No. 22-0682

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,
Appellant

v.

CHAIRMAN WILL WILLIAMSON,
In his official capacity,
COMMISSIONER LONNIE LOGAN,
In his official capacity, and
COMMISSIONER EVELYN ELKINS,
In her official capacity,
Appellees

ON WRIT OF CERIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BRIEF FOR APPELLANT

Oral Argument Requested

Team 27

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QUESTIONS PRESENTED

I. A plaintiff may have been injured or may face an imminent injury to satisfy the first requirement of standing under Article III of the Constitution. Facing an eminent economic injury, does ACES have standing to challenge PCS's Capacity Factor Order?

II. The Supremacy Clause of the U.S. Constitution holds that federal law preempts state law. Does the State of Vandalia Public Service Commission's Capacity Factor Order violate the Supremacy Clause of the U.S. Constitution because it contradicts the policies of the Federal Energy Regulatory Commission in the Federal Power Act?

III. State law that interferes with federal regulation violates the Supremacy Clause of the U.S. Constitution. Vandalia enacted a right of first refusal for its regional transmission facilities in direct response to Federal Energy Regulatory Commission Order 1000, which expressly prohibits them. Can Vandalia enforce its rate of first refusal, allowing it to undermine FERC's exclusive regulatory power over wholesale interstate electricity prices?

IV. The dormant Commerce Clause forbids states from discriminating between in-state and out-of-state actors unless such action is narrowly tailored to advance a legitimate local purpose. The right of first refusal provides preferential treatment to in-state transmission companies by granting them the unilateral right to construct transmission facilities in Vandalia. Can Vandalia engage in such patent discrimination, serving only protectionalist purposes, without violating the dormant Commerce Clause?

JURISDICTIONAL STATEMENT

This appeal is from the District Court of the Northern District of Vandalia's order granting Appellee's motion to dismiss. The district court had original subject matter jurisdiction because Appellant challenged (1) Appellee's ability to effectively set wholesale rate, violating the Federal Power Act; and (2) the state of Vandalia enacting a right of first refusal, direct opposing Federal Energy Regulatory Commission Order 1000. 28 U.S.C. § 1331.

The district court entered its final order granting Appellee's motion to dismiss on August 15, 2022, and Appellant filed timely review on August 29, 2022. Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107. Moreover, the Court's jurisdiction is proper because it is pursuant to a final order. 28 U.S.C. § 1291.

STATEMENT OF THE CASE

I. Statement of the Facts

Appalachian Clean Energy Solutions, Inc. (ACES)

ACES is a global energy company that constructs and operates electric generating plants and interstate electric transmission lines. CR1. ACES is currently working to decarbonize its fleet of electric generating facilities, through the closure of its existing coal plants and addition of renewable and zero carbon energy facilities. CR5. In June 2020, ACES adopted a company-wide goal of achieving zero carbon emissions by 2050. CR5.

ACES sells electricity in the wholesale market, regulated by FERC and the FPA. CR4. As part of its decarbonization effort, ACES is planning to retire its Franklin Generating Station, a 1,300 MW coal-fired power plant that sells its output into PJM Interconnection. CR5. The PJM Interconnection is the regional transmission organization (RTO) that serves the mid-Atlantic region and is responsible for maintaining and operating the transmission grid in Vandalia, 13 other states, and the District of Columbia. CR3.

Vandalia Public Service Commission's Capacity Factor Order

The Vandalia Public Service Commission (PSC) is the state government agency which regulates the rates and practices of utilities providing retail service within the state of Vandalia. CR6. The State legislature has encouraged this commission to regulate public electric utilities to operate coal fired plants at a maximum reasonable output. CR7.

In attempt to fulfil the legislative intent, PSC has implemented a Capacity Factor Order which requires coal fired plants within the jurisdiction to operate at 75% capacity, despite utilities showing that their economical capacity falls within the range of 34.7%-62.3%, depending on the facility. CR7. The PSC's Order, understanding that it is uneconomical, authorizes these electric utilities to be refunded by

the government if they produce too much energy at a price that is not market clearing, in order to comply with the order. CR8.

Right of First Refusals for Transmission Line

In 2011 FERC issued Order 1000 to prohibit Independent System Operators (ISOs) from providing incumbent transmission facilities an exclusive right of first refusal (ROFR) over FERC-approved transmission facilities. CR9. The ROFR served anticompetitive purposes by providing incumbent transmission owners an exclusive right to construct new facilities in their service areas even if a non-incumbent submitted the new facility's proposal. CR9. However, Vandalia enacted the Native Transmission Protection Act (NTPA) in direct response to Order 1000, which operates as a ROFR for incumbent transmission holders in Vandalia. CR9. Under the statute, incumbent transmission holders hold the exclusive right to construct new transmission facilities for 18 months. CR9–10; Vand. Code §§ 24-12.2, -12.3(d). ACES received approval from the PJM Board of Managers to construct the Mountaineer Express, which requires transmission facilities in Vandalia; however, under the NTPA, ACES cannot begin construction until September 30, 2023. CR10. Moreover, if LastEnergy or MAPCo use their ROFR before September 30, 2023, ACES will become indefinitely prohibited from constructing the Mountaineer Express. CR10.

II. Procedural History

On June 6, 2022, ACES sued the PSC concerning the Capacity Factor Order and the ROFR, asserting that both violated the Supremacy Clause of the U.S. Constitution. CR14–16. Moreover, ACES contended that the ROFR also violated the dormant Commerce Clause. CR15–16. PSC filed a motion to dismiss ACES' claims. CR14–16. The district court granted PSC's motion to dismiss. CR16.

SUMMARY OF THE ARGUMENT

The Court must reverse the district court's order granting Appellees motion to dismiss.

I. Argument about the Capacity Factor Order

The Vandalia PSC violated the Supremacy Clause of the Constitution when it implemented its Capacity Factor Order. This Capacity Factor Order directly impacts the wholesale electricity market of the area, the PJM Interconnection. The Order requires coal plants to operate at 75% capacity which violates the federal government's goal of competition within the electricity market. Wholesale electricity is exclusively under the jurisdiction of FERC.

This violation of the Supremacy Clause imminently impacts ACES, as a member of the wholesale market in the area. The imbalance of energy supply and demand that the Order creates will negatively impact ACES sales, profits, and ACES ability to transition to clean energy.

Therefore, the district court erred in granting Appellee's motion to dismiss.

II. Argument about the Right of First Refusal litigation

The Court must reverse the motion to dismiss, which allows incumbents to maintain complete control over wholesale electricity transmission lines within Vandalia, because it violates the Supremacy Clause. The ROFR is implicitly pre-empted under FERC Order 1000 because it invades FERC's regulatory field—wholesale electricity. Moreover, it directly conflicts with Order 1000 because it allows incumbent refusal, which Order 1000 expressly forbids.

In the alternative, the Court should hold that the ROFR violates the dormant Commerce Clause because it is facially discriminatory, and *per se* illegal. The NTPA discriminates between electricity transmission facility owners already operating within Vandalia and those without operations in Vandalia, which only advances anticompetitive purposes. Even if it is nondiscriminatory, NTPA places an excessive burden on interstate commerce, violating the *Pike* balancing test.

The district court erred in its legal conclusions because the NTPA's ROFR violates both the Supremacy Clause and the dormant Commerce Clause and requires reversal.

ARGUMENT

The Court reviews questions of law *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Moreover, when an appellate court reviews a motion to dismiss, the Court accepts "all factual allegations [as true] in the complaint and draw[s] all reasonable inferences in favor of the plaintiffs." *Muto v. CBS Corp.*, 668 F.3d 53, 57 (2nd Cir. 2012). Because the court granted Appellee's motion to dismiss, this Court provides no deference to prior legal conclusions and views the facts in the light most favorable to ACES.

I. As a matter of law, ACES has standing to challenge the PSC's Capacity Factor Order because ACES faces direct injury as a member of the PJM wholesale market.

ACES has sued over the implementation of Vandalia's program because it effectively sets an interstate wholesale rate for energy and contravenes the FPA's division of authority between state and federal regulators. CR14. Additionally, it thwarts ACES ability to decarbonize its electric generating facilities and shift towards a more sustainable, renewable future of energy. ACES is actively working to build a large natural gas-fired electric generating plant in southwestern Pennsylvania, to sell into the regional wholesale electricity market. CR1. As a member of the wholesale electricity market, ACES is injured by this decision, which effectively sets wholesale rates for the region, violating the FPA.

Article III of the Constitution outlines the three requirements necessary to establish standing. ACES has met these requirements. U.S. Const. art 3, §2, cl. 1. First, ACES faces an imminent injury in fact. *See id*. Second, there is a causal connection between the injury suffered and PSC's conduct. *See id*. Third, a favorable outcome would redress the injury suffered by ACES. *See id*.

A. ACES faces an imminent economic injury from PSC's policy therefore satisfying the first requirement of standing.

The first requirement of standing is that ACES suffer an injury that is (a) concrete and particularized and (b) actual or imminent. *See Lujan v. Def. of Wildlife*, 504 U.S. 555, 599 (1992). Imminent injury

does not require the plaintiff to have been harmed, it only requires that the acts necessary to make an injury occur are at least partially within the plaintiff's control. *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 702 (9th Cir. 1993).

The Supreme Court has found on multiple occasions that allegation of future injury satisfies Article III standing if the threatened injury is impending or there is a substantial risk that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *See also MedImmune, Inc. v. Genetech, Inc*., 549 U.S. 118, 128–29 (2007).

This was found recently in *Susan B. Anthony List v. Driehaus*, in which a political advocacy organization brought actions against the Ohio Election Commission challenging a statute that limited free speech. *Susan B. Anthony*, 573 U.S. at 149. In that case, the Supreme Court held that the organization's claims had standing because the challenge was "purely legal and will not be clarified by further factual development" and that "denying prompt judicial review would impose a substantial hardship on petitioners." *Id.* at 167–68.

ACES is a global energy company headquartered in Vandalia with coal plants operating in the region providing it with economic and personal interests in PSC's impact on wholesale energy rates and federal regulation of wholesale energy rates. Furthermore, ACES business in the PJM is impacted because Vandalia's policy impacts the wholesale rates within the PJM. In June 2020, ACES announced its company-wide goal of achieving zero carbon emissions by 2050 and its intent to decarbonize through the closure of existing coal plants. Two years after that announcement, in 2022, PSC changed its policy inhibiting its consumers from fairly accessing the clean energy that ACES is promoting.

PSC's policy also clearly impacts ACES Rogersville plant, which ACES modified in September 2020 to enable it to use carbon capture and storage technology. To increase the capability of the regional grid to accommodate the electrical output from the Rogersville, ACES plans to construct a high

voltage transmission line. This Rogersville plant's sales will be directly impacted by PSC's policy by disrupting competition in the PJM wholesale market. This effectively disrupts both supply and demand from the State of Vandalia therefore directly inhibiting ACES sales from the Rogersville plant.

It also has damaged ACES economic and environmental goals by preventing the closure of ACES Franklin Generating Station, which generates harmful carbon emissions. Since ACES is unable to close, it is required to implement environmental upgrades that are neither economical nor as environmentally friendly as the clean energy ACES is shifting towards. CR5.

The PSC's regulation violates federal law and directly impacts both ACES and its energy producing facilities. This injury qualifies for standing. *See Lujan*, 504 U.S. at 562. ACES faces imminent injury by the threat of government action. The Supreme Court has made clear that a plaintiff is not required to "expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune*, 549 U.S. at 128–29.

B. ACES's imminent injury is traceable to PCS's policy and redressable by the relief sought.

ACES meets the causation element of standing because the imminent economic injury is directly traceable to PSC's Capacity Factor Order. The PSC's Capacity Factor Order directly impacts wholesale rates in the PJM region since it requires coal plants within Vandalia to produce outside of a market rate. This will impact the market rate of the larger PJM area. The 75% Capacity Factor Order will result in excess energy production creating an imbalance between supply and demand within the PJM area. This will lower the market rate for other energy producers. *See* Midwest Indep. Transmission Sys. Operator, Inc., Docket No. Er07-478-000, Fed. Energy Reg. Comm'n Rep. P 61143.

ACES challenge to PCS's policy is purely legal and will not be clarified by further factual development, further satisfying the ripeness doctrine. *See Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985). Denying prompt judicial review would impose a substantial hardship on

ACES and would force them to choose between following PCS's uneconomical policy and suffering a revenue loss or moving toward a more sustainable, cost-effective path but risking costly commission proceedings while still suffering economic instability in the PJM wholesale market.

This injury would be redressed by PSC altering its policy to comply with federal regulations and goals. If the Capacity Factor Order were lifted, then the PJM Interconnection would rest again at market rate and a fair, competitive economy. This would redress the imminent injury facing ACES.

II. PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of the Federal Energy Regulatory Commission ("FERC") under the FPA.

Pursuant to the FPA, a federal agency granted power by Congress, FERC regulates interstate transmission of electricity and the sale of electricity wholesale in interstate commerce. *See* 16 U.S.C. § 824 (b)(1); CR13. As a federal agency empowered by congress it is empowered by the supremacy clause to preempt, or invalidate, state law. *See* U.S. Const. Art. 6 § 2.

PSC's Capacity Factor Order directly contradicts the goals of the FPA and the clear language of 16 U.S.C. § 824 and therefore violates the Supremacy Clause.

A. The FPA granted FERC exclusive jurisdiction over wholesale electricity.

The Supreme Court has stated on multiple occasions that FERC has exclusive regulatory control over incidental sales. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985). FERC has jurisdiction over "the sale of electric energy at wholesale in interstate commerce" among other things. 16 U.S.C. § 824(b)(1). As PSC's policy directly impacts wholesale rates and sales, it violates this federal provision because wholesale electricity is under the exclusive jurisdiction of FERC.

There are multiple cases and statutes that discuss FERC's exclusive jurisdiction over wholesale sales, including section 824(d), which requires "all rates and charges made, demanded, or received … in

connection with wholesale sales be just and reasonable." 16 U.S.C. § 824d(a). *See also Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty*., 554 U.S. 527, 536 (2008). FERC is further authorized to determine when a wholesale rate is unjust, unreasonable, discriminatory, or preferential. 16 U.S.C. § 824(e)(a). Therefore, FERC's exclusive jurisdiction over wholesale sales includes the power to regulate wholesale rates. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (holding that "FERC clearly has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers").

For the past thirty years, FERC has adopted policies that promote competition in wholesale electricity markets. CR 3. Further, FERC regulates the structure of electricity auctions to ensure that they effectively balance supply, demand, and produce a fair and reasonable clearing price. CR 13. PSC's policy harms that goal by requiring plants to operate at a higher capacity outside of a reasonable clearing price. CR 8.

B. PSC's policy impacts wholesale electricity and is therefore preempted by the federal regulations set forth by FERC.

The Commission has implemented a Capacity Factor Order acting under the power granted by the State of Vandalia. CR 7. Through this, the state has dictated the obligations of the coal powered energy plants by ordering operation at 75% which is contrary to the economical expectation of 40–60% operation. CR7. This compels coal-burning utilities to sell their energy to PJM regardless of the market rate or the demand of the region.

It is well within precedent for the FPA to preempt state regulation of incidental sales of electricity. *Rochester Gas & Elec.*, 754 F.2d at 102. *See also Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018). It is also within precedent to find that states have violated the Supremacy clause if the state is regulating incidental sales. *Rochester Gas & Elec.*, 754 F.2d at 102. The Commission's policy is a form of economic coercion because it forces coal plants to operate at

75%. The mandated, artificially inflated level of operation runs contrary to the plants economic expectations and directly affects the plants incidental sales. This coercion, in effect, compels incidental sales and thus the Commission is regulating those sales.

This is most clearly seen in *Hughes v. Talen Energy Marketing, LLC* in which utility companies brought action against the Commissioner of the Maryland Public Service Commission, challenging its order, which incentivized construction of power plants. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 151–52 (2016). Maryland implemented a program where it would enter a 20-year contract with the utility companies. *Id.* at 152. This program indirectly and improperly set the rate that that utilities would receive for interstate wholesale capacity sales. *Id* at 150–51. This was done in an attempt to encourage construction of in-state energy generation; however, the Supreme Court did not find this to be a redeeming factor. *Id.* at 150. The Supreme Court ultimately held this program was preempted because it disregarded the interstate wholesale rate that FERC requires. *Id*.

PNC requires operation of coal fired plants at 75% capacity, even though that has been found not to be economical. CR8. Furthermore, coal plants are required to comply with this requirement in order to recover costs for producing energy at a price that is not market clearing. *Id*. Vandalia's new policy thus disregards the interstate wholesale rate through its cost recovery program and its operation requirements which disregard competition via supply and demand in the wholesale market.

Per clear language of the Supreme Court, Vandalia's goal of in-state energy production does not excuse it from intruding on FERC's authority over interstate wholesale rates. *Id*. at 1297–98 ("That Maryland was attempting to encourage construction of new in-state generation does not save its program… they may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates. . . . .").

In the Commission's reasoning for the Capacity Factor Order, it directly states that this is "in response to wholesale system sales opportunities." CR8. The Commission cannot respond to the wholesale electricity market without impacting that market, which, as shown, is exclusively regulated by FERC.

III. Vandalia's enactment and enforcement of the right of first refusal violates the Supremacy Clause of the U.S. Constitution because it encroaches on FERC's regulatory field and directly conflicts with FERC Order 1000.

Vandalia's enforcement of the ROFR unquestionably violates FERC Order 1000 because it undermines federal regulatory requirements by circumventing and impeding the electric planning process. A state regulation that interferes with federal regulation is preempted by, and violates, federal law. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884–85 (2000). Congress will either expressly or impliedly preempt a state from interfering with federal law. *See id.* Explicit preemption requires an express statement made by Congress that explicitly restricts a state's ability to regulate a particular activity. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995). There is no express preemption in FERC Order 1000; however, the order impliedly preempts Vandalia from regulating electric transmissions in direct conflict with FERC.

Implicit preemption occurs when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 287 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). When a federal statute maintains a broad regulatory scope, Congress intended to occupy that field exclusively, and any state encroachment in that "field" cannot stand. *Freightliner Corp.*, 514 U.S. at 287. In such a situation, Congress "forb[ade] the [s]tate to take action in the field that the federal statute pre-empt[ed]." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 378 (2015). Moreover, when a state statute directly conflicts with a federal statute, the federal statute prevails, *Freightliner Corp.*, 514 U.S. at 287, because "the state law stands as an obstacle to the accomplishment

and execution of the full purposes and objectives of Congress." *Oneok, Inc.*, 575 U.S. 378. FERC sought to continue its proper regulation over "its electric transmission planning and cost allocation requirements for public utility transmission providers [through] manag[ing] electric grids on a regional level." CR14. Vandalia's NTPA wholly undermines how Congress permitted FERC to regulate public utility transmission providers on a regional level and cannot stand.

A. Vandalia's right of first refusal invades FERC's regulatory field because Congress intended for FERC to maintain exclusive regulatory control over electric transmission lines.

Because Vandalia's right of first refusal directly targets the creation of electric transmission lines, Vand. Code § 24-12.3(d), which is square in opposition to Order 1000, it cannot stand. *See id.* at 385 ("[T]he proper test for purposes of pre-emption in the natural gas context is whether the challenged measures are 'aimed directly at interstate purchasers and wholesalers for resale' or no[t].") (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 94 (1963)). While Vandalia maintains exclusive power over retail sales within its borders, it does not have the power to invade the domain of wholesale prices, a field that is unmistakably governed and regulated by FERC. *Id.* at 386–86. Section 24-12.3(d) is "unmistakably and unambiguously *directed at purchasers*" because it forces interstate sellers, such as ACES, to obtain a form of approval before engaging in business, which undoubtedly amounts to a regulation of facilities. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306–08 (1988).

Vandalia is prohibited from interfering with FERC and cannot regulate facilities that are necessary for interstate commerce because it is "a field occupied by federal regulation." *Id.* at 307–08. Because incumbent electrician transmission owners have an unfettered right to erect federally approved, by FERC, transmission lines, Vand. Code § 24-12.3(d); CR9, Vandalia has undermined "FERC's exclusive purview because transmission lines' are a critical part of the transportation of [electricity] and sale for resale in interstate commerce." *Schneidewind*, 485 U.S. at 308. Transmission lines are a base prerequisite in supplying electricity to the PJM region and, ACES must build the Mountaineer Express

to provide a wholesale supply of electricity from the Rogersville Energy Center. CR5–6, 11. FERC issued Order 1000 to directly combat and stop ROFR for incumbent transmission owners and increase competition in the wholesale market. CR9. The NTPA undermines FERC's order because Vandalia introduced it "as a direct response to Order 1000," CR9, and makes it impossible for non-incumbents to enter the market *de novo* without either waiting 18 months or acquiring an incumbent. *See* Vand. Code §§ 24-12.3(d), 12-12.2(f). Accordingly, the NTPA provides two services to incumbents that are antithetical to Order 1000. First, it forestalls competition directly intertwined with interstate transmissions of electricity. Second, it drastically raises entry costs for *de novo* entrants.[1] These effects create (1) a supply lag because if ACES waits 18 months, it cannot provide electricity for 18 months; and (2) increased upfront costs suffered by ACES, which are subsequently passed to customers in the form of higher auction bids. Thus, the NTPA violates the Supremacy Clause by entering FERC's exclusive regulatory field and cannot stand.

B. Vandalia's right of first refusal directly conflicts with FERC Order 1000.

The NTPA "stands as an obstacle to the accomplishment and execution of [FERC and Order 1000]," *Freightliner Corp.*, 514 U.S. at 287 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), violating the Supremacy Clause by directly conflicting with Congress' grant of authority. Conflict preemption requires an actual conflict between state regulation and federal objectives. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871–82 (2000). Because the NTPA directly undermines FERC's objective of promoting competition in the wholesale electricity markets, the district court's judgment cannot stand.

[1] "Not only will [the Right of Way Order] dramatically increase ACES's costs of building Mountaineer Express because new narrow strips of land must be razed to make way for the transmission line, but also ACES may have to bargain with landowners individually by private contract—one landowner not wanting to give ACES a right of way could significantly change the course of the line or prevent it from being built altogether." CR11.

The Vandalia PSC overstepped its power by enacting Section 24-12.3(d) because its grant of authority is derived from retail services within the state, ROA 6, and has now entered FERC's exclusive domain of wholesale electricity. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty*., 554 U.S. 527, 536 (2008) (FERC seeks "to break down regulatory and economic barriers that hinder a free market in wholesale electricity"). FERC's regulatory control oversees electric grids on a regional level, and while "states can continue to regulate electric transmission lines," CR14, Vandalia cannot enforce conduct prohibited by federal law. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486–87 (2013). Vandalia subjects ACES, and all potential entrants, to the whims of the incumbents through the ROFR, expressly rejected in Order 1000. Appellee's are mistaken in believing that "allow[ing] ACES to build a transmission line in 18 months if the incumbent utilities decline to exercise their ROFR," CR16, wholly disregards that "simply leaving the market" (or, in this case, simply not entering) is an insufficient solution. *Mut. Pharm. Co.*, 570 U.S. at 489.

Moreover, Order 1000 must prevail because federal law prevails when "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc.*, 575 U.S. 378 (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989)). "The FPA charged the Federal Power Commission (FPC), the predecessor of FERC, 'to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.'" *New York v. FERC*, 535 US 1, 6 (2002) (quoting *Gulf States Util. Co. v.* FPC, 411 U.S. 747, 758 (1973)). ACES seeks to expand its business; namely, wholesale electricity, CR5–6, and the NTPA distorts this process by regulating interstate electricity supplies and hamstringing *de novo* entrants. Under Order 1000, PJM sought "to encourage innovative, cost-effective, and timely solution[s] to the challenges of building and maintaining a highly reliable electric system." CR6. Thus, the ROFR disregards FERC's interstate authority by directing its aim at interstate suppliers. Vandalia's

blatant disregard of Order 1000 creates a circular results process—incumbents can still "wait for nonincumbents to identify promising opportunities for new transmission facilities and then exercise their ROFR to construct and operate th[e] facilities without having to compete." CR9. Under the NTPA, nothing changes. LastEnergy and MAPCo can continue to thwart the national grid by "restoring the 'status quo' from before Order 1000" and discourage "third-party transmission owners [from] buy[ing] and build[ing] transmission service[s] in Vandalia."[2] CR9.

The district court's order granting Appellee's motion to dismiss cannot stand. FERC's regulations demonstrate an intent to displace all state law concerning interstate electricity transmissions. The NTPA makes FERC Order 1000 moot because it allows intrastate incumbents to thwart nonincumbents from entering Vandalia and providing interstate services. Moreover, the NTPA expressly contradicts Order 1000 because it allows and incentivizes Vandalia incumbents to forestall any electric transmission entrant from participating in any interstate activity required to pass through Vandalia. Such a blatant violation of the Supremacy Clause obstructs competition in the interstate electricity supply market—a market that is entirely regulated by the federal government.

IV. Vandalia's statutory right of first refusal violates the dormant Commerce Clause because it is facially discriminatory and not narrowly tailored to advance Vandalia's interests.

The ROFR violates the dormant Commerce Clause because it discriminates between in-state and out-of-state actors, violating the United States Constitution, Article I section VIII clause III. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The first determination is whether a state statute facially discriminates against interstate commerce. *Id.* If the statute is facially discriminatory, the statute is subject to strict scrutiny and only upheld if "it is narrowly

[2] Representatives from both LastEnergy and MAPCo urged Vandalia to enact Vand. Code § 24-12.3(d) with these statements, CR9, which allows the companies to maintain monopolistic control over any and all electricity passing through Vandalia's borders.

tailored to 'advance a legitimate local purpose.'" *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (quoting *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)) (cleaned up). However, if the statute is nondiscriminatory, "directed [at] legitimate local concerns, [and only incidentally affects] interstate commerce," the statute does not violate *Pike*'s dormant Commerce Clause test. *United Haulers Ass'n*, 550 U.S. 446 (referencing *Philadelphia v. New Jersey*, 437 U.S. at 624). The ROFR fails each step required to pass judicial scrutiny.

The PSC's ROFR violates the dormant Commerce Clause because (1) it discriminates between incumbent and non-incumbents; (2) is not the least restrictive means to achieving its goals; and (3) even if it is nondiscriminatory, its burden on interstate commerce is excessive in relation to the local benefits. Accordingly, the Court must reverse the district court's decision.

A. Vandalia's statutory right of first refusal is facially discriminatory because it draws geographic distinctions between incumbents and nonincumbents.

When "a state law discriminates against out-of-state goods or nonresident economic actors," a regulation is facially discriminatory, *Tennessee Wine & Spirits*, 139 S. Ct. at 2461; accordingly, the ROFR cannot stand. Moreover, when nonresident discrimination applies "to all those seeking to operate in the State," the regulation discriminates on its face. *Id.* at 2474. Such discrimination is subject to the highest form of judicial scrutiny and rarely stands because it creates a geographic border between similarly situated entities. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307 n.15 (1997). States cannot provide preferential advantages to resident competitors and withhold advantages from nonresident competitors because "[t]he fundamental objective of the dormant Commerce Clause is to preserve a national market for competition." *Id.* at 299. By providing incumbents with a distinct advantage over nonincumbents, the ROFR creates a highly segmented market where geographic proximity is dispositive, the exact economic outcome the founders sought to avoid. *See Tenn. Wine & Spirits*, 139 S. Ct. at 2475.

The ROFR is facially discriminatory between incumbents and nonincumbents because, under *Tennessee Wine & Spirits*, durational-residency requirements to operate within a state violate the dormant Commerce Clause. *Id.* at 2459–2462. Unless an incumbent does not strike on a federally registered transmission plan within 18 months, nonincumbents cannot enter the interstate electric transmission market within Vandalia. *See* Vand. Code § 24-12.3(d). Like in *Tennessee Wine & Spirits*, in Vandalia, businesses not operating within the state are prohibited from starting operations for a specific period of time, essentially operating as a durational-residency requirement. Moreover, the restriction goes above and beyond Tennessee's regulation because if an incumbent decides to strike on a federally registered transmission plan, a nonincumbent is *indefinitely prohibited* from entering the market. Accordingly, Vandalia's blatant protectionism serves no purpose other than insulating MAPCo and LastEnergy from competing in the electricity transmission market—a market in which FERC's regulatory authority is absolute. *New York*, 535 U.S. at 20.

Moreover, the place of incorporation is not dispositive in deciding whether the ROFR is discriminatory. The place of incorporation overlooks how the regulation favors incumbents over nonincumbents. *See United Haulers*, 550 U.S. at 343. While the Eighth Circuit upheld a regulation similar to Vandalia's ROFR, the court analogized the regulation to a state's corporate tax rate deterring entry into the Minnesota market. *LSP Transmission Holdings, LLC, v. Sieben*, 954 F.3d 1018, 1028 (8th Cir. 2020) (quoting *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1386–87 (8th Cir. 1997)). However, there is an inherent difference between a state's corporate tax rate and a fundamental barrier to entry, which unequivocally favors corporations already operating within the state. While corporate tax rates are escapable by operating in a different state, a right of first refusal is not. The electric lines are inextricably linked to power plants, which can only operate in distinct marketplaces due to geographic restraints. Thus, transmitting electricity is also restricted. Accordingly,

the Eighth Circuit's assertion that a company can simply choose not to operate in a given market is short-sighted. Thus, as the Fifth Circuit stated, "a focus where the corporation is 'based,' which could mean either where it is incorporated or headquartered, is irreconcilable with Supreme Court dormant Commerce Clause jurisprudence addressing physical presence requirements." *NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 323 (5th Cir. 2022).

Accordingly, the ROFR undeniably violates the dormant Commerce Clause because it is premised on protectionist measures that discriminate between in-state and out-of-state actors.

B. The right of first refusal is grounded in economic protectionism, which is not a narrowly tailored state interest.

Because the ROFR is facially discriminatory, it is only sustained upon proof "that is narrowly tailored to 'advance a legitimate local purpose,'" *Tenn. Wine & Spirits*, 139 S. Ct. at 2461 (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)) (cleaned up); however, the ROFR is not narrowly tailored. The PSC's broad grant of authority is placed to "[e]ncourage the well-planned development of utility resources in a manner consistent with [Vandalia's] needs and in ways consistent with the productive use of [Vandalia's] energy resources." Vand. Code § 24-1-1(a)(3). However, the Senator who introduced the ROFR did so in "direct response to Order 1000 and its elimination of a 'federally recognized right of first refusal.'" CR9. Such reasoning is not related to developing utility resources for Vandalia's needs because the interstate electricity transmission market does not provide electricity to Vandalia's populace—it provides it to other states. Accordingly, the local purpose in support of the regulation cannot be rooted in its citizens because the citizens are unaffected by ACES constructing transmission lines in Vandalia. The only parties that would become affected by a third party entering this market are MAPCo and LastEnergy, and their goals are clear—maintain absolute power over the market within Vandalia. Such reasoning is patently anticompetitive and rooted in protectional reasoning that insulates in-state transmission suppliers from potential out-of-state

competition, which *Tennessee Wine & Spirits* expressly rejected. *Tenn. Wine & Spirits*, 139 S. Ct. at 2475.

Moreover, even if the purported local benefits had some link to the discriminatory regulation, "[a] states interest in overseeing the maintenance of transmission lines and the sitting of new lines is unpersuasive." *New York*, 535 U.S. at 24. Thus, the link is inapt.

Finally, the ROFR is not narrowly tailored to assist with Vandalia's utility resources because allowing nonincumbents to compete with incumbents in the marketplace yields the same results. The ROFR insulates Vandalia from competition and creates a false homeostasis within the state. If nonincumbents enter the market and use utility easements, citizens are left unaffected, and nonincumbents can assist in creating a more efficient interstate grid, resulting in lower costs to all consumers due to increased efficiency. Thus, the PSC's ROFR is not narrowly tailored to achieve the purported local interest.

C. Even if the ROFR is nondiscriminatory it fails *Pike*'s balancing test because the burden on interstate commerce clearly exceeds Vandalia's purported local benefits.

If the ROFR is deemed nondiscriminatory, its effects on interstate commerce are not incidental; they are excessive and violate the dormant Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The benefits asserted do not outweigh the burden imposed on interstate commerce because keeping transmission lines in the hands of more responsive in-state companies, "restoring the 'status quo,'" and "giving Vandalia . . . utilities the first opportunity to invest in federal[] regionally planned transmission projects," CR9, are not cognizable state interests. The purported state interests revolve around MAPCo and LastEnergy maintaining monopolistic control over any electric transmission line within Vandalia used for interstate transmission.

The *Pike* balancing test assumes the validity of nondiscriminatory statutes unless the associated burden upon interstate commerce is clearly excessive to the local benefits. *United Haulers Ass'n*, 550

U.S. at 346. The assertion that the "incumbency requirement . . . is far less egregious than [Texas']," CR16, rests upon faulty logic. To reach this conclusion, the PSC relies on benevolent incumbents who may choose to not exercise their right of first refusal, graciously allowing nonincumbents like ACES to enter the market. However, this belief turns a blind eye to multiple negative externalities associated with the opportunity to forestall competition and retain absolute power over all of Vandalia's interstate transmission lines.

First, it allows MAPCo and LastEnergy to engage in free riding. The two companies can reap the rewards from nonincumbents such as ACES. In doing so, MAPCo and LastEnergy are incentivized not to research how and where to expand interstate electric transmission. The companies can reap the rewards derived from the nonincumbent research and application process by striking on a nonincumbent plan once it is certified. Moreover, ROFR has substantial long-term effects, foreshadowed by ACES uncertainty if the Mountaineer Express is feasible without access to LastEnergy's easements and potential use of its ROFR. CR11. The Right of Way Order, coupled with the 18-month period, creates additional and substantial costs for nonincumbents, potentially making entry noneconomical. Thus, plans like ACES to construct natural gas-fired generation plants with carbon capture, CR5, may never materialize. This effect is not limited to Vandalia—it extends to every state from Pennsylvania to North Carolina. CR6. Thus, the overall electricity supply in northeast United States faces a foreboding future—stagnant energy supplies in a society that continually increases its energy usage. Accordingly, the negative interstate effects are substantial.

Second, the only alternative nonincumbents have to the previously discussed outcome is installing or using the interstate electricity transmission lines of states immediately surrounding Vandalia. However, this also proves noneconomical because the solution requires circumventing an

entire state to provide access. Circumventing Vandalia is neither cost-effective nor timely, directly contradicting FERC Order 1000 and PJM's competitive bidding process. CR6 & n.5.

Any such purported local benefit PSC offered is substantially outweighed by the short-term and long-term negative effects on interstate commerce. The ROFR increases the price of wholesale electricity in other states and disincentivizes the creation of energy-producing power plants. Accordingly, the ROFR is "protectional because all it d[oes] is protect [PSC's] members from out-of-state competition." *See Tenn. Wine & Spirits*, 139 S. Ct. at 2461, 2475 (the dormant Commerce Clause is used to stop a tendency "towards economic Balkanization").

CONCLUSION

For the foregoing reasons, ACES respectfully requests that the Court reverse the district court's order granting Appellees motion to dismiss. Moreover, ACES requests that the Court overturns both the Capacity Factor Order and the ROFR implemented by the PSC.

Respectfully Submitted,
/s/ *Team 27*
Team 27
Counsel for Appellant

CERTIFICATE OF SERVICE

Pursuant to Official Rule IV, Team Members representing Appellant certify that our Team emailed the brief (PDF version) to the West Virginia University Moot Court Board in accordance with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law.

The brief was emailed before 1:00 p.m. Eastern time, February 1, 2023.

Respectfully submitted,

Team No. 27

APPENDIX A

Court Record

APPENDIX B

Certificate of Compliance

APPENDIX C

Affirmation of Compliance with Official Rules