preempted because the use of the Carbon Assistance Payment Program as laid out in Section 1 does not materially interfere with FERC's exercise of authority in setting wholesale energy prices through the PJM Interconnection.

Just as Franklin's actions cannot be field preempted under the Supremacy Clause based on the FPA, Franklin's actions under EDEA cannot be conflict preempted because the CAPs Program does not materially interfere with FERC's right to set wholesale energy prices through the PJM Auction ("Auction"). Conflict preemption occurs where state law interferes with the ability of the federal government to fully perform and execute their objectives, but such a conflict is not present here. *See Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012).

The Court in *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016), did not explicitly state that Maryland's actions violated the Supremacy Clause based on conflict preemption. However, it is clear from the Court's analysis that Maryland's actions were in conflict with FERC's statutory grant of authority and were therefore invalid due to conflict preemption. In *Hughes*, the Court held that incidental effects on areas within FERC's domain are permissible, "but States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." 136 S.Ct. at 1298. Maryland, in an effort to encourage in-state development of electricity generation, contracted with CPV Maryland, LLC to build a new generation facility and provided funding to make the company competitive at the Auction. *Id.* at 1290. The funds Maryland provided to CPV Maryland were contingent upon CPV Maryland's successful entry into the Auction. *Id.* Maryland created this program because it believed FERC was not doing enough to encourage in-state generation of electricity, which was hindering Maryland's economy. *Id.* at 1299. The Court held that Maryland's actions violated the Supremacy Clause, but indicated that Maryland's goals were

ones that States could achieve through other means. *Id.* at 1290. Specifically, the Court held that Maryland violated the Supremacy Clause because its actions "adjust[ed] an interstate wholesale rate." *Id.* at 1290. The holding in *Hughes* was narrow and the Court emphasized that "[n]othing in this opinion should be read to foreclose . . . States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation." *Id.* at 1299. The "fatal defect" Maryland's program included that resulted in FERC's preemption was conditioning the funding to CPV Maryland on clearing the Auction. *Id.*

The facts in *Hughes* are quite different from the present facts. While Maryland made the payments to the electricity generating companies contingent upon their ability to compete in the Auction, Franklin in Section 1 of EDEA makes no such stipulation. Any impact Franklin's actions may have on the clearing prices of electricity at Auction is incidental and not significant enough to result in conflict preemption. R. at 4. Because EDEA did not make the CAPs contingent upon entry into the Auction, the CAP Program does not run afoul of the Supremacy Clause. Rather, Section 1 falls well outside of the narrow holding in *Hughes* and well within the statutory authority of Franklin to encourage electricity generating companies to remain in business. To hold otherwise would expand the narrow holding of *Hughes* and further restrict the police power of the States to govern themselves to the fullest extent afforded by the Constitution and by the FPA itself. Such a restriction would be a violation not intended by Congress and would be an overreach of Executive Power. The States must be permitted to facilitate and encourage generation within their borders.

II. SECTION 2 OF EDEA DID NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE IT WAS NOT DISCRIMINATORY, WAS NOT AN EXTRATERRITORIALITY REGULATION, AND WAS A LEGITIMATE STATE INTEREST WITH NO EFFECT ON INTERSTATE COMMERCE.

A. Standard of Review for dormant Commerce Clause analysis is based on a three-level analysis.

The Commerce Clause endows Congress with the power to regulate commerce. U.S. Const. art. I, § 8, cl. 3. This federal power to regulate commerce includes a corresponding negative power, the dormant Commerce Clause, which generally forbids state regulation of its own economy in a way that preferences in-state economic interests and burdens out-of-state interests. *Granholm v. Heald*, 544 U.S. 460, 460 (2005).

Courts have adopted a three-level analysis to determine whether a violation of the dormant Commerce Clause has occurred. First, a state statute that is "discriminatory on its face, in practical effect, or in purpose is subject to strict scrutiny." *North Dakota v. Heydinger*, 15 F.Supp.3d 891, 910 (D. Minn. 2014). This stringent standard requires a state to prove that its law is non-discriminatory toward other states and that there is no less discriminatory method available. *Id.* The second level of analysis nullifies state statutes as per se invalid if the statute has an "extraterritorial reach," or effectively "control[s] conduct beyond the boundaries of the state." *Id.* Finally, if a state statute is not discriminatory, "but indirectly burdens interstate commerce," it is evaluated using intermediate scrutiny under the balancing test set forth in *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). *See also Heydinger*, 15 F.Supp.3d at 910.

The District Court was incorrect holding that EDEA failed these three levels of analysis, and this Court reviews the grant of summary judgement de novo. *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012).

B. Section 2(a) does not violate the dormant Commerce Clause because: it does not overtly discriminate against out-of-state interests; it is not an extraterritorial regulation; and it satisfies the *Pike* balancing test.

1. *Section 2(a) does not overtly discriminate against interstate commerce either facially, in purpose, or in effect because it does not discriminate against out-of-state electric utilities to benefit in-state electric utilities.*

Under the dormant Commerce Clause, if a state statute is overtly discriminatory (a) on its face; (b) in purpose; or (c) in effect, it is per se invalid unless "there are no other means to

advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Granholm*, 554 U.S. at 472. A statute is discriminatory if it provides "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality* ("*Oregon Waste*"), 511 U.S. 93, 99 (1994). Section 2(a) of the Energy Diversification and Expansion Act ("EDEA") does not overtly discriminate in any of these methods, and therefore, the District Court holding should be reversed.

a. Section 2(a) does not facially discriminate because in-state and out-of-state interests are treated equally.

A statute is facially discriminatory if it clearly treats in-state economic interests differently than out-of-state interests and preferences the former based on the plain language of the statutory text. *Oregon Waste,* 511 U.S. at 99. For example, in *Oregon Waste*, the Supreme Court struck down an Oregon statute as facially discriminatory where it imposed a surcharge three times higher on the use of Oregon landfills for waste generated out-of-state than waste that was generated in-state. *Id.* This statute was struck down for violation of the dormant Commerce Clause where it "tax[ed] a transaction of incident more heavily when it cross[ed] state lines than when it occur[ed] entirely within the State." *Id.* (citations omitted).

Unlike *Oregon Waste*, Section 2(a) of EDEA applies evenhandedly to the three Locational Marginal Pricing ("LMP") zones servicing all or parts of Franklin. R. at 6. Section 2(a) modified Franklin's RPS by requiring electricity generating plants that sell to retail customers within Franklin to be fired with "certified biomass feedstock" from a "Designated Biomass Growing Region" which is defined as an area within the State of Franklin *and the adjoining states*. R. at 8. Vandalia and Allegheny are both adjoining states which are treated equally to Franklin with respect to this certified biomass requirement, and Section 2(a) thus

applies regardless of the utilities' in-state or out-of-state status. There is no "tax" or cost incurred simply by moving across state lines as there was in *Oregon Waste,* 511 U.S. at 99.

b. Section 2(a) does not discriminate in effect because there is no significant difference in impact level on in-state and out-of-state interests.

A statute discriminates in effect if the result of the statute is a preference for local interests over out-of-state interests. *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 350-52 (1977). However, differential treatment of states' interests does not mean that a statute automatically fails this analysis. For example, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the Supreme Court considered whether a state tax on mineral production was discriminatory under the Commerce Clause, where 90% of the coal was shipped out-of-state, forcing out-of-state consumers to bear the tax burden. *Id.* at 618. In holding that the mineral production tax did not violate the Commerce Clause, the Court stated that "assessing the State's 'monopoly' position or its 'exportation' of the tax burden out of State" were nothing more than "adventitious considerations." *Id.* The purpose of the Commerce Clause "was to create an area of free trade among the several States," and "under such a regime, the borders between the states are essentially irrelevant." *Id.* (citations omitted).

Similarly, Vandalia and Allegheny do not receive discriminatory treatment because Franklin is "exploit[ing] its monopoly 'position,'" as the third most forested state in the country. *Id.* at 619; R. at 3. The Commerce Clause does not give "residents of one State a right of access at 'reasonable' prices to resources located in another State that is richly endowed with such resource." *Commonwealth Edison Co.*, 453 U.S. at 619. For purposes of EDEA, the borders between the states are irrelevant just as they were in *Commonwealth Edison Co.*, because it is simply encouraging the free trade and use of biomass at electricity generating facilities. Franklin enjoys a monopoly of biomass due to its high forest coverage, and this enables it to more easily

fulfill the bio-mass energy requirement of Section 2(a). This existence of this monopoly does not therefore rise to the significant disparate impacts level required to invalidate the statute under the dormant Commerce Clause.

c. 2(a) does not discriminate in purpose because its goal is consumer protection not economic isolationism.

To determine whether a state statute has a discriminatory purpose in violation of the dormant Commerce Clause, courts must undergo a "cases-by-case analysis" of the "statute under attack" and assess what the statute purports to do. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (citations omitted). Typically, courts have been wary of discriminatory statutes which function as "mere experience or device to accomplish by indirection" what the State would otherwise be prohibited from doing. *Guy v. Baltimore*, 100 U.S. 434, 430 (1879). In other words, a state may not seek to "put itself in a position of economic isolation," by hiding behind "formulas and catchwords," that disguise a hidden discriminatory purpose. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). Protecting utilities to ensure "a reliable and affordable supply of energy" has been recognized as a "legitimate interest," not mere rhetoric that runs afoul of the dormant Commerce Clause. *Southern Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002).

Here, Franklin is not seeking to economically isolate itself or use statutory language to camouflage a hidden agenda. The purpose of EDEA Section 2(a) is to "improve[] reliance of the electric grid, reduce[] transmission and distribution costs, and increase[] the ability of customers to manage their energy costs." R. at 14. This purpose is not mere pretext—the declining coal industry in Franklin has placed numerous coal plants on the path to premature retirement, thus jeopardizing the electricity market. R. at 3.

The premature retirement of five coal-fired power plants threatens to create an unstable energy grid for Franklin residents because the closure of these coal-fired power plants facilities

will cause increased congestion in existing transmission lines, which will now be overburdened by the residents who had previously relied on the endangered coal-fired power plants. R. at 5-6. This increased demand on the transmission lines will also result in an increase in energy prices within the three locational LMP zones servicing Franklin. *Id.* EDEA is intended to protect all consumers, regardless of whether the customer's utility provider is located inside or outside Franklin.

d. Assuming, arguendo, that Section 2(a) is discriminatory, it survives strict scrutiny because there is no other way to advance Franklin's legitimate state interest of protecting customers.

The limits of the dormant Commerce Clause are "by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citations omitted). If a statute is overtly discriminatory, then a state 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." *Id.* (citations omitted). A state's regulation of utilities is recognized as such a legitimate purpose. *Southern Union Co.*, 289 F.3d at 509.

At the time of EDEA's enactment, Franklin derived 82% of its electricity generation from coal and was the third-largest coal producing state in the country. R. at 3. However, coal production has severely declined in recent years due to the availability of cheaper alternatives for electricity generating sources. *Id.* In order to combat threats to its energy supply, Franklin enacted Section 2(a), which mandates some co-firing with coal and biomass, thus making energy generation cheaper than when pure coal is used. Relying on such biomass sources is necessary to protect the legitimate state interest of ensuring consumers' reliable access to the electrical system. R. at 8. Franklin "retains broad regulatory authority to protect the health and safety of its

citizens and the integrity of its natural resources," and to do so it must utilize this regulation. *Taylor*, 477 U.S. at 151.

2. *Section 2(a) is not an extraterritorial regulation because it does not directly control commerce that occurs entirely outside of Franklin.*

Under the extraterritoriality doctrine, "[t]he Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders." *Heydinger*, 15 F.Supp.3d at 910–11 (citations omitted). If a state statute "requires people or businesses to conduct their out-of-state commerce in a certain way" it is invalid. *Id.* "The critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." *Id.* (emphasis in original). The practical effect is determined by assessing "the consequences of the statute itself" in conjunction with how the "statute may interact with the legitimate regulatory schemes of other States." *Id.*

For example, in *National Elec. Mfrs Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), the court held that Vermont's statute the labeling of mercury-containing light bulbs sold or used within the state did not violate the dormant Commerce Clause. *Id.* at 107–08. The statute in that case was "indifferent" to how lamps with mercury-containing light bulbs sold elsewhere were labeled, and "manufacturers could modify their production and distribution systems to differentiate between products destined for Vermont and those destined elsewhere." *Heydinger,* 15 F.Supp.3d at 914-15 (quoting *National Electrical Manufacturers Ass'n* 272 F.3d 104 at 110). Similarly, 2(a) is indifferent to how energy procured and sold to non-Franklin residents. The statute applies to how Franklin residents receive their energy, and therefore does not influence how other states provide energy for their own residents. Also, under the Renewable Portfolio Standards (RPS), utilities typically already procure a specific percentage of its electricity supply from renewable sources. Therefore, Section 2(a) likely does not require out-of-state utilities to modify their existing procurement methods. R. at 8.

Furthermore, any geographic limitation associated with certified biomass feedstock in Section 2(a) is not defined according to state borders, but rather is tied to factors geared toward the suitability of the feedstock for co-firing with coal in power plants, given that biomass can successfully be co-fired with coal at up to 15% biomass. Steven Ferrey, *Generation Technologies and Fuels for Electric Plus Thermal Energy*, 1 L. of Indep. Power § 2:12.40 (2016). Thus, there is a "good and non-discriminatory reason" for indirectly incorporating state boundaries into 2(a), and the dormant Commerce Clause does not require that such a "reality be ignored in lawmaking." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013). Therefore, Section 2(a) does not constitute "impermissible extraterritorial regulation." *Id.*

3. Section 2(a) survives the Pike balancing test because it does not favor in-state interests— it serves legitimate local interests relating to resource management and does not burden interstate commerce.

The *Pike* test states that, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). Because Section 2(a) is not overtly discriminatory, strict scrutiny does not apply. Instead the Court must apply intermediate scrutiny, which Section 2(a) satisfies because it serves a legitimate local interest and does not burden interstate commerce.

a. Section 2(a) confers significant putative local benefits relating to resource management.

A state legislative judgement determines what constitutes a putative local benefit. Courts typically defer to states' legislative judgments, interfering only if "the legislative facts . . . could not reasonably be conceived to be true by the governmental decision maker." *Minnesota v. Clover Leaf Creamery Co*. ("*Clover Leaf*"), 449 U.S. 456, 464 (1981). Courts are especially hesitant to interfere with state legislative judgments when the state is exercising what is

"traditionally a local government function." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 344 (2007). The regulation of utilities "is one of the most important of the functions traditionally associated with the power of the police state." *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citation omitted). Therefore, regulating utilities to assure "a reliable and affordable supply of energy" is recognized as a "legitimate interest." *Southern Union Co.,* 289 F.3d at 509.

Franklin is justified in exercising its traditional local government control over utilities to ensure a reliable and affordable source of energy for its residents. In 2016, Franklin was the third-largest coal producing state in the country and obtained 82% of its electricity from coal and. R. at 3. As a result, Franklin is particularly impacted by market forces affecting coal. *Id.* In recent years, market forces have detrimentally impacted coal and, therefore, Franklin is now facing the risk of electricity supply deficits. *Id.* The anticipated loss of generating capacity due to premature closures of five coal-fired power plants within Franklin and its neighboring states could threaten residents' access to energy, and cause significant price increases for consumers. R. at 3, 5. Section 2(a) protects consumers from these threats by requiring companies to utilize certified biomass feedstock, which is a "low-cost option for efficiently and cleanly converting biomass to electricity by adding biomass as a partial substitute fuel in high-efficiency coal boilers." *Biomass Cofiring: A Renewable Alternative for Utilities*. National Renewable Energy Laboratory 1 (2000), http://www.nrel.gov/docs/fy00osti/28009.pdf. Biomass is particularly suited to co-fire with coal because it can be co-fired with coal at 15% biomass, which is a significantly greater ratio compared to other sources. R. at 14; Ferrey, *Generation Technologies*, § 2:12.40. Therefore, Section 2(a)'s biomass requirement is the best means to achieve putative local benefits for consumers.

b. Section 2(a) of EDEA does not burden interstate commerce.

Under the *Pike* balancing test, "if a legitimate purpose is found, then the question becomes one of degree" of the effect on interstate commerce. *Pike*, 397 U.S. at 142. In determining the extent of this burden, a court looks at the "nature of the local interest" as well as its direct and indirect effects on commerce. *Id.* This does not mean that any effect on interstate commerce is an impermissible burden which results in the failure of the *Pike* balancing test. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001). The burden on interstate commerce must be substantial or significant for the statute to violate the dormant Commerce Clause. *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). For example, in *Clover Leaf*, Minnesota enacted a statute which banned the sale of milk in certain types of containers, unless those containers were make of paperboard. *Clover Leaf,* 449 U.S. at 458. The Court held that the burden imposed on interstate commerce was minor because the products could still freely move across state borders, and the inconvenience of the different packaging requirements was slight because most manufacturers already used more than one type of packing container. *Id.* at 472.

Here, similar to *Clover Leaf*, utilities are required to generate a specific percentage of its electricity supply from renewable sources to satisfy Franklin's RPS to sell their electricity in Franklin. R. at 8. Although no data is provided in the record regarding biomass locations in Allegheny, Vandalia has 256 acres of biomass in their state which they may already be using to meet their RPS. R. at 9. Since both Vandalia and Allegheny are already required to utilize renewable energy, specifying the type, as in *Clover Leaf,* represents a "minor" inconvenience. *Clover Leaf,* 449 U.S. at 472. Furthermore, "there is no reason to suspect that the gainers will be [Franklin utilities], or the losers out-of-state" facilities. *Id.* at 473. As in *Clover Leaf*, those challenging the litigation (here, the EPC), include utilities operating within Franklin. R. at 12. The industry most likely to benefit is the biomass producers, just as the pulpwood producers

were the industry likely to benefit under Minnesota's statute. *Clover Leaf,* 449 U.S. at 473. Claiming that such an effect rises to the level of a significant burden on interstate commerce is, as the Supreme Court put it, an "exaggeration." *Id.*

C. Section 2(b) of EDEA does not violate the dormant Commerce Clause because the carve-out promotes the unique benefits of customer-sited generation without restricting out-of-state business.

Section 2(b) of the Energy Diversification and Expansion Act ("EDEA"), intentionally and effectively promotes customer-sited distributed generation resources, and does not run afoul of the dormant Commerce Clause because the requirements of the Section are applied evenly to both in-state and out-of-state actors. The practical effects of this statute are sufficient energy capacity and stabilized power prices, increased resistance of the utility grid, reduced transmission and distribution costs, more opportunities for employment within Franklin, and benefits to the environment. R. at 4, 14.

Appellee argues that Section 2(b) excludes the participation of energy providers outside of the State of Franklin and that it has articulated no reason to justify this burden on interstate commerce. This is demonstrably false. Section 2(b) does not burden out-of-state energy distribution utilities from participating in the Franklin market, rather, it sets an equal standard for both out-of-state and in-state energy providers. R. at 10.

Here, Section 2(b) satisfies all three levels of analysis under *Heydinger*, and does not violate the dormant Commerce Clause. *See North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 910 (2014). First, Section 2(b) does not discriminate against interstate commerce either facially, in purpose, or in effect. Second, Section 2(b) is not an extraterritorial regulation because it regulates conduct strictly within Franklin. Finally, Section 2(b) survives the *Pike* balancing test because Franklin's legitimate state interests outweigh any potential discriminatory effects of the statute on interstate commerce.

1. Section 2(b) does not overtly discriminate against interstate commerce either facially, in purpose, or in effect because it does not pose a barrier for out-of-state actors to participate in Franklin's market.

As previously stated, if a state statute is discriminatory on its face, in purpose, or in effect, then it is overtly discriminatory and subject to strict scrutiny. *See Granholm v. Heald*, 544 U.S. 460, 472 (2005).

Section 2(b) is not discriminatory where the requirement for energy distribution utilities to procure a portion of energy from customer-sited, biomass-fueled combined heat and power ("CHP") facilities is evenly applied to both in-state and out-of-state electricity distribution utilities, and is enacted for the purpose of bolstering local biomass-fueled energy—not to discriminate against out-of-state utilities. R. at 5.

a. <u>Section 2(b) is not facially discriminatory where the procurement requirement is the same for in-state and out-of-state electricity distribution utilities and electricity sales outside of Franklin are not obstructed.</u>

"[T]he Supreme Court has consistently recognized facial discrimination where a statute . . . distinguishes between in-state and out-of-state products and no nondiscriminatory reason for the distinction was shown." *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1089 (2012). A state statute is facially discriminatory where it "overtly blocks the flow of interstate commerce at [the] State's borders." *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *see e.g., Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979) (holding that the statute was facially discriminatory against interstate commerce because it forbid the transportation of natural minnows out of the State for purposes of sale).

Here, Section 2(b) is not facially discriminatory because it does not treat out-of-state electric distribution utilities differently than in-state electricity distribution utilities. R. at 10. Further, Section 2(b) is not facially discriminatory because it does not prohibit energy from leaving Franklin for sale in interstate commerce. *Id.*

b. Section 2(b) does not discriminate in effect because out-of-state and in-state distributors are treated equally.

When determining whether a statute has a discriminatory effect, the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the state." *See Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S. Ct. 2491 (1989). For example, in *Chemical Waste v. Hunt*, 504 U.S. 334 (1991), the Court held that an Alabama statute violated the dormant Commerce Clause because it placed a tax on out-of-state waste but not on waste generated within Alabama. *Id*. at 342.

Here, Section 2(b) is distinguishable from *Chemical Waste* because the same procurement requirement is applied equally to out-of-state and in-state electric distribution utilities. R. at 10. The effect of Section 2(b) is to require that 0.5% of the renewable energy required under the existing Renewable Portfolio Standard ("RPS") be procured from customer-sited, biomass fueled CHP facilities. *Id.* Distributors may procure the remaining 2.5% of the required biomass fueled energy from in-state or out-of-state generators. R. at 8. Therefore, Franklin's intent to promote customer-sited biomass-fueled generation is achieved, and distributors are given autonomy to decide where they will procure the remaining portion of biomass fueled energy. *Id.*

c. Section 2(b) does not discriminate in purpose because Franklin's intent is to bolster customer-sited generation.

Section 2(b) is not discriminatory in purpose and therefore does not violate the dormant Commerce Clause. In *Rocky Mountain Farmer's Union v. Corey*, 730 F.3d 1070 (2012), California's interest in enacting its statute regarding ethanol was to protect its coastline, natural resources, food sources, and population from the effects of global warming. *Id.* The Court held that "California should be allowed to continue and to expand its efforts to find a workable solution . . . [because] if no solution is found, California residents . . . will suffer great harm." *Id.*

The purpose of Section 2(b) is "to capture the unique benefits of customer-sited generation, such as improved resilience of the electric utility grid, reduced transmission and distribution costs, and increasing the ability of customers to manage their energy costs." R. at 14. This purpose is similar to California's in *Rocky Mountain Farmer's Union*, in that Franklin enacted this statute to bolster customer-sited biomass fueled generation, and in turn, to protect the state from the threats of an unstable energy market. R. at 4. Section 2(b), by utilizing customer-sited biomass fueled energy, diminishes effects of climate change, ensures a source of income through employment for residents, and also reduces the price of electric utilities for residents. *Id.* This Court should uphold Section 2(b) because Franklin will be severely harmed without the promotion of its customer-site biomass fueled generators.

d. <u>Assuming, arguendo, that Section 2(b) is discriminatory, it survives strict scrutiny because there is no other way to advance Franklin's legitimate state interest of promoting biomass fueled energy generation.</u>

The Court in *Rocky Mt. Farmer's Union*, 730 F.3d 1070, 1087, articulated that "[i]f a statute discriminated against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'"

Here, the best available method for Franklin to achieve its goal of bolstering Franklin's economy and benefiting the quality of life for its residents is through the provisions of Section 2(b). At the time of EDEA's enactment, Franklin's energy market was being trampled by out-of-state energy markets. R. at 3. Franklin was faced with losing an entire industry that it depends on for jobs and revenue. *Id.* Franklin responded to this crisis by implementing a nondiscriminatory and environmentally wholesome means of achieving its goal. Through Section 2(b), Franklin's air would be cleaner because the customer-sited biomass fueled generators are being utilized rather than purely coal burning plants. R. at 4. Further, Section 2(b) assured job security for the

residents, and based upon the success of their energy market, a positive trickle-down effect on all aspects of Franklin's economy. *Id.*

2. *Section 2(b) is not an extraterritorial regulation because it manages conduct within the State, rather than outside the State.*

Section 2(b) is a non-discriminatory standard for how energy is received in Franklin. The statute is indifferent as to how energy is distributed outside of Franklin. Therefore, Section 2(b) is not an extraterritorial regulation. *See, e.g., National Elec. Mfrs. Ass'n v. Sorrell* 272 F.3d 104, 110 (2d Cir. 2001) (affirming the constitutionality of a Vermont statute where, ". . . by its terms, is indifferent to whether lamps sold anywhere else in the United States are labeled or not.").

As previously stated, under the extraterritoriality doctrine, if a state statute "requires people or businesses to conduct their out-of-state commerce in a certain way" it is invalid. *See North Dakota v. Heydinger*, 15 F.Supp.3d 891, 910–11 (2014). In *Federal Compress Co. v. McLean*, 291 U.S. 17 (1933), the Court upheld the constitutionality of a state tax on storing and compressing cotton because once the cotton was stored in the warehouse it did not become a part of interstate commerce. *Id.* at 21 (holding that, "[t]he business . . . is local, and a nondiscriminatory state tax upon it is consistent with the commerce clause of the Constitution.").

Similarly, here, the Section 2(b) requirement for electricity distribution utilities serving Franklin customers, which requires the procurement of renewable energy from customer-sited, biomass fueled generators, brings energy into the State for the sole purpose of being utilized by customers within Franklin. R. at 10.

Further, Section 2(b) is constitutional because the energy procured under the statute does not penalize wholly out-of-state transactions, but rather is a requirement for participants in Franklin's market. *Id.*, *see, e.g., Rocky Mountain Farm's Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (noting that the court has "distinguished statutes 'that regulate out-of-state parties

directly' from those that 'regulate[] contractual relationships in which at least one party is located in [the regulating state].").

3. *Section 2(b) survives the Pike balancing test because it is narrowly tailored and uses the least discriminatory means available to achieve Franklin's goal of bolstering the development of biomass fueled generators within the State.*

Franklin's impending crisis of losing the State's main source of electricity and revenue was best mitigated through implementation of Section 2(b). This Section enhances the success of Franklin's energy industry, the prosperity of its residents, and the health of the environment. R. at 4.

a. Section 2(b) confers the local benefits of sufficient capacity and stabilized power prices, increased resistance of the utility grid, reduced transmission and distribution costs, greater employment opportunities within Franklin, and environmental advantages.

In *Rocky Mt. Farmers Union*, California's statute was upheld despite setting a standard for out-of-state actors, because the state's interest—combating global warming and creating a market recognizing the harmful costs of products with a high carbon intensity—was compelling and the most narrowly tailored means of achieving that interest. *Rocky Mt. Farmers Union*, 370 F.3d 1070; *see also, Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (holding that under the Commerce Clause, "[a]bsent discrimination, we will uphold the law unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.").

Here, Section 2(b) will strengthen the reliability of the electricity grid, will be beneficial to the environment, and will be advantageous to residents of Franklin. R. at 4. The promotion of customer-sited biomass fueled energy ensures a sustainable and environmentally beneficial method of energy production and may reduce the impacts of global warming. *Id.* Additionally, the local nature of the customer-sited biomass fueled energy ensures a steady source of energy to the utility grid, which will stabilize power prices. *Id.* Finally, stimulating the development of a

biomass industry promotes employment opportunities for Franklin's residents, which will lead to an increase in the overall health of Franklin's economy. *Id.*

b. Section 2(b) does not burden interstate commerce.

"Differential treatment explicitly discriminates against interstate commerce by limiting the emerging and significant direct-sale business." *Granholm v. Heald,* 554 U.S. 460, 467, 125 S. Ct. 1885, 1892 (2005). Here, Section 2(b) does not impose differential treatment on out-of-state and in-state electric distribution utilities, and so does not burden interstate commerce.

D. Dormant Commerce Clause jurisprudence respects federalism by protecting local autonomy.

The traditional federalism model encompasses "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States." Thomas Mason, *Federalism: The Role of the Court*, in *Federalism: Infinite Variety in Theory and Practice*, 24-25 (1968). The dormant Commerce Clause does not purport to infringe on this "local autonomy." *National Ass'n of Optometrists & Opticians*, 682 F.3d at 1148-49. Invalidating EDEA on dormant Commerce Clause grounds would infringe on Franklin's recognized autonomy in protecting its citizens. This Court should therefore uphold Sections 2(a) and 2(b) as they are most efficient means to ensure Franklin's citizens possess a reliable access to the energy grid. Therefore, this Court should find that there is no violation of the dormant Commerce Clause in either Section 2(a) or 2(b).

Conclusion

For the foregoing reasons, the State of Franklin respectfully requests this Court find that Franklin did not violate either the Supremacy Clause or the dormant Commerce Clause and therefore reverse the holding of the District Court below.

Brief Certificate of Compliance

Pursuant to *Official Rule III.C.9*, the State of Franklin certifies that its brief contains [# of pages] pages in Times New Roman 12-point font.

We further certify that we have read and complied with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the *Team Members* of *Team No. 2*, and the *Team Members* of *Team No. 2* have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No. 2

<u>Certificate of Service</u>

Pursuant to *Official Rule* IV, *Team Members* representing the State of Franklin (Appellant) certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. E.T., February 13, 2016.

Respectfully submitted,

Team No. 2