C.A. 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
D.C. No. 16-02345

BRIEF OF APPELLANT, STATE OF FRANKLIN

ORAL ARGUMENT REQUESTED

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JURISDICTION

This is an appeal from the order granting summary judgment to Appellee, Electricity Producer's Coalition ("EPC"). EPC alleges violations of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, of the U.S. Constitution by Appellant, State of Franklin ("Franklin"). Pursuant to 28 U.S.C. § 1331, the District Court had jurisdiction to review the actions arising under the Constitution. The District Court then granted EPC's motion for summary judgment on Nov. 7, 2016. On Dec. 6, 2016, Franklin filed a timely notice of appeal, which was granted by the Twelfth Circuit. This court has jurisdiction to review the District Court's final order of summary judgment, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Is Section 1 of the EDEA "field preempted" under the Supremacy Clause of the U.S. Constitution, given the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act with respect to the sale of electric energy and the sale of capacity at wholesale in interstate commerce?

II. Is Section 1 of the EDEA "conflict preempted" under the Supremacy Clause of the U.S. Constitution, given that FERC—the agency charged with administering the Federal Power Act—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 U.S?

III. Is Section 2(a) of the EDEA 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?

IV. Is Section 2(b) of the EDEA 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

States, with their power and obligation to protect the public welfare, have long regulated electricity production and markets. With the development of interstate electricity transmission

came Congress' decision to regulate areas of the electricity markets it found to significantly impact interstate commerce—chiefly, the sale of electricity at wholesale across state lines. The Federal Power Act ("FPA") vests this power with the Federal Energy Regulatory Commission, ("FERC"). R. at 5. However, Congress has always reserved the power to regulate electricity markets in the areas of production, reliability, and retail sales to the States. Franklin exercised its regulatory power to enact the Energy Diversification and Expansion Act ("EDEA"). R. at 3. In the face of declining supply and inadequate transmission infrastructure, the EDEA aims to protect the reliability of electricity in Franklin by supporting existing coal-fired power plants that are at risk of closing, and incentivizing the production of more generation sources to serve Franklin. Because the coal-fired plants are at risk due to environmental regulations, Franklin incentivizes new generation that uses cleaner-burning and more sustainable biofuels. R. at 4.

This case involves the appeal of the District Court's decision to grant the Electricity Producers Coalition's (EPC") motion for summary judgment. EPC asserts that the EDEA violates the Supremacy and dormant Commerce Clauses of the Constitution. R. at 13. Specifically, they allege the EDEA violates the Supremacy Clause because it intrudes on the field of FERC's jurisdiction to regulate wholesale interstate sales, even though the EDEA taxes retail sales to subsidize production; and because the EDEA conflicts with the FPA's purpose, even though the EDEA promotes reliable energy for Franklin's citizens, a legitimate state concern. R. at 13. Additionally, EPC alleges the EDEA violates the dormant Commerce Clause because the EDEA subsidizes electricity generation capable of reaching Franklin customers, and the development of sustainable biofuel sources in or near Franklin. Both parties brought cross-motions for summary judgment, and the District Court granted EPC's motion. R. at 12. Franklin timely appealed to petition this Court to reverse the District Court's decision. R. at 12.

STATEMENT OF THE FACTS

Franklin faces a lack of electrical transmission. The State of Franklin is in an area of the PJM Interconnection impacted by inadequate electrical transmission facilities. R. at 5–6. Though PJM operates in 13 states, power cannot flow throughout the entire PJM Interconnection region. R. at 5. There are three locational marginal pricing ("LMP") zones within Franklin and the adjoining states: Franklin East, Vandalia South, and Allegheny North. R. at 6. These LMP zones operate as submarkets whose electricity prices reflect the impact of transmission congestion in those zones. R. at 5–6. As a result of this congestion, low-cost electricity produced outside of the LMP zones in Franklin is not able to reach Franklin electrical customers. R. at 6.

Franklin faces a shortage of electrical supply. Exacerbating the threat of the inadequate transmission infrastructure is the fact that "a number" of large coal-fired power plants located within Franklin are facing premature retirement. These plants are in financial distress due to more stringent federal regulation, as well as other market forces. The prospect of closing these generators threatens the reliability of Franklin's electricity markets and Franklin's ability to attract or retain jobs. R. at 3.

Franklin cannot increase transmission capabilities. Franklin cannot mitigate the loss of local electricity supply by increasing transmission capabilities because "the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce [,]" is regulated by FERC. R. at 11. FERC also regulates the PJM Interconnection, the Independent System Operator ("ISO") responsible for managing the electrical grid and ensuring reliability for the customers in its region. R. at 11.

Franklin seeks to increase electric energy generation instead. Because it cannot exercise its powers to increase transmission capabilities and give its citizens access to the

regional electricity market, Franklin seeks to incentivize new electric generation in the local markets it can access. R. at 4. To this end, Franklin enacted the Energy Diversification and Expansion Act ("EDEA") in January 2016. R. at 3. The EDEA sought to protect the reliability of Franklin's electricity supply by: 1) preventing existing electric energy generation from retiring; 2) incentivizing the displacement of coal with cleaner burning biomass; and 3) incentivizing the development of distributed energy resources ("DERs") within Franklin, particularly combined heat and power ("CHP") facilities fueled with biomass. R. at 4–5.

Preventing existing electric energy generation from retiring. Section 1 of the EDEA describes the CAP program, which provides financial support to existing coal-fired power plants serving Franklin in the form of Carbon Assistance Payments ("CAPs"). R. at 3. The EDEA allows Franklin's Public Service Commission ("PSC") to determine which plants would be eligible for CAPs and set the level of CAPs per the standards in the EDEA. R. at 6.

CAPs eligibility. Per Section 1(a)(6), an "eligible coal-fired generating plant" is one that: 1) is located in one of the LMP zones that serve Franklin; 2) relies on coal as its primary fuel source, where at least 10% of that coal originates from mines located in whole or in part within Franklin; and 3) has been determined by the PSC to require financial assistance to continue operating, based on projected energy, capacity and ancillary service revenues and projected fuel and operating and maintenance costs. R. at 6.

CAPs price. Section 1(a)(2) sets forth how the PSC determines the price of the CAPs. The PSC takes into account 1) the incremental capital and operating costs associated with coal-fired generating units as compared with competing sources of electricity; 2) the extent to which energy, capacity, and ancillary service revenues of eligible coal fired generating plants are

insufficient to allow the plants to continue operating; 3) the impact of CAPs on ratepayers within Franklin; and 4) the public interest.

CAP administration. Franklin's State Energy Office ("SEO") offers owners of eligible plants a ten-year contract to receive CAPs. The SEO funds the CAPs through assessments against the five electric distribution utilities ("EDUs") operating in Franklin, based on what percentage of Franklin's electric energy load they provide. The PSC then sets retail rates for electric customers in Franklin that allow the EDUs to recover the cost of the CAP assessment. The amount of CAPs sold annually is capped according to the verifiable historic contributions that plants receiving CAPs have made to total retail electricity consumed in Franklin. R. at 6–7.

PSC's Implementation Order. In February 2016, after the passage of the EDEA in January, Franklin's PSC initiated an expedited informal rulemaking process to implement the Act. In June 2016, the PSC issued the EDEA Implementation Order, which identified five coal-fired generating plants as eligible for CAPs for the ten-year contract period beginning September 1, 2016. The plants have an aggregate generating capacity of 3500 megawatts ("MW"). Three are located in the Franklin East LMP zone, one in the Vandalia South zone, and one in the Allegheny North zone. The plant in the Vandalia South zone is located outside of Franklin. The PSC also set the CAP at $18.50 per MWh, based on the analysis of a power supply expert retained by the PSC and the criteria found in Section 1(a)(2). R. at 7–8.

Incentivizing the displacement of coal with cleaner burning biomass. Section (2)(a) of the EDEA modifies Franklin's Renewable Portfolio Standard to include a requirement that EDUs procure three percent of the electricity sold to retail customers within Franklin from electric generating plants fired with a fuel supply comprising coal and no less than 15 percent certified biomass feedstock ("CBF") by 2020. The requirement grows to five percent in 2030.

Section 2(a)(3) defines CBF as biomass feedstock that is harvested from a forest identified by the Franklin Department of Natural Resources ("DNR") and Franklin Division of Commerce as a Designated Biomass Growing Region ("DBGR"). Section 2(a)(4) defines a DBGR as an area within the state of Franklin or the adjoining states that has been identified by the DNR as containing biomass suitable for sustainable harvest and use for co-firing with coal to generate electricity; and by the Division of Commerce as an economically depressed area. The DNR and Department of Commerce initiated an expedited informal rulemaking process to February 2016 and issued a Biomass Eligibility Determination Order in June 2016. The order identified two DBGRs, one entirely within Franklin and the other split between Franklin and Vandalia, a neighboring state. R. at 8–9.

Incentivizing the development of DERs. Section 2(b) requires EDUs to purchase 0.5 percent of the energy sold to Franklin retail customers from customer sited, biomass-fueled, combined heat and power ("CHP") facilities by 2020, rising to 1.0 percent by 2030. The CHP facilities are not required to burn CBF. They are required to be on the customer side of the meter and connected to the distribution grid of a EDU that serves customers in Franklin. This requirement means the CHP will be located in Franklin. R. at 10.

Electricity Producers Coalition. The EPC is the national trade association representing leading competitive electric power suppliers. EPC members are involved in competitive wholesale and retail electricity markets, and have significant investments in electricity generating and marketing operations within Franklin and the PJM operating region. R. at 12

Commencement of Federal Court Action. The EPC commenced this action on July 1, 2016 in the Federal District Court for the Eastern District of Franklin, seeking a declaratory ruling that: 1) the CAP program violates the Supremacy Clause of the U.S. Constitution, given

FERC's exclusive authority over the sale of electric energy at wholesale in interstate commerce; and 2) the modifications of Franklin's RPS violated the dormant Commerce Clause of the U.S. Constitution because they have a discriminatory impact on interstate commerce. EPC also sought injunctive relief. R. at 12. Shortly after the action was commenced, both EPC and Franklin filed cross-motions for summary judgment.

District Court Decision. The District Court granted EPC's motion for summary judgment on November 7, 2016, finding: 1) Section 1 of the EDEA is field preempted under the Supremacy Clause of the U.S. Constitution; 2) Section 1 of the EDEA is also conflict preempted under the Supremacy Clause of the U.S. Constitution; 3) Section 2(a) of the EDEA is invalid under the dormant Commerce Clause of the U.S. Constitution; and 4) Section 2(b) of the EDEA is invalid under the dormant Commerce Clause of the U.S. Constitution. R. at 12–13.

SUMMARY OF THE ARGUMENT

This Court should reverse the grant of summary judgment to EPC and review this case keeping in mind the value of preserving state sovereignty, public policy, and legislative intent. This brief highlights why the Court should reverse the District Court's holding and addresses the four main issues on appeal. First, Section 1 of Franklin's EDEA is constitutional and should not be field preempted because Congress has authorized States, such as Franklin, to regulate retail sales—and the CAP Program falls within their authority. The CAP Program simply provides a subsidy to several generating plants that, without the subsidy, face retirement and therefore threaten Franklin's energy reliability and economic growth. By providing a subsidy that is funded through local, retail sales, the CAP Program falls directly under state authority—not federal authority. Furthermore, whether field preemption applies requires application of two tests: the direct effect test and the target test. The CAP Program does not directly affect the

wholesale rate, and similarly, does not target the FPA, since it operates completely independently from PJM's capacity auction process. Therefore, the CAP Program fails both of these tests.

Second, Section 1 of Franklin's EDEA is constitutional and should not be conflict preempted because the CAP Program does not obstruct or do clear damage to FERC's or the FPA's goals, purpose, or methods for two reasons. First, the CAP Program's potential incidental price effects are not evidence of conflict. In fact, FERC has already permitted similar programs to come to fruition. Second, the FPA and the EDEA have harmonious goals, which are to provide reliable, cost-effective energy to consumers. While their methods to achieve these goals may differ, they do not *conflict*. Furthermore, even if the EDEA's methods do conflict with FERC or the FPA, jurisdictional tension between State and federal authority is permitted when the States are regulating a matter of legitimate State concern. The EDEA regulates energy reliability, which has long been considered a matter of legitimate State concern.

Third, Section 2 of Franklin's EDEA is constitutional and does not violate the Commerce Clause because the Commerce Clause is not applicable for three reasons. First, Franklin's Renewable Portfolio Standard is a direct subsidy, which allows for in-state benefits without penalizing or burdening out-of-state competitors. Second, there is no competition between entities. Franklin's biomass feedstock does not compete with out-of-state feedstock, and similarly, Franklin's CHP facilities don't compete with out-of-state producers. Lastly, Franklin is acting as a market participant, which means that its actions do not fall under the Commerce Clause, because doing so would prohibit states from participating in the free market altogether. The Commerce Clause was never intended to prohibit the States from exercising police powers, even if they indirectly affect the national market.

Fourth, Section 2 of Franklin's EDEA is constitutional because even if the Commerce Clause is applicable, Franklin's RPS serves the twin goals of developing environmentally responsible biofuels industry and promoting clean, reliable electricity production for Franklin residents. Facially discriminatory laws are permitted only if they advance a legitimate local purpose that cannot be accomplished through other, reasonable alternatives that do not discriminate. In this case, the legitimate local purposes are protecting Franklin's environment and energy supply, which cannot be advanced by any other reasonable alternatives. For the above reasons, Franklin has not violated the Supremacy or Commerce Clause of the U.S. Constitution. Thus, Franklin respectfully requests that this Court reverse the District Court's grant of EPC's motion for summary judgment.

STANDARD OF REVIEW

The District Court interpreted the Supremacy Clause and Commerce Clause of the U.S. Constitution in favor of EPC. This court reviews the District Court's grant of summary judgment de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004). The constitutional and statutory interpretation presents a question of law over which this court also exercises de novo review. *Id.* Under this standard of review, the Court owes no deference to the District Court's statutory interpretation analysis.

ARGUMENT

I. Section 1 of the EDEA Is Constitutional And Should Not Be Field Preempted By The FPA Because Franklin Has The Authority To Regulate Retail Sales And The CAP Program Does Not Set Capacity Prices Since It Operates Completely Independently From PJM's Capacity Auction.

In the U.S., the electric energy industry is divided between federal and state authority. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). Historically, states alone have regulated the energy market. However, in *Attleboro*, the U.S.

Supreme Court held that the Commerce Clause precluded state regulation of wholesale electricity sales across state lines, creating the "Attleboro gap." *Id.* To close the gap and distinguish between state and federal jurisdiction, Congress enacted the FPA, allowing federal regulation of "the sale of electric energy at wholesale in interstate commerce," and state regulation of any other sale of electricity—most notably retail sales. *Hughes v. Talen Energy Marketing*, LLC, 136 S. Ct. 1288, 1292 (2016).

Unfortunately, the FPA still doesn't address the heart of the issue and the reason for the present case: mixed jurisdictions. A "mixed" jurisdiction is one where both state and federal action can encompass both retail and wholesale concern. This direct relationship blurs the jurisdictional distinction, causing friction and imprecision among the courts. *See Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375 (1983) (applying Commerce Clause balancing test but leaving state retail authority largely intact); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 246 (4th Cir. 2014) (rejecting the argument that "field preemption will occur whenever a state's legislation indirectly affects matters within FERC's jurisdiction. By statute and tradition, states have a role to play in energy markets."); *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014) (declining to express an opinion on alternative state measures, such as "direct subsidies or tax rebates... [i]t goes without saying that not 'every state statute that has some indirect effect' on wholesale rates is preempted.") (citations omitted).

The first justification the District Court relied on for granting EPC's summary judgment was field preemption by the FPA. However, under proper analysis of the FPA, this Court should reverse and hold that Franklin's CAP program—found in Section 1 of the EDEA—is not preempted because it operates completely independently from PJM's capacity auction process. Field preemption applies when "Congress has legislated comprehensively to occupy an entire

field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). With an assumption in favor of the state, "[o]nly a clear and manifest conflict with federal law, or clear and manifest Congressional intent to override state choices, will overcome the presumption against preemption." *Solomon*, 766 F.3d at 250. Section 1 of the EDEA is not "field preempted" under the FPA for two reasons: 1) The FPA expressly *reserves* authority to states and *limits* FERC's authority to only those facilities that are not used for retail reliability; and 2) The CAP program does not set or interfere with wholesale capacity prices, since it does not directly affect or target wholesale rates.

A. The CAP Program provides supplemental payments to avoid capacity deficiency within its borders—which falls squarely within the FPA's express reservation of state authority.

The FPA expressly *reserves* retail authority to states, and *limits* FERC's authority to only those facilities that are not used for retail reliability. 16 U.S.C. § 824(b)(1). Only the states retain the authority to "ensure the safety, adequacy, and reliability of electric service within that state, so long as such action is not inconsistent with any reliability standard." This authority includes the power to order new generation as a means of mitigating local electric system reliability concerns and solve other issues related to the lack of local generation. *N.Y. v. F.E.R.C.,* 535 U.S. 1, 6 (2002). State authority regarding retail reliability has become so important in modern energy law that the FPA was amended to limit federal authority. FERC does not have jurisdiction over retail transactions, such as: construction of additional generators; compliance, safety or adequacy of generators; or enlargement of current facilities. 16 U.S.C. §§ 824a(b); 824f; 824o(i)(2). The CAP Program deals with these issues by focusing on reliability at a retail level—dependability, generation, and local distribution—which the FPA has explicitly recognized as being under the states' historical jurisdiction. *N.Y.,* 535 U.S. at 6; 16 U.S.C. § 824(a).

In *Pacific Gas*, the Supreme Court held that "States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). Furthermore, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Id.* Analogously, retail reliability in Franklin is a serious concern. R. at 4. The mid-Atlantic region recently lost significant electrical generation capacity due to the retirement of coal-fired generating plants, with more closures to come. *Id.* Consequently, the availability of a reliable electricity supply within Franklin is threatened. *Id.* The CAP Program addresses this problem by incentivizing new generation to meet reliability needs. Section 1 provides the CAP eligibility requirements, as well as the implementation formula. At present, there are five generators that meet the standards, per Section 1(a)(6), all of which are under severe duress and need CAPs to avoid capacity deficiency. These five will receive subsidies that are funded through *retail charges* based on *consumed electricity within Franklin*. R. at 7. The fact that one of the five is outside of Franklin's state lines is a moot point, since all of them only receive CAPs based only on the electricity consumed directly by Franklin residents. The FPA expressly gives States the authority to regulate state and local markets, and the CAP program, funded based solely on electricity consumed within Franklin, falls under that purview. Section 1 of the EDEA deals directly with reliability of local generation, and consequently falls squarely within state authority—not FERC's. The lack of power granted to FERC in the FPA—no authority to order construction, siting, permitting, or expansion—demonstrates Congress' intention to give States authority over retail reliability, and curtail federal authority. Therefore, the FPA does not field

preempt Franklin's authority to ensure a reliable and reasonably priced electricity supply. To the contrary, the FPA *supports* state authority and *bars* federal authority.

B. The CAP Program does not set capacity prices because it operates completely independently from the capacity auction, as demonstrated by the direct effect and target tests.

In analyzing modern energy cases, the U.S. Supreme Court has used two tests to determine whether state regulations should be preempted by federal law: 1) the Direct Effect Test; and 2) the Target Test. *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 774 (2016); *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1599 (2015). Section 1 of the EDEA does not meet the requirements of either test, and therefore should not be preempted by the FPA.

1. *Section 1 should not be field preempted because it does not meet the direct effect test since the CAP Program is untethered to wholesale market participation and any incidental effect decreases market price.*

The CAP program created in Section 1 of the EDEA does not directly affect wholesale rates, since it operates completely independently from PJM's capacity auction process. The first applicable inquiry into whether a state program has run afoul of the FPA is a determination based on direct effect, since FERC's jurisdiction is limited to regulations "directly affect[ing] the [wholesale] rate." *EPSA*, 136 S.Ct. at 774. State regulations that have *incidental* effects on the federal markets are often not preempted. *Nazarian*, 753 F.3d 467 at 479; *see also Nw. Cent.*, 489 U.S. at 514 (declining to find field preemption based on an incremental effect on rates). To preempt based on incidental effects would undermine Congress and render their "specific grant of power to the States to regulate production… meaningless.'" *Id.* (citations omitted).

In *Hughes*, 136 S.Ct. at 1299, the court preempted Maryland's stipulation requiring a plant to clear PJM's wholesale auctions because it interfered with FERC's wholesale regulations. However, the holding was limited only to programs that disregarded FERC's interstate wholesale

rate requirements. The court did not address other measures that States might implement to encourage production, such as "tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Id.* The court further noted that nothing in the opinion should discourage States from incentivizing production through methods "'untethered to a generator's wholesale market participation.' So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.* (citations omitted). The CAP Program does not require capacity clearing the auction.

Franklin's CAP Program is exactly the type of permissible regulation the Court suggests, since it only has an incidental effect on the market. The District Court incorrectly held that the CAP program would interfere with wholesale power markets prices by allowing the CAP-funded coal-fired plants to receive substantial out-of-market payments that effectively set a higher, above-market price for electricity sold by the subsidized generators." R. at 13. However, the CAP program does not have a direct effect because it encourages production that is "untethered to wholesale market participation," operating separately from the auction. Section 1(a)(2), which determines the price at which CAPs should be set, does not allow, require, and or condition payment based upon capacity clearing the PJM market. The PSC does not set or establish any wholesale rates, and any "practical effects" are incidental and permitted under *Nazarian*. *See also Solomon*, 766 F.3d at 255 (incidental effects on the wholesale price of electric capacity do not constitute preemption, since "every conceivable regulation would have some effect on operating costs or available supply"). Because the CAPs do not infiltrate the PJM capacity auction, they do not directly affect the wholesale market, and do not contradict *Hughes*.

Furthermore, the District Court held that the CAP program would "effectively" set a higher capacity price. R. at 13. This is incorrect, since only the highest bidder sets the capacity price, and CAP's generators will not be the highest bidder. In capacity markets, each resource bids into the auction, and when the necessary threshold is met, the most expensive unit needed to meet the demand sets the clearing price. In most cases, new generators bid at higher rates, since they include both capital and operational costs. However, these extra costs do not exist here because of the CAP—allowing these new generators to bid at a lower rate by subsidizing their extra cost. Therefore, the new generators will not bid at a significantly higher rate than the generators already within PJM territory. In fact, the CAP generators will provide lower cost resources that will *suppress* prices since they ensure that demand can be met at a lower cost. Therefore, because the CAP program operates outside of the capacity market and only has an incidental effect that doesn't increase price, it does not meet the direct effect test and should not be field preempted.

2. *Additionally, Section 1 should not be field preempted because it does not meet the target test since it aims at retail markets.*

In addition to failing the direct effect test, Section 1 of the EDEA does not meet the requirements for the target test, since it operates completely independently from PJM's capacity auction process. The second applicable inquiry for whether a state program runs afoul of the FPA is a determination based on "the target at which the state law aims." *Oneok*, 135 S.Ct. at 1599 (2015).[1] The addition of the target test and departure from traditional division of retail and wholesale markets stems from the fact that modern energy cases are exceedingly complex. To expect a "clear division between… authority" is a "Platonic ideal." *Id.* at 1601.

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[1] *Oneok* was based upon a Natural Gas Act claim, not the Federal Power Act. However, "the relevant provisions of the two statutes are analogous," and courts have "routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10.

In *Oneok*, the court found that the state anti-competition regulation was not preempted, even though it *directly affected* wholesale rates. The decision introduced a new analysis for preemption: "the *target* at which the state law *aims*." *Oneok*, 135 S.Ct. at 1599. The test "is whether the challenged measures are 'aimed directly at interstate purchasers and wholesales for resale' or not." *Id.* at 1600 (citations omitted). Additionally, targeting "must mean more than just the physical activity that a State regulates," since a single action may be the subject of many different laws. *Id*. Consequently, state laws aimed directly at wholesale markets are preempted, but laws aimed at general retail regulation will stand even if they directly affect wholesale markets—provided they do not otherwise conflict with FERC regulations.

Similarly, Section 1 of the EDEA targets retail rates specifically—not wholesale rates. The CAP program's purpose is to encourage electricity production locally through financial incentives funded through local utility retail rates. R. at 7. While the CAP Program may have an incidental impact on wholesale rates, it does not specifically target them. Rather, the CAP Program targets the retail rates of local utilities. *Id*. Section 1(a)(2) and 1(a)(6) both deal with retail rates: one providing that eligibility is confined to plants with power originating at least partially from within Franklin and the other determining CAP price based on several factors, including impacts on Franklin ratepayers. While both affect the wholesale market, both *target* retail sales. Therefore, because Section 1 does not directly target interstate purchasers and wholesale rates, it does not meet the target test and should not be field preempted.

II. Section 1 Of The EDEA Is Constitutional And Should Not Be Conflict Preempted Because Franklin's CAP Program Does Not Conflict, Obstruct, Or Clearly Damage The Market Signals Or Competitive Market Forces Within FERC's Regulatory Scheme And Even If There Is Conflict—Jurisdictional Tension Is Permissible Regarding Legitimate State Concerns.

Under proper analysis of the FPA, this court should reverse the District Court's decision granting EPC's motion for summary judgment and hold that Franklin's CAP program is not conflict preempted by the FPA. Conflict preemption only exists where "compliance with both state and federal law is impossible," the state law obstructs the accomplishment of Congressional purposes and objectives, or causes "clear damage" and "is so extensive and disruptive" that the states must give way to nullification. *Nw. Cent.*, 489 U.S. at 509. Furthermore, jurisdictional tension between federal and state regulation is permitted, so long as the states regulate within their jurisdiction and "the means chosen [are] at least plausibly … related to matters of legitimate state concern." *Id*. Consequently, the "conflict-pre-emption analysis must be applied sensitively" to prevent the diminution of the States' role "while at the same time preserving the federal role." *Id.* at 515. Judged by these standards, EPC's claim fails because the EDEA: 1) does not conflict, obstruct, or clearly damage market signals or competitive market forces; and 2) even if it does, this is permissible jurisdictional tension.

A. Section 1 is not preempted because it does not conflict, obstruct, or clearly damage the methods or purpose of the FPA since their goals are harmonious.

The CAP Program does not directly conflict, obstruct or cause clear damage to the FPA, since they both have similar goals and do not interfere with each other's methods to achieve those goals. Where possible, statutes should be read so as not to create a conflict. *Louisiana Pub. Serv. Comm'n v. F.C.C.,* 476 U.S. 355, 370 (1986). Therefore, the standard for obstruction is stringent and requires: "Interfer[ence] with the accomplishment of Congress's actual objectives, or interfer[ence] with the methods that Congress selected for meeting those legislative goals." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir.2005) (emphasis omitted). The CAP program does not meet these standards for two reasons.

First, the CAP Program's potential incidental effects on price do not interfere with the FPA's methods for reaching their goals. Not only do the FPA and the CAP program naturally reconcile to the same purposes, the FPA expressly *permits* interplay between state and federal jurisdictions to ensure plentiful electricity supply at a reasonable price. 16 U.S.C. §§ 824a(b); 824f; 824o(i)(2). The FPA aims to ensure plentiful supply at a reasonable price through methods such as the capacity market. Franklin achieves that same goal by incentivizing production via the CAP Program. While these two methods *differ*, they do not *obstruct* one another and are entirely harmonious. Just because the CAP Program may incidentally affect potential investors does not mean it clearly damages or obstructs the FPA's methods. Courts have recognized that transactions that occur at one level will "have natural consequences" at another. *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring); *EPSA*, 136 S. Ct. at 776.

In fact, FERC already permits similar programs. Renewable Energy Credit ("REC") programs affect auction prices in exactly the way EPC claims that the CAPs trigger preemption: revenue-altering payments; inflated revenues; and lower clearing price. Yet FERC states that these programs do not affect wholesale electricity rates and fall beyond its jurisdiction. *Wspp Inc.,* 139 FERC ¶ 61061, 61426 (Apr. 20, 2012). Furthermore, FERC has allowed states to encourage generation by giving direct subsidies, even if doing so "allow[s] states to affect the price." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080; *see also Iso New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61023 (Apr. 8, 2016) (rates do not become unjust or unreasonable "simply because [state support for renewables] has the potential to suppress prices").

The CAP Program is analogous the permitted activities. Rather than interfering with PJM's capacity markets, the CAP Program creates a separate state-jurisdictional mechanism—

just like an REC. R. at 5. Because the CAPs never enter the PJM marketplace, the CAP Program does not directly interfere with market signals. The new Franklin generators funded by the CAPs receive financial incentives for production, not a different auction price. Franklin then recovers the costs of the CAP funding through retail rates for electric customers located in Franklin. The CAP program never enters or affects the PJM market directly, does not set wholesale capacity prices, and does not interfere with the operation of FERC's market forces. The CAP Program does not set rates for *energy* or *capacity*, but instead provides financial assistance that has natural consequences on the market signals. To be sure, Franklin's method does not obstruct the FPA's method to the extent that it is "so extensive and disruptive" that it must be conflict preempted.

Second, the FPA and EDEA's purposes align. The purpose of FPA is to "encourage the orderly development of plentiful supplies of electricity… at reasonable prices." *NAACP v. FPC,* 425 U.S. 662, 670 (1976). Similarly, the purpose of the CAP program is to "preserv[e] the economic viability of the existing coal-fired generating plants" by providing "supplemental payments to a narrowly defined group of generators (i.e., coal-fired generating plants serving Franklin that are found to require financial assistance to remain in operation) to avoid capacity deficiencies within its borders." R. at 13. These two laws naturally square because they have the same purpose—reliable generation at reasonable prices. The CAP program does not obstruct or do clear damage to the federal purpose, since their purposes are harmonious.

B. Even if the CAP Program does conflict with the market signals and competitive market forces, it is not conflict preempted because jurisdictional tension regarding matters of legitimate state concern is permitted.

Jurisdictional tension between federal and state regulation is permitted, so long as the states regulate within their jurisdiction and "the means chosen [are] at least plausibly … related to matters of legitimate state concern." *Nw. Cent.,* 489 U.S. at 522. The District Court incorrectly

held that the CAP Program would interfere with market signals and therefore potentially discourage investors from financing and building new generation. This argument fails because the CAP Program does not interfere with market signals; and any incidental effects are permissible because the CAP Program is related to a legitimate state concern—reliable generation. The CAP Program is plainly "related to matters of legitimate state concern" because it is part of the EDEA—a broader initiative to ensure that Franklin has a reliable and cost-effective electricity supply. R. at 3. The CAP program advances these goals by providing "financial incentives to eligible coal-fired generating plants serving Franklin." R. at 3. EDC cannot dispute that the CAP program relates to Franklin's efforts to ensure a reliable supply of electricity. Therefore, even if there is jurisdictional tension between state and federal authority, the CAP program is not preempted because it is a state regulation regarding a matter of legitimate state concern.

III. Section 2 of the EDEA Is Constitutional Because Franklin's Renewable Portfolio Standard Does Not Implicate The Dormant Commerce Clause Since It Is A Direct Subsidy, There Is No Competition Between Entities, and Franklin Is Acting As A Market Participant.

The Commerce Clause grants Congress the power to regulate commerce among the states. U.S. CONST. art. I, § 8, cl. 3. Though the Constitution does not expressly limit the power of the states, the Court has recognized a negative, or "dormant" Commerce Clause since early in the nation's history. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The fundamental objectives of the dormant Commerce Clause are preserving a competitive national marketplace and encouraging production. *GMC v. Tracy*, 519 U.S. 278, 299 (1997), *quoting H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). To that end, the dormant Commerce Clause prohibits state regulations that discriminate against or burden out-of-state producers in favor of in-state interests. *C & A Carbone v. Town of Clarkstown*, 511 U.S.

383, 389–90 (1994). However, States remain free to regulate local affairs for the common good, because while the Framers feared the economic Balkanization that plagued the Colonies and States under the Articles of Confederation, they deeply valued federalism and local autonomy. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008).

The dormant Commerce Clause was never intended to prohibit the States from exercising legitimate police powers, even though these may indirectly affect the national market. *Tracy,* 519 U.S. at 306. Every state regulation has the potential to affect interstate commerce, and it would destroy state power to find regulations unconstitutional on these grounds alone. The Court is especially hesitant concerning the propriety of the judiciary in striking down state laws when the alleged favoritism is hypothetical or requires the Court to engage in an analysis of the real-world economic effects of the regulation. *Tracy*, 519 U.S. at 309–11. Some aspects of the electricity market do impact interstate commerce. Congress found as much when it enacted the FPA under the powers enumerated in the Commerce Clause. But Congress left regulation of generation, reliability, and affordability to the states. Where Congress conducts fact finding as to which activities affect interstate commerce and which do not, the Court should defer to Congress's superior fact finding ability and Constitutional power to regulate commerce between the states and only enter the field with "extreme caution." *Tracy*, 519 U.S. at 309–10 (citations omitted).

Franklin enacted its RPS to protect the welfare of its citizens. In *Tracy,* Ohio did exactly that by taxing in-state and out-of-state gas suppliers differently to protect natural gas prices for residential consumers. Here, Franklin regulates to protect the reliability of their isolated electrical grid, to stabilize the price of electricity, and protect the environment. In upholding Ohio's different taxation of in-state and out-of-state suppliers, the Court emphasized the fact that, if not for the regulatory action of the state, natural gas customers could potentially be left without gas,

literally in the cold during harsh winter months. Here, the circumstances are arguably even more dire. If the electric grid is unreliable in Franklin, citizens could be without heat in the winter, without cooling during a heat wave, without the ability to communicate, and without industry.

In *Tracy*, the Court cited its lack of expertise in energy markets as a reason to not overturn a state regulation based on hypothetical market impacts put forth by the plaintiffs. The effects of Sections 2(a) and (b) implicate analysis of local and regional energy supply, demand, and transmission capability. Congress has deemed FERC and state public service commissions the appropriate authorities to study and make informed judgments on these issues. The Court is ill-equipped to make such predictions and should not intrude on the regulatory scheme established by Congress. *Tracy*, 519 U.S. at 299. Franklin's new RPS, enacted in Sections 2(a) and (b) of the EDEA, is exactly the type of regulation that is exempt from dormant Commerce Clause scrutiny for three reasons: Franklin's regulation is a direct subsidy that doesn't burden out-of-state competitors, the entities are not competitors, and Franklin is a market participant.

A. Franklin's RPS does not implicate the dormant Commerce Clause because Sections 2(a) and (b) involve a direct subsidy that does not burden interstate commerce.

The States may regulate in a way to benefit in-state interests, so long as those regulations do not burden out-of-state competitors. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). To that effect, the Clause does not apply when States subsidize in-state industry:

> "The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does." *Id.* at 278.

Therefore, because Franklin's regulations do benefit their in-state interests but do not burden out-of-state competitors, the commerce clause does not apply.

The District Court found Franklin's RPS violated the dormant Commerce Clause because the geographic limitation in Section 2(a) "impermissibly discriminates against biomass produced outside of the state of Franklin, thus burdening interstate commerce[;]" and in Section 2(b) "excludes the participation energy providers outside of the state of Franklin." R. at 13. The District Court erred because when states are subsidizing new industry, they are not required to subsidize industry outside of the state. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The geographic limitations exist to direct Franklin's subsidies to Franklin's citizens. Franklin is permitted to subsidize in-state biomass production and DERs so long as it does not do so by harming or burdening out-of-state biomass producers. Here, neither Sections 2(a) nor (b) harm out-of-state biomass or electricity producers.

Section 2(a) of the EDEA does not harm any out-of-state interests because the only interests burdened are: 1) in-state retail electricity consumers, who may pay higher rates for power produced with CBF; and 2) in-state coal producers, whose product will be displaced by CBF. Out-of-state interests are not harmed. Out-of-state interests may purchase Franklin's CBF; they may own businesses that harvest CBF; and the current, non-CBF biomass market is untouched by the regulation. Additionally, no out-of-state interests are harmed by §2(b). This provision is most likely to harm *Franklin's* citizens by the way of more expensive electricity. Out-of-state interests may own CHP facilities in Franklin; may purchase electricity or other products from CHP facilities in Franklin; and may sell biomass, or even electricity, to CHP facilities in Franklin. Moreover, the fact that the citizens of Franklin, through their elected representatives, have potentially burdened themselves to foster development of in-state resources supports the notion that this statute is not discriminatory at all, as the Court found in *United*

Haulers, 550 U.S. at 338. If the citizens of Franklin object to this burden, they should rely on the political process and not the Court to do away with it. *Id.* at 345.

B. Franklin's RPS does not implicate the dormant Commerce Clause because there is no competition between supposedly favored and disfavored entities.

The Court has noted that discrimination assumes "a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. In this case, the entities are dissimilar because they do not compete. Without "actual or prospective competition between the supposedly favored and disfavored entities," there is no *discrimination* or *burden* to which the dormant Commerce Clause applies. *Tracy*, 519 U.S. at 300. Furthermore, interests may be dissimilarly situated for dormant Commerce Clause purposes even if they do compete for a portion of the same market. *Tracy*, 519 U.S. at 303–04. This is especially true where the state plays a central role in creating or encouraging the market in question. *McBurney v. Young*, 133 S. Ct. 1709, 1720 (2013).

1. *Certified Biomass Feedstock does not compete with out-of-state biomass feedstock.*

If the favored and disfavored entities serve different markets and would continue to do so in the absence of the regulation, then removing the regulation does not preserve the national marketplace—the fundamental objective of the dormant Commerce Clause. *Tracy*, 519 U.S. at 299. Section 2(a) mandates EDUs in Franklin procure a certain amount of the electricity sold to Franklin retail customers from electric generating plants co-fired with coal and no less than 15 percent CBF. R. at 8. CBF is defined as biomass feedstock coming from a Designated Biomass Growing Region ("DBGR"). R. at 8. Per statutory definition, a DBGR must be an area within Franklin or an adjoining state. R. at 9. The District Court erred in finding that this impermissibly discriminates against biomass produced outside of the state of Franklin. R. at 13. The producers of CBF feedstock will serve the market created by Section 2(a)'s mandate for co-fired electricity

generation. In the absence of Section 2(a), there would be no mandate for EDUs and ultimately consumers to purchase any amount of electricity generated at plants co-firing coal and biomass.

Whatever market out-of-state biomass producers currently serve in Franklin will continue unperturbed by the regulation. Because out-of-state biomass producers would serve the same market in the absence of Section 2(a) as they would with it enacted, Section 2(a) does not discriminate. *Tracy*, 519 U.S. at 299. Further, their market share will increase if some of the biomass currently produced in Franklin is diverted to CBF and energy production. While the regulations in *New Energy Co.* violated the dormant Commerce Clause because they were designed and had the effect of discriminating against out-of-state coal, Section 2(a) does not violate the dormant Commerce Clause because it displaces coal with a different energy source altogether. 486 U.S. at 270. Further, Section 2(a) will likely displace coal produced in Franklin—an in-state burden. Therefore, the effects of Section 2(a) on interstate commerce are no different than if Franklin mandated the use of solar or wind energy.

2. *CHP facilities do not compete with out-of-state electricity producers.*

The in-state CHP facilities "favored" by the statute are not similarly situated to and will not compete with the out-of-state facilities serving "competitive wholesale" markets that EPC members own. R. at 12. CHP facilities do not produce electricity specifically for the wholesale markets, but primarily for their own use. In this way, the CHP facilities and out-of-state power producers are exactly like the natural gas companies the Court found to be dissimilar for dormant Commerce Clause purposes in *Tracy*, 519 U.S. at 299. There, in-state gas companies who qualified as utilities served primarily residential customers with some incidental industrial sales, while out-of-state gas companies who did not qualify as utilities served primarily large industrial customers with only incidental sales to smaller customers. *Id.* at 288–89. CHP facilities in

Franklin will produce power for their own purposes, i.e. large industrial uses, and sell only an incidental amount to Franklin's EDUs. The electric production facilities like those owned by EPC—ones that produce electricity specifically for sale into the market—will still provide 99% of electricity to retail consumers. R. at 10.

Under the theory advanced in *H.P. Hood & Sons,* the dormant Commerce Clause promotes production by preserving a national marketplace and therefore Franklin's regulations should stand. 336 U.S. 525 (1949). Franklin's CHP requirement serves to promote CHP facilities within the state. These facilities are by definition heavy industrial production. They will consume raw materials from the national marketplace, and presumably put finished products into the national marketplace. CHP facilities will sell some electricity to EDUs serving Franklin, but Franklin's regulations do not prohibit the export of electricity produced by CHP facilities. CHP facilities may even buy electricity from the regional market at certain times when the need arises. Franklin's regulations serve the same ends of production and a national market as the dormant Commerce Clause. To overturn a regulation that encourages and increases production, because it appears to run afoul of a doctrine that encourages and increases production, is to put the proverbial cart before the horse.

C. Franklin's RPS does not implicate the dormant Commerce Clause because Franklin is acting as a market participant when it mandates electricity sold at retail be purchased from specific sources.

When the state is a market participant, its actions do not fall under the dormant Commerce Clause. *Alexandria Scrap Corp.*, 426 U.S. 794. These exceptions exist because while "[t]he Commerce Clause significantly limits the ability of States [to] burden the flow of interstate commerce, [] it does not elevate free trade above all other values." *United Haulers*, 550 U.S. at 338 (citations omitted). "Nothing in the purposes animating the Commerce Clause prohibits a

State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Alexandria Scrap Corp.*, 426 U.S. at 810. While a state does not act as a market participant when its actions are purely regulatory, it may safely "employ[] the tools of regulation to invigorate its participation in the market . . . ." *Davis*, 553 U.S. at 345–46. Where states act as participants, as well as regulators, the Court prescribes "exceptional treatment for [] direct governmental activity in commercial markets for the public's benefit." *Id.* at 348.

Just like Maryland's scheme to "bid up" the price of old automobile hulks in *Alexandria Scrap Corp.*, Franklin's RPS is only superficially regulatory. While private utilities are privately owned, their activities are almost completely controlled by the state. They may only charge what the state finds to be a just and reasonable rate, and states may dictate what type of energy they purchase. *Pac. Gas & Elec. Co.*, 461 U.S. at 205. Similarly, when Franklin mandates that EDU's buy a certain type of electricity for resale to its citizens at a rate the state determines, Franklin is acting as a participant in that market. Franklin may mandate electricity produced with biomass harvested according to certain criteria and it may mandate electricity produced at CHP facilities within its borders. Just like the bonds sold by Kentucky in *Davis*, Franklin is mandating certain action by the EDUs to build infrastructure for the public good. The citizens of Franklin pay for this infrastructure directly through the rates their PSC sets for retail electricity. Therefore, Franklin does not offend the dormant Commerce Clause when it favors biomass from within its region or electricity produced within its borders because it is a market participant.

IV. Section 2 of the EDEA Is Constitutional Because Even If The Dormant Commerce Clause Is Applicable, The Renewable Portfolio Standard Protects Franklin's Environment And The Reliability Of Franklin's Electricity Market—Both Legitimate Local Purposes That Could Not Be Accomplished Through Non-Discriminatory Means.

Should the court find that the dormant Commerce Clause does apply, the question becomes whether or not the law facially discriminates against interstate commerce. If so, the law will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. A non-discriminatory law will be upheld unless the burden it imposes on interstate commerce is clearly excessive in relation to the putative local benefits. *Davis*, 553 U.S. at 338–39 (citations omitted). Franklin's RPS serves the twin goals of developing environmentally responsible biofuels industry and promoting clean, reliable electricity production for Franklin residents. Both the development of industry and reliable electricity are considered traditional state powers. *New Energy*, 486 U.S. at 273–78. Franklin is located in a part of the PJM territory that is faced with a congested grid, evidenced by the existence of three LPM regions in Franklin. These areas are isolated from the rest of the PJM market because transmission constraints prevent electricity from flowing to them from areas with a greater and cheaper supply.

Further, the LPM regions in Franklin are in danger of losing base load production due to the retirement of coal-fired power plants in the region. R. at 3–6**.** These factors threaten the reliability of Franklin's electricity supply, which in turn effects the welfare of its citizens and economy. State governments are vested with the responsibility of protecting health, safety, and welfare, *United Haulers*, 550 U.S. at 342, and pursuant to that responsibility, states have "a legitimate interest in ensuring that [their] residents have available to them an adequate supply of electric energy." *PPL Energyplus LLC v. Nazarian*, 974 F. Supp. 2d 790, 854–55 (D. Maryland, 2013). To safeguard this interest, Franklin must promote either better transmission infrastructure or more generation that is connected to a grid serving Franklin customers. Interstate transmission of energy is within FERC's jurisdiction, leaving only the promotion of new generation as an

option. Franklin's interest in reliable electricity could not be achieved by "available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

CONCLUSION

For the reasons above, Appellant urges this Court to reverse the District Court's grant of summary judgment. The record evidence demonstrates that Franklin is not in violation of either the Supremacy Clause or the Commerce Clause of the U.S. Constitution. Therefore, this Court should reverse.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Appellant, State of Franklin, 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,

Team No. 10