C.A. No. 16-01234

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF FRANKLIN,

Appellant,

v.

ELECTRICITY PRODUCERS COALITION,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This case arises under the Supremacy Clause, U.S. Const. art. VI, § 2, and dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, of the United States Constitution; therefore, the United States District Court for the Eastern District of Franklin properly exercised original jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2016). Following that court's November 7, 2016 final decision, Franklin timely filed its motion to appeal on December 6, 2016. R. at 13. This Court was vested with appellate jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294(1) (2016).

STATEMENT OF THE ISSUES

I. Whether Section 1 of the Energy Diversification and Expansion Act is field preempted under the Supremacy Clause of the Constitution because the Carbon Assistance Payment program encroaches on FERC's exclusive authority over interstate wholesale sales of capacity.

II. Whether Section 1 of the Energy Diversification and Expansion Act is conflict preempted under the Supremacy Clause of the Constitution because the Carbon Assistance Payment Program cannot act in concert with FERC's operation of the wholesale capacity market-based auction.

III. Whether Section 2(a) of the Energy Diversification and Expansion Act is constitutionally viable under the dormant Commerce Clause in light of the "certified biomass feedstock" requirement that mandates a portion of Franklin's energy load be generated from biomass harvested from forests located primarily in Franklin.

IV. Whether Section 2(b) of the Energy Diversification and Expansion Act is constitutionally viable under the dormant Commerce Clause in light of the "eligible facilities" requirement that mandates a portion of Franklin's energy load must be satisfied by energy produced within the State of Franklin.

STATEMENT OF THE CASE

Spurred by the issuance of the Electricity Diversification and Expansion Act ("EDEA") Implementation Order and the Biomass Eligibility Determination Order, and in light of the September 1st, 2016 implementation date, Electricity Producers Coalition ("EPC") filed for declaratory and injunctive relief against Franklin on July 1, 2016.[1] R. at 12. Electricity Producers Coalition asserted in the District Court for the Eastern District of Franklin that the Carbon Assistance Payment ("CAP") program violates the Supremacy Clause, and the Franklin Renewable Portfolio Standard ("RPS") modifications violate the dormant Commerce Clause. *Id.* In July 2016, the EPC and Franklin filed cross-motions for summary judgment. *Id.* On November 7, 2016, the District Court granted EPC's motion for summary judgment. *Id.* Franklin timely filed its motion to appeal on December 6, 2016. R. at 13. Constitutional questions are reviewed de novo. *See United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996).

STATEMENT OF THE FACTS

In January 2016, Franklin enacted the EDEA to prop up its coal-fired generating plants and compel the development of its biomass and CHP industries. R. at 3. Among the motivations set forth in the preamble of the Act were concerns about the availability of new generation in the state, the economic viability of its coal industry, and job protection. R. at 4–5.

Section 1 of the EDEA provides CAPs for eligible coal-fired generators serving Franklin. R. at 3. This program, administered by Franklin's Public Service Commission (PSC), provides a

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[1] The Electricity Producer Coalition is the national trade association representing leading competitive electric power suppliers. R. at 12. Our members include companies involved in competitive wholesale and retail electricity markets, with significant financial investments in electricity generation and electricity marketing operations in Franklin and throughout the PJM operating region. *Id.* Because EPC's "members would obviously be concretely affected" by the EDEA, EPC has standing to bring this suit. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 573 n.8 (1992); *see Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977).)

ten-year subsidy to eligible coal-fired generators. To qualify, generators must offer their capacity to PJM Interconnection ("PJM"), have at least ten percent of their coal originate from mines located in Franklin, and require financial assistance to remain in operation. R. at 6.

PJM oversees the reliability of the electricity grid through a capacity auction, of which Franklin is a member. *Id.* PJM predicts electricity demand three years in advance and assigns shares of the demand to participating Load-Serving Entities ("LSEs"). *See PPL Energyplus v. Hanna*, 977 F. Supp. 2d 372, 378–79 (D.N.J. 2013). Generators that have the capacity to produce three years' worth of electricity sell capacity to PJM through bids at an auction. *Id.* at 387. PJM accepts the lowest bid first and accepts each next highest bid until the capacity meets the projected demand. *Id.* at 388–89. The selected bidders receive a payment equal to the highest bid chosen before capacity was satisfied—called the clearing price. *Id.* Next, the LSEs purchase their previously-assigned share of capacity from PJM at the clearing price. *Id.* When the clearing price is high, new generators enter the market due to favorable economics and a high likelihood of a return on their investment. *Id.* at 389. When the clearing price is low, new generators are discouraged from constructing and entering the market.[2] *Id.*

The CAP program was created to revive Franklin's waning coal industry. R. at 3. The amount of the CAP is determined by the incremental capital and operating costs associated with coal-fired generators compared to competing sources of electricity, the shortfall of revenue

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[2] FERC has two other requirements: a Minimum Offer Price Rule ("MOPR") and a New Entry Price Adjustment ("NEPA"). The MOPR is not at issue here because it does not apply to coal-fired generators, rather is used for "new generators to bid capacity into the auction at or above a price specified by PJM, unless those generators can prove that their actual costs fall below the MOPR price." *Hughes v. Talen*, 136 S. Ct. 1288, 1294 (2016); *see also N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 86 (3d Cir. 2014). The NEPA "guarantees new generators, under certain circumstances, a stable capacity price for their first three years in the market." *Hughes,* 136 S. Ct. at 1294. The NEPA is not at issue here because Franklin's eligible coal-fired generators are not new entrants.

preventing coal plants from operating, the impacts of the payments on ratepayers, and the public interest. R. at 7. In June 2016, the PSC issued its EDEA Implementation Order identifying five coal-fired generating plants as eligible for the CAP program, four of which are located in Franklin. *Id.* The payment amount was set at $18.50/MWh in consultation with a power supply expert who based this price, in part, on historical capacity bids into the PJM wholesale capacity market. R. at 7–8. Franklin recaptures the funds paid to the PJM-participating coal-fired, generators under the CAP program through a complex, multi-tiered assessment protocol. R. at 7.

The EDEA also modifies Franklin's RPS to favor in-state resources and generators. Section 2(a) of the EDEA imposes a requirement on electric distribution companies to procure a portion of their electricity supply from coal generators that co-fire with at least fifteen percent "certified biomass feedstock" harvested from "Designated Biomass Growing Regions." R. at 8. These regions are selected based on suitability for sustainable harvest, suitability of the biomass to be used as feedstock in co-fired coal generators, and locality, assigning preference to Franklin's economically depressed areas. R. at 9. In June 2016, the Franklin Department of Natural Resources ("DNR") and the Division of Commerce issued a joint Biomass Eligibility Determination Order, which identified the Designated Biomass Growing Regions. R. at 9. The counties recognized by the Order have suffered an economic decline as a result of the downturn in the coal industry and have unemployment rates at or above 9.7%. *Id.* Of the 1,178 acres of forest identified by the Order, 922 acres are located in Franklin.[3] *Id.*

The modified RPS not only imposes mandatory in-state biomass harvesting, but also requires utilities to purchase biomass-fueled electricity produced exclusively in-state. In 2007, Franklin enacted an RPS that required 20% of Franklin energy to come from renewable sources

[3] Approximately 78% of the acres identified as Designated Biomass Growing Region are within Franklin. *See* R. at 9.

by 2020, increasing to 30% by 2030. R. at 8. Permissible sources of renewable energy are solar, wind, geothermal, biomass, and small-scale or run-of-river hydro. *Id.* Section 2(b) of the EDEA modifies the RPS to include a carve-out for combined heat and power ("CHP") facilities fueled by biomass that are connected to the distribution grid of a Franklin utility. R. at 10. Under the modification, an increasing subset percentage, 0.5% by 2020 growing to 1% by 2030, of the existing RPS must be produced by customer-sited CHP generators. *Id.* By nature of the distribution connection requirement, every generator eligible to contribute to the carve-out requirement is located within Franklin. R. at 10.

SUMMARY OF THE ARGUMENT

The EDEA is an unconstitutional exercise of state power. The Eastern District of Franklin correctly granted EPC's declaratory and injunctive relief. First, it rightly recognized that Franklin's CAP program is preempted under the Supremacy Clause because it intrudes on FERC's exclusive authority over wholesale sales of capacity. Second, it accurately held Franklin's geographic limitations on certified biomass feedstock and eligible facilities violate the dormant Commerce Clause because the limitations discriminate against interstate commerce.

A state law is field preempted when Congress has legislated an entire field of regulation so comprehensively that states have no room to supplement federal law. The EDEA, through the CAP program, encroaches into a field specifically reserved to FERC. The Act guarantees a payment to failing coal-fired generators that is based on the relative capacity bids in the PJM auction. This subsidy serves to supplement FERC's jurisdiction over the wholesale capacity market and causes generators to bid based on the subsidy and not the market for demand.

A state law is conflict preempted when a state and federal law conflict such that the laws cannot act in concert together, and the state law stands as an obstacle to the accomplishment of Congress's full purposes and objectives with regard to the federal laws. Congress gave FERC authority to create and oversee the PJM capacity auction to increase electric reliability. The CAP program disrupts the market signals that FERC and capacity producers rely on to adequately serve consumers. Franklin's law frustrates Congress's purposes by creating an auction of fictional bids based not on operational costs, but on an impermissible subsidy. Franklin's law and FERC's regulations cannot work in concert.

A state law violates the dormant Commerce Clause when it favors in-state economic interests at the expense of out-of-state economic interests. This discrimination against interstate commerce can manifest on the face of a statute or in its practical effects. Section 2(a) is discriminatory because the definition of "Designated Biomass Growing Region" explicitly favors Franklin's interests and in practical effect excludes out-of-state biomass. Section 2(b) discriminates against out-of-state CHP generators because it does not permit their energy to satisfy the RPS carve-out requirement.

A discriminatory state law can survive a dormant Commerce Clause challenge in the extraordinary case that the state shows, in a strict scrutiny analysis, that it serves a legitimate local purpose that cannot be adequately achieved through a nondiscriminatory means. Section 2(a) fails to point to a local purpose other than economic protectionism, which has a *per se* rule of invalidity. Section 2(b), even assuming it does serve a legitimate local purpose, ignores the multiple nondiscriminatory means that could equally serve the local purpose. For these reasons, both sections are invalid under the dormant Commerce Clause.

ARGUMENT

I. THE ENERGY DIVERSIFICATION AND EXPANSION ACT IS PREEMPTED BECAUSE IT ENCROACHES INTO AND CONFLICTS WITH FERC'S EXCLUSIVE AUTHORITY OVER THE WHOLESALE CAPACITY MARKET.

Field preemption is found where "Congress has legislated comprehensively to occupy an entire field of regulation." *Hughes v. Talen Energy Mktg, LLC*, 136 S. Ct. 1288, 1297 (2016) (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989)). When a state issues new laws that step into a field reserved for the federal government, courts hold that the state is preempted under the Supremacy Clause. *See* U.S. Const. art. VI, § 2. An actual conflict between a "federal law is unnecessary to a finding of field preemption; instead, it is the mere fact of intrusion that offends the Supremacy Clause." *PPL Energyplus v. Nazarian*, 753 F.3d 467, 474 (4th Cir. 2014) (citing *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 97–98 (1963)).

Conflict preemption results from the "imminent possibility of collision" between the state and federal regimes. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 294 (1988). When examining whether a state law is conflict preempted, courts look to the full statutory scheme to determine whether the statutory purpose may be accomplished by other means. *See, e.g., Hanna*, 977 F. Supp. 2d at 410 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000)). The EDEA, through the CAP program, fails under both preemption analyses.

A. The Act is Preempted Because the Carbon Assistance Payments Program Intrudes on a Field Regulated Exclusively by FERC.

Congress passed the Federal Power Act ("FPA") to resolve tensions between federal and state authorities in the electricity sector and draw bright lines of jurisdiction between the two. *See Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 531 (1945); *see also Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (holding that the federal government has an interest in the regulation of interstate wholesale sales of electricity). FERC has exclusive jurisdiction over the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1) (2012). The FPA only gives states authority to regulate retail sales of electricity to end-users. *See Hughes*, 136 S. Ct. 1288, 1292 (2016); *PPL Energyplus v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 80 (3d Cir. 2014). The EDEA encroaches into FERC's regulatory power by interfering with the wholesale capacity market; therefore, the EDEA is unconstitutional under the Supremacy Clause.

FERC regulates through an intricate, market-based system devised to encourage new generation and increase electric reliability for the end user. *See* 16 U.S.C. § 824a-2 (granting FERC the authority to study and make recommendations about electric reliability); FERC, *Electric Power Markets: PJM* (May 25, 2016), https://www.ferc.gov/market-oversight/mkt-electric/pjm.asp. The market-based system is implemented through the PJM capacity auction. *See, e.g., Hanna*, 977 F. Supp. 2d at 384 (explaining the end of vertical integration in New Jersey and the state's relationship with PJM and the capacity auction). The capacity auction ensures that capacity to meet electric demand is reliable, cost effective, and available for the next three years. *See id.* When states devise statutory schemes that affect PJM's capacity auction, FERC's regulatory scheme is undermined, congressional purposes are frustrated, reliability may go down, and costs for consumers may rise.

Conversely, states retain authority over how electricity gets to the end user. 16 U.S.C. § 824(b) ("The provisions of this subchapter . . . shall not apply to any other sale of electric energy [other than transmission in interstate commerce]."). States may also select "the type of generation to be built . . . and where to build the facility," which can potentially result in incidental effects on the wholesale capacity market. *Solomon*, 766 F.3d at 255. These incidental effects do not preempt the state. *See id.* It is when states create a regulatory scheme that renders FERC's regulation of the market-based approach to capacity sales moot that a state is preempted. *See Hughes*, 136 S. Ct. at 1299; *Nazarian*, 753 F.3d at 477–78; *Solomon*, 766 F.3d at 253–54. The EDEA does not have an incidental effect on the market. Its effects are imminent and direct.

Providing CAPs to eligible coal-fired generating plants in Franklin preempts the EDEA because it directly interferes with the FERC-regulated wholesale capacity market. Courts have invalidated analogous state-sponsored plans because the practical effect of the plans allows facilities to bid capacity based on the state regulation rather than FERC's wholesale capacity market. *See, e.g., Hughes*, 136 S. Ct. at 1288; *Solomon*, 766 F.3d at 241. The Supreme Court invalidated a Maryland contract for differences program that encouraged the construction of an in-state power plant by "requir[ing] LSEs to enter into a 20-year pricing contract" at a specified rate set by the new power plant that guaranteed a payment regardless of the plant's performance in the capacity auction. *See Hughes*, 136 S. Ct. at 1294–95. Maryland's program[4] subsidized the plant by guaranteeing a fixed payment for the wholesale sale of its capacity for twenty years. *See id.* at 1295. Because the bid was influenced by the plant's guaranteed contract payment and not its actual operating costs, the Court held the Maryland program had the "potential to seriously . . . undermin[e] the incentive structure FERC [] approved for construction of new generation" and unlawfully encroached into FERC's exclusive regulation of the wholesale capacity market. *See id.* at 1297.

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[4] Under the program, the plant sold its capacity through PJM's capacity market and, if the capacity was a bid selected by PJM and the clearing price was below the contract price, the plant received the difference between the contract price and the clearing price from the LSE via its ratepayers. If the clearing price was above the contract price, the plant paid the LSEs the difference between the contract and clearing prices.

Similarly, the Third Circuit invalidated a New Jersey Act that instructed the Board of Public Utilities to construct new power-generating facilities. *See Hanna*, 977 F. Supp. 2d. at 393–94. The Board of Public Utilities subsidized new generation by issuing agreements to eligible generators. *Id.* at 393. The program required electric distribution companies to contract with the generators to "pay any difference between the [capacity] auction price and their actual development costs approved by the Board." *Id*. The court held the Act was field preempted because it "established the price the generators would receive for their sales of capacity," thus supplanting FERC's jurisdiction of the wholesale market and PJM auction. *Id*. at 409, *aff'd. sub nom PPL Energyplus v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("When New Jersey arranged for LCAPP generators to receive preferential capacity rates, the state entered into a field of regulation beyond its authority."). Both the Supreme Court and the Third Circuit struck down the Maryland and New Jersey plans because they impermissibly influenced FERC's wholesale capacity market. *See Hughes*, 136 S. Ct. at 1297; *Solomon*, 766 F.3d at 246. The EDEA is essentially a reiteration of these unconstitutional laws.

Franklin developed the CAP program to keep coal-fired generators competitive against cheaper electricity sources. But the practical effect of the CAP program is to provide an impermissible subsidy that directly affects how Franklin's coal-fired generators bid into the PJM wholesale capacity market. R. at 7. To even be eligible for the CAP, the coal-fired generator must offer its capacity in the PJM auction. *Id.* The CAP amount is then determined based on prior capacity bids to promote generation at coal-fired power plants whose operational costs cannot otherwise compete. *Id.* The program gives facilities a guaranteed subsidy for ten years. *Id; see also Hughes,* 136 S. Ct. at 1297 (holding the twenty-year contract assurance to be unlawful); *Solomon*, 766 F.3d at 252 (holding the fifteen-year contract assurance to be unlawful).

In practice, the CAP program allows these coal-fired generators to undercut competition in the capacity market by offsetting their costs of production and allowing the generator to bid at an artificially low price. *Cf. Hughes*, 136 S. Ct. at 1295; *Solomon*, 766 F.3d at 253. Because the CAP subsidy is contingent on the generator offering its capacity into the auction, and the relative wholesale capacity bids for other coal-fired units, Franklin's plan directly impacts the PJM capacity auction. *Cf. Hughes*, 136 S. Ct. at 1299 (rejecting Maryland's plan because it "disregards an interstate wholesale rate required by FERC."). Franklin calibrates the CAP subsidy based on historical wholesale capacity bids, and the payment needed to offset the shortfall required for the generator to remain competitive within the wholesale market. R. at 7–8. So structured, the subsidy is directly tethered to the PJM capacity market. *See Hughes*, 136 S. Ct. at 1299 (noting that plans untethered to the wholesale capacity market are lawful). Because the CAP guarantees a payment to eligible generators, it undermines FERC's authority and encroaches into the field of FERC's regulation of wholesale capacity markets.

The CAP program undermines FERC's extensive market-based regulatory scheme by giving subsidies to generators such that they bid their capacity based on the contractually guaranteed ten-year capacity amount and not the wholesale market price. *See id*. at 1297 (noting the practical effects of Maryland's plan adjusted the interstate wholesale rate through the generator's bidding based on the guaranteed payment in the contract for differences plan). The EDEA creates a regulatory scheme through the PSC. The regulations are designed to stall the retirement of coal-fired electricity generators in the face of decreasing costs from alternative electricity sources. The scheme's practical effects attempt to make coal-fired electric generators competitive in the PJM auction at the expense of new generation. Because it focuses on the generator's competitive place in the auction and not on retail sales to customers, the Act enters into the field of FERC's exclusive jurisdiction over the wholesale capacity market. The EDEA induces Franklin's coal-fired generators to artificially decrease their wholesale capacity bids into the PJM auction; therefore, like the Maryland and New Jersey plans, it is preempted because it encroaches on a field reserved exclusively to FERC.

B. The Act is Preempted Because it Conflicts with the Purposes and Objectives of the Federal Power Act.

Conflict preemption exists when state law frustrates the execution of congressional objectives and purposes. *See Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 355 (1988) (holding that under preemption principles "FERC has exclusive authority to determine the reasonableness of wholesale rates."). Section 1 of the EDEA is preempted because the CAP program interferes with the market signals used to increase competitive capacity bidding, thereby discouraging construction of new electricity generators.

The CAP program allows coal-fired generators to bid lower prices than their costs require, thus distorting the market signals for other electricity generators. *See Hughes*, 136 S. Ct. at 1296 (quoting a FERC document holding FERC's authority to act "[w]hen subsidized entry supported by one state's or locality's policies has the effect of disrupting [PJM's] competitive price signals."). The program conflicts with federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hanna*, 977 F. Supp. 2d at 410 (quoting *Crosby*, 530 U.S. at 373). Congress gave FERC exclusive authority to create an efficient and reliable capacity market for the PJM auction participants. *See* 16 U.S.C. § 824 *et seq.* (2012). Section 824a of the United States Code encompasses Congress's intention for FERC to implement an efficient electricity transmission market:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered

> and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for generation, transmission and sale of electric energy.

16 U.S.C. § 824a. FERC accomplishes this through regulation of nonprofit entities such as PJM. *See FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016) (noting that "FERC encouraged the creation of nonprofit entities to manage the wholesale [electricity] markets on a regional basis."). PJM serves as the marketplace for thirteen states and the District of Columbia to share capacity and ensure reliability to the end user. *See Hanna*, 977 F. Supp. 2d at 378. The sharing pool created and regulated by FERC "drastically drops consumer costs by limiting the number of electrical generation facilities required for peak hour production." *See id.* When states distort the market through state law, it is impossible for state law and federal law to act in concert and the state law must be preempted.

The PJM market exists because Congress needed to regulate interstate transactions of electricity. *See Hanna*, 977 F. Supp. 2d at 383–84 (explaining the origin of FERC's authority and PJM). Prior to the development of PJM, utilities had little interaction, which created "inefficiencies because each utility would construct its own power plants to meet peak electric demand," meaning that there were some in-state plants that were only operating for a few hours at a time based on the demand from the state's residents. *Hanna*, 977 F. Supp. 2d at 383. When interstate utilities started selling capacity to each other to maintain a balanced grid, Congress stepped in to regulate the interstate sales through the FPA. *See id.* at 384. The result is implementation, by PJM, of a FERC-approved market-based system to increase reliability and lower prices for end users. *See id.* at 387 (noting that the auction is intended to "secure sufficient capacity resources to meet standards for serving the highest aggregate demand of the region's electric customers."). Through market-based signals and the auction process, PJM ensures that electric generators can supply capacity to the LSEs and consumers at prices that adequately reflect demand. *Id.* at 387–88.

The integrity of the capacity auction is predicated on generators accurately representing their costs. When generators represent their market bids on actual operating costs, PJM can set reliable and consistent clearing prices that incentivize new investments in electricity generation. *See, e.g.*, *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("By using competitive bidding for future capacity contract, [the market] system both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers."). Congress contemplated the transparency of market prices when giving FERC its authority to "direct[] and facilitate price transparency in markets for the sale of transmission." *See* 16 U.S.C. § 824t. Congress delegated to FERC the authority to create an efficient and reliable capacity market. FERC implemented this delegation by creating a capacity auction that relies on honest participation by generators. *See Nazarian*, 753 F.3d at 476 (holding Maryland's law "compromise[d] the integrity of the federal scheme" because it "supplant[ed] the rate generated by the auction with an alternative rate preferred by the state."). In repudiation of this goal, Franklin induces generators to bid in reliance on a subsidy divorced entirely from the actual operating costs, thus distorting the integrity of the auction.

Courts have invalidated attempts by Maryland and New Jersey to undermine the capacity market. To address concerns about reliable electricity, the two states crafted plans to require contracts between their LSEs and new generators to give the generators price-assurances for twenty years and fifteen years, respectively, no matter what the clearing price was at the capacity auction. *See Hughes*, 136 S. Ct. at 1294–95; *Solomon*, 766 F.3d at 248–49. In doing so, they sought to give preferential treatment to their own generators. *See id.* The courts held that these plans unconstitutionally conflicted with FERC's authority to regulate the PJM wholesale capacity market. *See Hughes*, 136 S. Ct. at 1299; *Solomon*, 766 F.3d at 255; *Nazarian*, 753 F.3d at 480; *Hanna*, 977 F. Supp. 2d at 412; *PPL Energyplus v. Nazarian*, 974 F. Supp. 2d 790, 855 (Md. Dist. 2013). The courts recognized the practical effect of giving an intrastate generator preferential treatment in an interstate market. *See, e.g., Solomon*, 766 F.3d at 246 ("[W]hen New Jersey arranged for LCAPP generators to receive preferential capacity rates, the state entered into a field of regulation beyond its authority). If each state gives a contract for differences, or a subsidy, to its intrastate generators, the generators would bid based on the state subsidy and not the actual costs to maintain capacity. New entrants would be dissuaded from entering the market because they would discover the reality of capital and operational costs upon construction. The courts recognized that FERC would lose all authority if states operated in this manner. *See Hughes*, 136 S. Ct. at 1297; *cf. N.J. Bd. of Pub. Utils.*, 744 F.3d at 100–01 (discussing FERC's removal of the MOPR's state exemption and noting the exemption could "adversely affect others states that wished to rely on prices in the capacity market . . . as opposed to relying on state subsidies."). Because Congress intentionally gave FERC regulatory power to prevent market distortion, the courts preempted the states' plans.

Franklin's plan disrupts the market signals in the same manner as the Maryland and New Jersey plans; therefore, it is preempted. Using the previous clearing prices, the State Energy Office determines the CAP amount and offers it to "eligible" facilities for ten years. R. at 7. The program gives preferential treatment to "eligible" coal-fired electric generators. *Id.*; *see also Solomon*, 766 F.3d at 246. When the generators make bids in the capacity market, they are able to bid lower than actual costs require because they rely on the CAP subsidy. *Cf. Hughes*, 136 S. Ct. at 1295 (explaining that the contract terms "encourage [the generator] to bid its capacity into the auction at the lowest possible price" to receive the guaranteed rate if its capacity clears). By bidding lower, these "eligible" facilities have a higher probability of clearing. This choice displaces facilities that are bidding based on their actual costs and abilities to produce adequate capacity. *Cf. Hanna*, 977 F. Supp. 2d at 400 (noting the New Jersey statute displaced the clearing price and supplanted the contract price "causing less predictability in the energy capacity markets."). This disrupts the market because it squeezes out generators bidding based on their actual operational costs and brings down the market clearing prices, thus disincentivizing new generation and undermining congressional goals.

Rather than this unconstitutional scheme, Franklin has a viable alternative. Franklin may encourage production "of new or clean generation through measures 'untethered to a generator's wholesale market participation.'" *Hughes*, 136 S. Ct. at 1299; *see also N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d at 79–80. If Franklin provided a direct subsidy to all coal-fired generators separate and apart from the wholesale clearing price, it would not encroach on FERC's authority. Because the state is giving preferential treatment to only a handful of generators, and basing the CAP directly on bidding in the capacity market, the program is preempted.

Section 1 of the EDEA disrupts the market signals that FERC, participants in the PJM auction, and new entrants rely on to provide electric generation across the thirteen states included in the auction. The CAP program, as contemplated by the EDEA, cannot work in concert with the FPA. The program disrupts the auction by allowing certain coal-fired electric generators to bid at fictionally low rates because they are insured by a subsidy. This affects the efficiency and reliability of the auction and the market as a whole. Therefore, Section 1 of the EDEA is in direct conflict with federal law and is preempted.

II. THE GEOGRAPHIC LIMITATIONS IN THE ENERGY DIVERSIFICATION AND EXPANSION ACT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE THEY DISCRIMINATE AGAINST INTERSTATE COMMERCE WHEN NONDISCRIMINATORY ALTERNATIVES ARE AVAILABLE.

"Our economic unit is the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949). As such, state "laws that would excite [] jealousies and retaliatory measures" among sister states are prohibited under the Commerce Clause. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994); *see also* U.S. Const. art. I, § 8, cl. 3. Written as an express grant of power authorizing Congress to regulate interstate commerce, the Commerce Clause is not limited to spheres of affirmative legislation. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). Rather, as early as *Gibbons v. Ogden* and *Cooley v. Board of Wardens*, the Supreme Court has interpreted "a further, negative command, known as the dormant Commerce Clause." *Am. Trucking Assocs., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). This "negative command" protects the free flow of commerce among the states, even where Congress has not explicitly spoken. *See Oregon Waste,* 511 U.S. at 98 (stating that the Commerce Clause's "'negative' aspect [] denies the States the power [to] unjustifiably [] discriminate or burden the interstate flow of articles of commerce."); *Welton v. Missouri*, 91 U.S. 275, 282 (1875) (finding the dormant Commerce Clause "is equivalent to a declaration that inter-State commerce shall be free and untrammeled."). Therefore, the dormant Commerce Clause operates to maintain "the principle of the unitary national market." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

The threshold inquiry in a dormant Commerce Clause challenge is whether the at-issue state law, either facially or through its practical effects, discriminates against interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). A discriminatory statute mandates "differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the ladder." *Oregon Waste,* 511 U.S. at 99; *see also New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (defining "economic protectionism" as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."). A discriminatory law can only stand if the state demonstrates, after a rigorous analysis, that the law serves a legitimate local purpose that cannot be adequately accomplished through nondiscriminatory means. *See Granholm v. Heald*, 544 U.S. 460, 489 (2005) (stating that finding the at-issue law discriminatory "does not end the [dormant Commerce Clause] inquiry."); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977) ("When discrimination against commerce . . . is demonstrated, the burden falls on the State to justify both . . . the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives."); *cf. Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992) (holding that a legitimate local purpose must be "unrelated to economic protectionism"). However, the state must show a legitimate local purpose and lack of nondiscriminatory alternatives under the strict scrutiny standard. *See C & A Carbone*, 511 U.S. at 392; *Maine v. Taylor*, 477 U.S. 131, 144 (1986) ("[T]he proffered justification for any local discrimination against interstate commerce must be subjected to 'the strictest scrutiny'") (citing *Hughes v. Oklahoma*, 441 U.S. at 337). Consequently, the dormant Commerce Clause routinely invalidates discriminatory state laws. *See W. Lynn Creamery*, 512 U.S. at 192; *Maine*, 477 U.S. at 148 ("[S]tate laws that amount to 'simple economic protectionism' [] have been subject to a 'virtually *per se* rule of invalidity." (quoting *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978))); *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (discriminatory state laws are "viewed with particular suspicion" and "[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.").

Nondiscriminatory statues that affect interstate commerce are not spared from dormant Commerce Clause inquiry. Statutes that do not discriminate against, but nevertheless impose an incidental burden on, interstate commerce are examined under an undue burden balancing test. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (applying balancing test to laws that "regulate[] even-handedly to effectuate a legitimate local public interest . . . ."). Under the *Pike* balancing test, the legitimate interests motivating the at-issue law are weighed against the burdens imposed on interstate commerce. *See id.* ("[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.") Although presumptively valid, even-handed regulations must be invalidated under the dormant Commerce Clause where the burdens imposed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Id.* (invalidating Arizona statute because the "State's interest [was] minimal at best . . . .").

Sections 2(a) and 2(b) of the EDEA are discriminatory and must be held to the strict scrutiny standard of the dormant Commerce Clause. The state regulations cannot meet this high burden because, even if the State could advance a legitimate local interest, it failed to choose one of the many nondiscriminatory alternatives available to effectuate its purposes. Therefore, this Court should affirm and declare both sections of the Act unconstitutional under the dormant Commerce Clause.

A. <u>The Geographic Limitation on "Certified Biomass Feedstock" Violates the Dormant Commerce Clause Because it is Discriminatory on its Face and in Practice.</u>

As relevant here, two forms of discrimination recognized under the dormant Commerce Clause are facial discrimination and discrimination in practical effect. Facial discrimination is found in state policies that expressly favor local businesses or guard resources for local use. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) (finding facial discrimination in a local ordinance that prohibited the sale of milk unless it had been pasteurized within five-miles of the city center); *Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978) (finding facial discrimination in a state law prohibiting out-of-state waste from being brought in-state). Where facial discrimination is found, the burden shifts to the State to provide a legitimate interest. *See Oregon Waste*, 511 U.S. at 101 (quoting *Hughes,* 441 U.S. at 337). This burden is so substantial that "facial discrimination by itself may be a fatal defect." *Id.* The state also has a substantial burden where discrimination is found in the practical effect of the statute.

Even if not discriminatory on its face, a statute still violates the dormant Commerce Clause if its practical effect interferes with interstate commerce. *See Bacchus Imps. v. Dias*, 468 U.S. 263, 273 (1984) (invalidating a facially neutral tax imposed on wholesalers because it provided an exemption for in-state liquors; therefore, raising the price of out-of-state liquor); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010) (invalidating a facially neutral law imposing a volume cap on eligibility for shipping licenses because it was set at a level that larger out-of-state wineries could not meet). When evaluating the practical discriminatory effects, courts look to how the enacted state law operates and may ignore any justifications or reasoning offered by the enacting legislature. *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1801 n.4 (2015). Laws that have the practical effect of reserving resources for state use or restricting out-of-state access are considered discriminatory in their practical effects. *See Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (statute invalidated because it reserved a portion of the coal market for coal produced in-state, which in practical effect excluded coal mined in other states."). Any impact on interstate commerce by the practical effect of the statute is impermissible, no matter how small. *See id.* at 455–56. Once found to be discriminatory under either of these methods, the burden then shifts to the state to provide a legitimate local interest to justify the discrimination.

Discriminatory statutes can be saved in the rare case the state advances a legitimate local interest capable of surviving strict scrutiny review. The legitimate state interests that have been upheld despite dormant Commerce Clause challenges are those that have immediate health and safety consequences or concern unique environmental challenges. *See Maine*, 477 U.S. at 152 (prohibition on import of out-of-state baitfish upheld due to concerns of parasites destroying native fish population); *Asbell v. Kansas*, 209 U.S. 251 (1908) (prohibition on import of livestock originating from out-of-state upheld due to concerns regarding spread of disease); *Reid v. Colorado*, 187 U.S. 137 (1902) (same). Conversely, economic protectionism is not a legitimate justification for burdening interstate commerce. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). Laws that do so are *per se* invalid. *See All. for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1994) (quoting *Philadelphia*, 437 U.S. at 624). For example, state policies favoring intrastate generators are a form of economic protectionism and violate the dormant Commerce Clause. *See id.* at 595 (striking down a state law that required approval of any ten percent or greater decrease in the use of Illinois coal due to the policy's protectionist effect); *see also Wyoming*, 502 U.S. at 437 (striking down a statute requiring coal-fired power plants to burn a mixture containing at least ten percent Oklahoma mined coal due to the policy's protectionist effect). If the state finds a legitimate local interest that justifies discrimination, the state must further demonstrate that it had no nondiscriminatory alternative available.

If nondiscriminatory alternatives are available, the state must pursue those methods; otherwise, the statute as enacted is invalid under the dormant Commerce Clause. *Compare Dean Milk*, 340 U.S. at 354–57 (city ordinance invalidated because nondiscriminatory alternatives were available), *with Rocky Mountain Farmers Union*, 730 F.3d at 1090 (California fuel standard upheld because it was based on carbon intensity, a nondiscriminatory method, rather than fuel origin). In the unlikely case that a legitimate local interest survives strict scrutiny, the asserted unavailability of nondiscriminatory alternatives must survive the same standard. *See Dean Milk*, 340 U.S. at 354–57. The EDEA discriminates against interstate commerce, without a justifying legitimate local interest and despite nondiscriminatory alternatives being available.

Section 2(a) of the EDEA is discriminatory on its face and in its practical effects because "certified biomass feedstock," as defined by the PSC, favors Franklin economic interests, and in practice displaces coal that would be consumed from other coal producing states. The EDEA is facially discriminatory because its definition of a "Designated Biomass Growing Region" includes economic criteria favoring Franklin for classifying biomass as certified biomass feedstock. R. at 9. The Act classifies two forests as certified biomass feedstock areas: one is located entirely in Franklin and the other has more than two-thirds of its area located within Franklin. R. at 9. This definition prohibits the use of biomass harvested from any other forest simply because it is not located in Franklin, regardless of whether it is of the same, or even better, quality for feedstock purposes. This restriction is functionally identical to the milk ordinance invalidated in *Dean Milk* and the waste import restriction in *Philadelphia*. *See Dean Milk*, 340 U.S. at 356; *Philadelphia*, 437 U.S. at 618. These state laws were considered *per se* invalid because on their face they expressly excluded commerce simply because it was moving to or coming from out-of-state. Similarly, Franklin's definition of "certified biomass feedstock" excludes all other forms of biomass, solely because it originates from out of state and therefore is *per se* invalid.

Additionally, the geographic limitation is discriminatory in its practical effects, resulting in economic protectionism. The restrictions on certified biomass are economically protectionist because they discriminate against comparable biomass that could be acceptable for use in coal generators simply because it originates from outside of Franklin's designated regions. *See Bacchus*, 468 U.S. at 273 (invalidating a liquor tax for having a discriminatory effect on comparable out-of-state goods); *Family Winemakers of Cal.*, 592 F.3d at 5 (invalidating a volume cap for having a discriminatory effect on comparable out-of-state goods). The motives expressed in the preamble to protect jobs and the environment cannot save the act from its practical discriminatory effects because the court is only concerned with how the enacted law operates and affects interstate commerce and not the motivations behind passing the law. *See Comptroller of the Treasury*, 135 S. Ct. at 1801 n.4.

Franklin's scheme is invalid because it requires in-state electric plants to burn a mixture of fifteen percent Franklin biomass, thus expressly reserving a segment of the Franklin electricity feedstock market for Franklin-produced biomass. This is functionally identical to the invalidated Oklahoma statute requiring electric plants to burn a mixture of coal containing at least ten percent Oklahoma-mined coal, because it "expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other states." *See Wyoming*, 502 U.S. at 437. Franklin may contend that the inclusion of out-of-state biomass in the certification of the Franklin-Allegheny State Forest militates against a dormant Commerce

Clause violation, but the possible linkage to another state does not change the discriminatory character of the law. *See Nazarian*, 974 F. Supp. 2d at 850 (holding that a Maryland law incentivizing construction of a generation facility was discriminatory even when the law provided that the facility might be built in Maryland or Washington, D.C.).

Absent from Franklin's justification for this law is the immediate risk to health and safety that courts have held as a legitimate reason justifying discrimination against interstate commerce. *See Asbell*, 209 U.S. at 251 (holding that the risk of decimating local livestock populations is a legitimate local interest); *Reid*, 187 U.S. at 137 (same). Also absent are unique environmental considerations that would necessitate discrimination in the interest of environmental protection. *See Maine*, 477 U.S. at 152 (holding that the irreversible impacts to Maine's pristine ecology is a legitimate local interest). Here, the biomass restrictions are not motivated by any legitimate interest. Instead, the justification is naked economic protectionism evident in the law's criteria used to determine eligible growing areas. R. at 9. These criteria include determinations by the Franklin Division of Commerce that an area is "economically depressed" based on an analysis of "labor and employment trends, unemployment rates, [and] average income." *Id.* Because these criteria only seek to prop up local commerce at the expense of interstate commerce they fail to carry the heavy burden necessary to qualify as a legitimate state interest.

The environmentally beneficial actions that Franklin purports to advance with the EDEA do not mitigate the economic protectionism inherent to the scheme. *Cf. Dean Milk*, 340 U.S. at 354 ("[T]hat the ordinance is valid simply because it professes to be a health measure[] would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."). Furthermore, Franklin's interest in protecting the state coal industry does not save the Act from its practical discriminatory impacts. R. at 4; *cf. All. for Clean Coal*, 44 F.3d at 595 ("[T]he need to maintain and preserve as a valuable State resource the mining of coal in Illinois" did not save the Act from its protectionist invalidation).[5]

Even if Franklin's purported economic or environmental concerns met the strict scrutiny standard necessary to justify discrimination against interstate commerce, the scheme still violates the dormant Commerce Clause because non-burdensome alternatives are available. Franklin has several permissible alternatives to mitigate the decline of their local coal industry. *See Dean Milk*, 340 U.S. at 35457 (1951) (city ordinance invalidated because inspections by local officials was an available nondiscriminatory alternative). The first, and most significant, is the PJM Fixed Resource Requirement ("FRR") alternative. *See N.J. Bd. of Pub. Utils.*, 744 F.3d at 84. This method permits states to opt-out of the capacity auction and elect to pay its generators a directly negotiated price. *Id.* If Franklin believes that the auction method is insufficient to incentivize generation within its borders, it can employ the FRR option, which is consistent with state police powers and does not conflict with interstate commerce. Alternatively, if environmental factors are Franklin's primary concern, and the state feels that biomass is the best solution, it can build state-owned biomass generators to encourage the development of the biomass industry rather than displacing the consumption of coal generators. *Cf. Hughes* 136 S. Ct. at 1299 (suggesting, *inter alia*, state-owned generation as a permissible alternative state action). Finally, if Franklin is concerned about unemployment and economic stagnation in coal mining areas, it can create state-sponsored education grants or a retraining program to ensure jobs for residents. *Cf. W. Lynn Creamery*, 512 U.S. at 199 n.15 (citing *New Energy Co.* 486 U.S.

[5] It is worth nothing that these burdens on interstate commerce would weight just as heavily under a *Pike* balancing test approach with the burdens on interstate commerce being far greater than the benefit to Franklin.

at 278. (indicating a standalone subsidy is permissible under the dormant Commerce Clause). Any of these nondiscriminatory alternatives are valid exercises of state police power and do not offend the dormant Commerce Clause. But, Franklin's approach under the EDEA prioritizes in-state biomass resources over out-of-state biomass resources and displaces previously used out-of-state coal; therefore, the scheme cannot stand under the dormant Commerce Clause.

B. The Geographic Limitation on "Eligible Facilities" Violates the Dormant Commerce Clause Because it is Discriminatory Despite the Availability of Nondiscriminatory Alternatives.

The same strict scrutiny test that applies to Section 2(a), applies with equal force to Section 2(b)'s geographic limitations on eligible CHP facilities. Even if these limitations were not discriminatory, Section 2(b) still fails to satisfy the less burdensome *Pike* balancing test and must be struck under the dormant Commerce Clause.

Section 2(b) of the EDEA discriminates against interstate commerce facially and in its practical effects because it requires all electric distribution utilities to purchase a portion of their capacity load from CHP facilities located in Franklin. R. at 10. Section 2(b) of the EDEA modifies the RPS to create a carve-out for customer-sited, biomass-fueled CHP facilities that are connected to the distribution grid of a utility that serves customers in Franklin. R. at 10. Because of the customer-sited constraint, the carve-out creates an impermissible requirement within a permissible one: not only are Franklin distribution utilities required to procure a percentage of their energy from renewable sources, but further, they must purchase a subset of that energy from a discriminatorily circumscribed set of CHP facilities. R. at 10. The RPS carve-out scheme limits eligible CHP facilities to only those that are on the customer side of the meter, and therefore necessarily within Franklin. R. at 10. The result is functionally identical to the invalidated milk pasteurization and flow control ordinances at issue in *Dean Milk* and *C & A Carbone*, respectively. *See Dean Milk*, 340 U.S. at 349; *C & A Carbone*, 511 U.S. at 390. Just as the invalidated ordinance in *Dean Milk* permitted the sale of only milk products pasteurized within a five-mile radius of the city, here, the Act's customer-sited provision permits CHP power produced only within Franklin to contribute toward the mandatory carve-out requirements. *See Dean Milk*, 340 U.S. at 350. The Act's geographic limitation discriminates against interstate commerce because, by designating "preferred [generating] facilities," Franklin "deprive[s out-of-state competitors] access to local demand for their services." *Cf. C & A Carbone,* 511 U.S. at 392 (declaring regulation that funneled all business to a single, favored facility discriminatory). By requiring distribution utilities to purchase a portion of their electricity only from Franklin CHP facilities, Section 2(b) benefits in-state interests while burdening comparable out-of-state renewable energy facilities. Because the provision grants a competitive advantage to Franklin's CHP generators, it is a form of economic protectionism that facially and practically discriminates against interstate commerce.

Franklin cannot rescue Section 2(b) because, even assuming that the benefits offered in the preamble constitute a legitimate local interest, its aims can be adequately accomplished through nondiscriminatory alternatives. The preamble of the EDEA purports to encourage CHP generation and use of renewable energy sources in the interest of reliability and decreased costs. R. at 4–5. Franklin chose to enact a mandatory provision to attain these goals and promote the use of CHP, biomass-fueled power. *See* EDEA § 2(b). However, far from employing the least discriminatory alternative, Franklin chose to promote renewable energy sources "in the way that most overtly discriminates against interstate commerce." *Hughes*, 441 U.S. at 337–38. For the portion of renewable energy "carved-out" by Section 2(b), Franklin proscribed interstate acquisition of CHP energy. R. at 10. Franklin enacted a complete ban on interstate commerce to promote its own CHP industry rather than, for example, incentivizing investment in CHP technology through a tax deduction similar to those used to encourage solar panel installation in other states. *Cf. Hughes* 136 S. Ct. at 1299 (suggesting, *inter alia*, tax incentives as a permissible state action). If Franklin's goal is to encourage CHP generation, and not merely to protect local industry from interstate competition, Section 2(b) should have omitted the customer-sited requirement and instead expressed a location-neutral mandate for CHP electricity. Section 2(b) of the EDEA revealed itself as a protectionist measure when it designated customer-sited facilities as the only permissible energy generators for the carve-out mandate rather than permitting any CHP facilities' energy to contribute. Because the purported aims of the provision could adequately be accomplished through nondiscriminatory means, the law must yield to the dormant Commerce Clause.

Even if the CHP carve-out was not discriminatory, its effect on interstate commerce is clearly excessive when weighed against Franklin's putative benefit, and the provision still fails under the *Pike* balancing test.[6] *See Pike*, 397 U.S. at 144–45. The EDEA's preamble extols the efficiency benefits of CHP generation. R. at 5. To take advantage of these benefits, Section 2(b) mandates that 0.001%[7] of Franklin's total energy consumption derive from in-state CHP facilities by 2020. The benefit to Franklin must be weighed against the burden to interstate commerce. *See Pike*, 397 U.S. at 142 ("If a legitimate local purpose is found, then the question becomes one of degree."). Like in *Pike*, Franklin's interest in reserving 0.001% of the State's energy consumption to electricity produced by in-state CHP is minimal at best. *See Pike*, 397

[6] Because Section 2(b) is discriminatory, the Court need not reach the issue of a *Pike* balancing test. However, the analysis is included to demonstrate that the provision fails under any dormant Commerce Clause formulation.

[7] Section 2(b) of the EDEA mandates that 0.5% of Franklin's 20% renewable energy requirement must be from CHP by 2020. By 2030, the RPS requires 30% of Franklin's energy consumption derive from renewable sources, 1% of which must be from in-state CHP. Therefore, by 2030, 0.003% of Franklin's energy must come from Franklin CHP facilities.

U.S. at 146. In contrast, out-of-state CHP facilities are completely foreclosed from contributing to the carve-out mandate and are thus disincentivized from participating in the Franklin market at all. Because Franklin's putative benefit in requiring that 0.001% of its consumed energy is purchased from in-state CHP generators is clearly excessive when weighted against the complete deprivation out-of-state contributors face, Section 2(b) fails under a *Pike* balancing test.

Section 2(b) of the EDEA discriminatorily modifies the Franklin's RPS to require that only in-state generators can satisfy a portion of the State's energy demand. Nondiscriminatory alternatives were available, but ignored, to achieve the provision's purported legitimate aim of increasing CHP generation. Therefore, the provision must be invalidated under the dormant Commerce Clause.

CONCLUSION

Franklin's enactment of the EDEA is preempted because it encroaches into FERC's field of jurisdiction and its CAP program cannot act in concert with the wholesale capacity market. Further, Franklin enacted its certified biomass and CHP provisions as economically protectionist methods for bolstering its own economy at the expense of out-of-state competition. For the foregoing reasons, Electricity Producers Coalition respectfully requests this Court affirm the district court's decision and invalidate Sections 1 and 2 of the Energy Diversification and Expansion Act as unconstitutional.

Respectfully Submitted,

/s/ Team 8

<u>**CERTIFICATE OF SERVICE**</u>

Pursuant to *Official Rule* IV, Team Members representing Electricity Producers Coalition 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. Eastern time, February 13, 2017.

Respectfully Submitted,

<u>/s/ Team 8</u>