C.A. No. 22-0682

In the United States Court of Appeals
for the Twelfth Circuit

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Plaintiff-Appellant,

v.

CHAIRMAN WILL WILLIAMSON, IN HIS OFFICIAL CAPACITY, COMMISSIONER LONNIE LOGAN, IN HIS OFFICIAL CAPACITY, AND COMMISSIONER EVELYN ELKINS, IN HER OFFICIAL CAPACITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Vandalia
C.A. No. 22-0682

BRIEF OF PLAINTIFF-APPELLANT

Team No. 36

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JURISDICTIONAL STATEMENT

This case involves a preemption challenge, under the Supremacy Clause, Commerce Clause, and the Federal Power Act ("FPA") 16 U.S.C. § 791a et seq., to actions taken by the Vandalia Public Service Commission. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because the claims arise under the Constitution and under 16 U.S.C. § 825p, which gives district courts authority to rule on violations of the Federal Power Act or the rules, regulations, and orders thereunder and "all suits" "to enforce any liability or duty."

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES has standing to challenge Vandalia PSC's Capacity Factor Order where it implicates the wholesale retail market and obstructs transmission lines operating in the interstate energy market?

II. Whether Vandalia PSC's Capacity Factor Order violates the Supremacy Clause where it favors inefficient coal-operated plants, distorts wholesale market prices, and excludes efficient alternatives from the market?

III. Whether Vandalia's statutory Right of First Refusal violates the Supremacy Clause where it acts against the mandate, language, and purpose of FERC Order 1000?

IV. Whether a Vandalia law suppresses the Dormant Commerce Clause where it deters ACES, a global energy company, from constructing a transmission line and facilitating interstate commerce?

STATEMENT OF THE CASE

In April 2020, Appalachian Clean Energy Solutions, Inc. ("ACES") announced plans to construct a new combined-cycle natural gas-fired generating plant, called the "Rogersville Energy Center," in southwestern Pennsylvania. R. at 5. The estimated cost of the Rogersville Energy

Center is about $3.1 billion. R. at 5. To accommodate Rogersville Energy Center's electrical output into the regional grid, ACES planned to construct and own the "Mountaineer Express"–a 460 mile long high-voltage transmission line from Rogersville, Pennsylvania to Raleigh, North Carolina. R. at 5. The total capital cost of Mountaineer Express is estimated at $1.7 billion. R. at 6.

As one of the largest independent electricity transmission companies in the United States, ACES has constructed and maintained electric transmission lines throughout the Eastern Interconnection. R. at 5. ACES is headquartered and incorporated in Springfield, Vandalia, to which the company has provided electricity to the wholesale market for years. R. at 4-5. The energy generated by ACES is resold into wholesale markets either through bilateral power purchase agreements with retail electric utilities or participation in regional wholesale markets such as the PJM Interconnection. R. at 4. As a wholesale utility company, ACES does not have direct retail electricity customers, nor does it own any retail electric utilities as part of its corporate structure. R. at 4-5.

However, regulation on the retail energy market and restrictions for the construction of transmission lines in the state have prevented ACES from moving forward on the Rogersville Energy Center and the Mountaineer Express. *See* R. at 9-11.

The Regulatory Framework of the U.S. Electricity Market

Behind every flip of a light switch, is a complex exchange of energy from a facility generating energy through coal burning, natural gas, or renewable sources like wind that is sold into an electric grid, which then is transported by transmission lines to the consumer. People often see transmission lines out the window of their home, but not a generating facility and that is because energy can come from many states over because most energy grids are regional. As electricity became widespread in the early 20th century, state and local agencies oversaw nearly all generation, transmission, and distribution of electricity. R. at 13. However, as the U.S. energy market expanded, the energy market came into conflict with the Commerce Clause. In 1927, the Supreme Court held that "States were powerless to regulate such [electricity] sales under the Commerce Clause . . . resulting in what became known as the "Attleboro gap." *New York v. FERC*, 535 U.S. 1, 5-6 (2002) (citing *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927)).

To fill the Attleboro gap, Congress passed the Federal Power Act ("FPA"), 16 U. S. C. § 791a et seq., vesting exclusive jurisdiction over wholesale sales of electricity in the interstate market in the Federal Energy Regulatory Commission ("FERC"). *See* 16 U. S. C. § 791a et seq. (LexisNexis, Lexis Advance through Public Law 117-262, approved December 21, 2022). The FPA "extend[ed] federal coverage to some areas that previously had been state regulated," *New York*, 535 U.S. at 6, and gave FERC exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The FPA defines "wholesale" as any "sale of electric energy to any person for resale." *Id.* § 824(d). As a result, any sale of electricity in interstate commerce falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business or home that will actually consume the electricity. *See FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate … sales for resale in interstate commerce.").

PJM Interconnection

PJM Interconnection ("PJM") is the regional transmission organization ("RTO") and Independent Service Operator ("ISO") serving the mid-Atlantic region. As such, PJM maintains and operates the transmission grid in Vandalia, thirteen other states, and the District of Columbia. R. at 3. RTOs became an important regulator of transmission grid construction and maintenance after FERC's Order 2000 effectively required transmission-owning utilities to participate in RTOs like PJM. Consequently, PJM–not the states–authorizes the construction of new transmission facilities to serve its grid. R. at 3. Therefore, any public utility or independent transmission owner that wants to build new transmission facilities within PJM must obtain PJM's approval. R. at 3.

PJM implemented a competitive planning process for new transmission facilities to implement FERC Order 1000 and provide nonincumbent transmission developers an opportunity to participate in the regional planning and expansion of the PJM bulk electric system. R. at 6. In furtherance of this policy, PJM approved ACES's Mountaineer Express for inclusion in the Regional Transmission Expansion Plan ("RTEP") in March 2022. R. at 6.

In addition to the transmission grid, PJM operates both energy and capacity markets in the region. R. at 3. The energy market is a real-time market that enables PJM to buy and sell electricity to distributors for delivery within the next hour or 24 hours. R. at 3. For the capacity market PJM predicts demand three years into the future and assigns a share of that demand to each participating load-serving entity in the region. R. at 3. However, FERC does regulate the structure of the PJM capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 268 (2016) (hereinafter "EPSA") (the clearing price is "the price an efficient market would produce").

Vandalia, a Legacy Coal State

The state of Vandalia is a part of the PJM power grid and it is a net supplier of electricity to the regional grid because Vandalia typically only uses about half of the electricity generated in the state, according to the U.S. Energy Information Administration. R. at 4. Vandalia also has a legacy of coal-fired electric power plants that accounted for 91 percent of Vandalia's total electricity net generation in 2021, and therefore, Vandalia is committed to maintaining coal's prominent role in the state's economy. R. at 4, 6.

To do so, Vandalia's legislature tasked the Vandalia Public Service Commission ("Vandalia PSC") with preserving the state's coal legacy by "revers[ing] these undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close." R. at 6. Vandalia PSC is the state government agency that regulates the rates and practices of utilities providing *retail service* within the state of Vandalia. R. at 6 (emphasis added). *See* Vand. Code § 24. Under its broad authority, the Vandalia PSC must "provide the availability of adequate, *economical* and reliable utility services." Vand. Code § 24-1-1(a)(2) (emphasis added). R. at 6.

Vandalia PSC's Capacity Factor Order Effectively Regulates the Wholesale Market

On May 15, 2022, Vandalia PSC issued a Capacity Factor Order ("CFO") applicable to both retailer electric utility coal-fired power plants in Vandalia, Mid-Atlantic Power Co. ("MAPCo") and Last Energy.[1] R. at 8. The CFO included a finding of fact that operation of the jurisdictional coal-fired plants at a 75 percent capacity factor would be economical, directly contradicting both MAPCo and Last Energy's power cost adjustment ("PCA") filings that "capacity factors for their coal-fired power plants could be expected to remain at or below 60 percent going forward, given the availability of lower cost power from the wholesale market (i.e., PJM)." R. at 7-8. The cost to produce electricity at Vandalia's coal-fired plants is greater than the market-clearing price in PJM, the CFO thus allowed MAPCo and Last Energy to subsidize their losses from operating at 75 percent capacity "to be recovered . . . from retail ratepayers." R. at 8.

Due to the energy markets structure, all of the coal-fired power plants within Vandalia are connected with and exclusively sell into PJM. But before doing so the utilities are generally

[1] LastEnergy is headquartered and incorporated in Akron, Ohio, and serves customers in Ohio, Pennsylvania, Maryland, New Jersey, and West Virginia, in addition to the 600,000 customers served in Vandalia. MAPCo is headquartered and incorporated in Columbus, Ohio, and serves customers in Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia, in addition to the 450,000 customers served in Vandalia. R. at 4.

obligated to obtain sufficient capacity for all loads from PJM in order to account for PJM's entire capacity market needs, including wholesale market electricity. *See* R. at 8.

Vandalia PSC's Violated of Order 1000 by continuing ROFRs

In 2011, FERC issued Order 1000, which required ISOs to eliminate right-of-first-refusal ("ROFR") provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects to be competitively and regionally planned by entities like PJM. R. at 9. Historically, ROFR provisions gave owners of existing transmission facilities the exclusive right to construct new transmission facilities in their service areas. R. at 9.

In response to Order 1000, the state legislature in Vandalia in 2014 passed the "Native Transmission Protection Act" ("NTPA"), which grants incumbent transmission owners the exclusive right, for a prescribed period, to construct transmission lines within Vandalia. R. at 9. The senator who introduced the bill described it as a direct response to Order 1000 and its elimination of "a federally recognized right of first refusal." R. at 9. The NTPA provides: "If such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line." R. at 9. Vand. Code § 24-12.3(d).

Congruently and in accordance with Order 1000, PJM–the entity responsible for authorization of transmission line construction–removed the federal ROFR provisions from its tariff. R. at 14. As noted above, Mountaineer Express was approved by the PJM and thereafter, ACES submitted its application for a Certificate of Public Convenience and Necessity ("CPCN") for construction of the Vandalia portions. R. at 14. Due to the operation of the NTPA, the Vandalia PSC has not taken any action on the application; as the incumbent electric transmission owners in Vandalia, LastEnergy and MAPCo, have eighteen months—until September 30, 2023—to decide whether to exercise their ROFR. R. at 14.

ACES transmission line construction was further blocked from construction by the December 13, 2022 "Right of Way Order." In that Order the Vandalia PSC ruled that because ACES was not a "public utility" LastEnergy took the position that, as the "incumbent utility," it had the right to prohibit ACES's use of its rights of way for Mountaineer Express under the NTPA. R. at 11. The PSC's order therefore creates grave uncertainty that Mountaineer Express can even be built by ACES. R. at 11.

Procedural History

June 6, 2022, ACES filed suit against the Vandalia PSC arguing that the CFO is federally preempted because it effectively sets an interstate wholesale rate in violation of the FPA. R. at 14. However, the district court granted Vandalia PSC's motion to dismiss because ACES lacked standing without a tether from the CFO's retail market regulation and the wholesale market. R. at 14-15. The district court also found that even if ACES had standing, the CFO does not violate the Supremacy Clause when analyzed under cases from the Second and Seventh Circuits regarding state programs subsidizing nuclear energy plants' issuance of "zero emission credits" ("ZECs"). R. at 15 (citing *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018); *Electric Power Supply Association v. Star*, 904 F. 3d 518 (7th Cir. 2018)).

At the same time, ACES brought another suit against the PSC to contest Vandalia's ROFR which unconstitutionally infringes on FERC's regulatory authority–specifically Order 1000's ban on ROFR–and violates the Dormant Commerce Clause by unfairly forcing ACES to wait up to 18 months to see if Last Energy or MAPCo would exercise their ROFR. R. at 15. On June 27, 2022, Vandalia PSC also moved to dismiss ACES's ROFR claims. R. at 16. The district court granted the PSC's motion to dismiss, finding that Vandalia's Native Transmission Protection Act, which reinstated ROFR after FERC's Order 1000 banned the practice, was valid and not a preemption of federal law. The district court also found that the ROFR's benefit to Vandalia's coal industry outweighed the burden imposed on interstate commerce, thereby allowing for an infringement on the Commerce Clause based on the state's coal interest. See R. at 16.

The district court consolidated ACES's two suits in a single order that granted the PSC's motion to dismiss on all issues on August 15, 2022. R. at 16. ACES then filed a timely appeal of that order on August 29, 2022. R. at 16.

SUMMARY OF THE ARGUMENT

This Court should reverse the lower court's ruling and hold that Vandalia's actions violate the Constitution. ACES' PJM approved investment in an efficient interstate regional transmission line which crosses through Vandalia is blocked by Vandalia PSC's CFO and ROFR.

The CFO indirectly regulates wholesale markets due to the structure of the law itself, despite the law only referring to the retail market. Evaluating the impact of the law reveals that ACES and the PJM wholesale market will suffer substantial financial injuries including sunk costs on their investment, a loss in bargaining power, and being excluded from the market. Accordingly, these impacts can be traced back to the CFO and remedied by the Court overturning the CFO in favor of existing federal law.

Because ACES has standing, this Court should recognize that Vandalia's CFO is preempted by Federal law because it creates conflict with the FPA's regulatory structure of interstate wholesale energy sales. The CFO distorts wholesale rates, is analogous to other preempted laws, and interferes with FERC and PJM's market functions.

In terms of preemption, the same is also true of Vandalia's ROFR. It directly contradicts the language, motive, and mandate established by FERC Order 1000. It does so as it applies to transmission companies that are part of the regional transmission plan, which is explicitly barred by Order 1000 as it allows ROFR provisions for only local facilities. Moreover, the ROFR is also constitutionally suspect because it violates the Dormant Commerce Clause. The law discriminates against non-incumbent and non-public-utilities, as defined by Vandalia law, by erecting economic barriers that do no withstand strict scrutiny nor can they be justified by considering the weight of any local economic benefits. Therefore, due to the constitutional limits imposed on Vandalia, the CFO and ROFR should be overturned to better facilitate interstate commerce.

ARGUMENT

Congress addressed the Attleboro gap in 1935 by enacting the Federal Power Act, which delegates power to the FERC to regulate the transmission of energy between states and the sale of electricity in the wholesale market. Jetta Cook, *Transmission Troubles: Solving the Roadblocks to Renewable Energy*, 11 Chi.-Kent J. Envtl & Energy L. 37, 44 (2022). Under the FPA, states retain authority over the retail sale of electricity and *intrastate* transmission. *Id* (emphasis added). Accordingly, through the FPA, the FERC implements a structure that allows for continued federal, state, and local economic coherence in an increasingly complex energy market.

However, Vandalia's actions threaten the existing energy market structure. ACES, one of the top companies on the wholesale energy market, won a bid in the PJM interconnection, has invested heavily in meeting state and federal energy tax incentives, and is now facing the consequences of Vandalia's constitutionally suspect protectionist measures. The following brief establishes the injury ACES suffers due to Vandalia PSC's CFO, that the CFO is preempted by FERC Order 1000, that Vandalia's statutory ROFR violates the Supremacy Clause and Dormant Commerce Clause. Accordingly, this Court should reverse the lower court's ruling in favor of ACES.

I. ACES has Standing to challenge the Vandalia PSC's CFO

ACES has standing and therefore satisfies Article III of the U.S. Constitution's "cases and controversies" requirement in order to challenge the Vandalia PSC's CFO. *See* U.S. Const. Art. III, § 2. The Supreme Court stated that standing to sue is part of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). As to the question of justiciability, plaintiffs have standing when they have "alleged such a personal stake in the outcome of the controversy" as to justify the court's intervention on the plaintiff's behalf to remedy the controversy in question. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

ACES establishes the following Article III standing required elements: (1) an "injury in fact" suffered by the plaintiff, (2) causation in the form of a "connection between the injury and the conduct complained of," and (3) redressability, or that "it must be 'likely,' as opposed to merely 'speculative,'" that the injury can be remedied by the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 43 (1976)). The party invoking federal jurisdiction bears the burden of establishing these elements. *See Warth v. Seldin*, 422 U.S. 490, 508 (1975).

ACES meets the burden of proof for standing because (1) ACES will suffer imminent injury–financial loss–from Vandalia PSC's CFO; (2) that loss is a traceable result of the Vandalia PSC CFO's indirect regulation of wholesale markets through retail utility regulations; and (3) ACES' injury can be redressed by the requested relief to overturn the CFO that violates the Constitution's Supremacy Clause.

A. Vandalia PSC's CFO will cause an imminent "Injury in fact" to ACES

ACES will suffer financial losses and be unjustly prevented from building its new energy center along with the requisite transmission lines to reach the regional market as a result of the Vandalia PSC CFO's federally preempted regulation of the wholesale energy market. An injury in fact is "a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Whitmore*, 495 U.S. at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)). . Further, the "'injury in fact' test requires more than an injury to a cognizable interest . . . the party seeking review [must] be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972). However, "[w]here there is no actual harm, [ ] its imminence (though not its precise extent) must be established." *Lujan*, 504 U.S. at 564. The mere "'risk of real harm [can] satisfy the requirements of concreteness,' and there are situations where no additional harm needs to be shown beyond the intangible harm identified in a statute." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016).

Furthermore, when a violation to the Supremacy Clause is alleged, probable economic injury or loss of bargaining power resulting from a governmental action satisfies Article III's injury in fact requirement. *See Clinton v. New York*, 524 U.S. 417, 433 (1998) (holding that a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result). *See also Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville,* 508 U.S. 656, 666 (1993) ("under Article III, prospective bidders could establish an injury in fact even though there was no showing that any party would have received a contract absent the ordinance.") (internal quotation marks omitted). The Eighth Circuit elaborated on *Clinton's* holding: "when a statute is alleged to violate the Commerce Clause, plaintiffs have standing if the law 'has a direct negative effect on their *borrowing power, financial strength, and fiscal planning*.'" *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006), cert. denied, 549 U.S. 1328 (2007) (quoting *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003), cert. denied, 541 U.S. 1037 (2004)); *see also, La. Energy & Power Auth. v. Ferc*, 329 U.S. App. D.C. 400, 404 (1998) (The D.C. Circuit held that the State's attempt to unilaterally lift Federal restrictions in order to enable itself to compel wholesale sales, thus increasing competition is itself an Article III injury).

ACES alleges an injury in fact of probable economic injury from Vandalia PSC CFO's violation of the FPA by pushing wholesale utility companies out of the open energy market through its preferential treatment to retail coal-fired utility companies, effectively controlling the wholesale market which is beyond Vandalia PSC's authority under the FPA. ACES harm is imminent because as one of the largest participants in the wholesale market, the CFO's negative impact on the wholesale market will impact the operation of other projects beyond the Rogersville Energy Center and Mountaineer Express.

B. The Vandalia PSC's CFO caused ACES harm

Vandalia PSC's CFO indirectly regulates the wholesale energy market is the direct cause of ACES injury in fact. The causation element of standing is met when "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant" is established. *Simon*, 426 U.S. at 41-42, 48. The fact that the harm may have resulted indirectly, does not in itself preclude standing. *Warth,* 422 U.S. at 504-05. Especially "[w]hen a governmental prohibition or restriction imposed on one party causes specific harm to a third party, *harm that a constitutional provision or statute was intended to prevent,* the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Id.* (emphasis added).

The FPA prevents states from directly regulating the "prices of interstate wholesale markets or from regulation that would indirectly achieve the same result." *EPSA*, 577 U. S. at 28 (internal quotation marks omitted). The Supreme Court has "ma[de] clear that States interfere with FERC's authority by disregarding interstate wholesale rates that FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 165 (2016).

Here, the CFO's restrictions on retail utility companies' operations and forcing retail coal-fired utilities to saturate the market is more than "fairly" traceable to the de facto regulation of the wholesale market and third parties, namely ACES.

C. **The CFO's illegal regulation of wholesale energy markets is redressable.**

The financial injury to ACES caused by the CFO can be appropriately remedied by striking down the CFO. Plaintiffs are not required to show a guarantee that the court's actions would redress its injury to establish standing, only that "it is likely, as opposed to merely speculative, that the injury will be redressed." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Simon*, 426 U.S. at 38, 43.). The Supreme Court emphasized that "[redressability] doctrine can be boiled down to a fundamental inquiry: 'whether a plaintiff personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105 (1998) (quoting *Warth,* 422 U.S. at 508).

However, in *Steel Co.* plaintiffs failed to meet the threshold of likelihood for redressability because "[n]one of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request, would serve to reimburse [plaintiffs] for losses caused by [defendant's] late reporting, or to eliminate any effects of that late reporting." *Id.* at 105-06 (remedies were sought to redress the defendant's failure "to provide EPCRA information in a timely fashion, and the lingering effects of that failure, as the injury in fact to itself and its members.").

ACES's injury is redressable because the Court can prohibit the CFO's requirement for retail coal-fired plants' operation at 75 percent capacity, which directly impacts wholesale rates and requires Vandalia to adhere to the rules prescribed by Congress when regulating retail energy sales. This Court's finding that the CFO is federally preempted by FERC's sole authority to regulate wholesale markets would certainly eliminate the adverse impacts to ACES resulting from the CFO's distortion of the wholesale market. Unlike the relief requested in *Steel Co.*, ACES's challenge to the CFO would not only likely redress the injury, it would remove the wholesale market injury entirely. The Court's intervention would result in the most tangible of results–the construction of the Rogersville Energy Center and Mountaineer Express, providing affordable energy for consumers throughout the eastern energy market. ACES has established Article III elements of injury in fact, causation and redressability and establishes standing for this court to review the Vandalia PSC's CFO.

II. PSC's CFO is preempted under the Federal Powers Act.

The Supremacy Clause provides that federal law takes precedence over state law and that federal law "shall be the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. Congress can preempt State law either (1) expressly by including explicit statutory language, or (2) by implication when a State law is within the same field or in conflict with a Federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U. S. 493, 509 (1989); *Crosby v. National Foreign Trade Council*, 530 U. S. 363, 373 (2000). Congress' purpose is the ultimate touchstone in every pre-emption case. *Altria Group, Inc. v. Good*, 555 U. S. 70, 76 (2008). 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.*, 489 U.S. at 509. Conflict preemption applies when "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.,* 575 U.S. 373, 377 (2015).

The Federal Power Act preempts Vandalia's CFO by implication, as it (1) intrudes on the field of interstate wholesale sales, which is occupied by the FPA, and (2) is in conflict with federal law. The Federal Power Act authorizes FERC to ensure that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy" in interstate commerce are "just and reasonable." 16 U.S.C. § 824d(a). The District Court's decision incorrectly ratifies a fundamental transfer of regulatory authority to the States, away from the federal government and its policy of relying on market forces to set just and reasonable wholesale rates and send economically efficient signals regarding market entry and exit. The CFO will create subsidies for local loss-making coal-operated plants by passing the costs on to retail consumers, which will grossly distort market outcomes. This scheme will impose huge costs on the retail consumers and threaten serious distortions of the FERC-authorized mechanisms for setting wholesale rates at economically efficient levels and sending appropriate price signals to wholesale market participants. The CFO seeks to accomplish the opposite effect of FERC's pricing mechanisms by (1) guaranteeing a wholesale compensation rate contrary to that set by FERC, giving incentive to coal-fired plants to bid lower than competition, and (2) favoring inefficient plants that will keep running at a loss, almost necessarily forcing efficient plants, such as ACES's, either to leave or not enter the market.

A. <u>PSC's CFO is preempted as it directly intrudes on an exclusively federal field of law by interfering with the just and reasonable wholesale rates set by FERC.</u>

Congress has expressly vested FERC with exclusive jurisdiction over "the sale of [electric] energy at wholesale in interstate commerce." 16 U.S.C § 824a. Specifically, under the FPA, FERC has exclusive authority over "[a]ll rates and charges . . . received by any public utility for or in connection with" interstate wholesale sales. *See id.* § 824d(a), 824e(a); *see also id*. § 824v (prohibits any "manipulative or deceptive device… in contravention of [rules that the commission prescribes] for the protection of electric taxpayers"). This statutory text makes crystal clear that "[t]he FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'" *EPSA*, 577 U.S. at 288 (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963)). Because state programs that provide for additional payments to producers "in connection with" their sale of electricity into the wholesale market "invade[] FERC's regulatory turf," they are preempted by the FPA. *Hughes*, 578 U.S. at 163. If a state sets a wholesale contract rate by "law or policy" that differs from FERC's just and reasonable rate, the "contracts will be considered to be void." *Conn. Light & Power Co.*, 70 FERC P 61,012, 61,029-61,030 (1995).

When the rates for wholesale electricity sales in PJM are established via the FERC-approved auction process, those rates are by definition the rates that FERC has determined to be just and reasonable, in its mandate of creating an efficient national energy market. Vandalia only uses about half of the electricity generated by the state, of which 91 percent of net electricity was generated by coal-power plants in 2021. R. at 4. By giving the coal-powered plants a subsidy that guarantees a rate, and forcing them to inject even more subsidized, inefficiently generated electricity into the wholesale market, Vandalia is directly invading FERC's regulatory turf. As such, Vandalia is preempted not only because it intrudes on a field regulated by the FPA, but also because it is in direct conflict with the FPA.

1. The CFO is functionally indistinguishable from the Program that was found preempted in Hughes.

The CFO ensures that Vandalia's in-state coal-powered plants receive payments for their wholesale electricity sales that exceed FERC's just and reasonable rate, operating at a capacity above that determined by the FERC-approved PJM auctions. Vandalia's Coal-operated plants currently operate at a 40-60% capacity, due to availability of cheaper energy supplies in the region. R. at 9. The CFO forces these coal-operated plants to instead operate at a capacity of 75%, imposing the significant costs of expensive coal-fired generation on the retail customers. R. at 9. Vandalia PCS claims to have conducted their own finding of fact that the coal-fired plants would be profitable at 75% capacity, in direct contradiction to the economic capacity determined by PJM's wholesale market. *See* R. at 10.

In substance, the CFO is identical to the Maryland subsidy program that the Supreme Court unanimously held was preempted in *Hughes*. In *Hughes*, Maryland required Load Serving Entities (LSEs) to enter into a "contract for differences" with the selected supplier. 578 U.S. at 157. The state subsidized the price difference between the PJM capacity auction clearing price and the state's target price, which would be covered by the LSEs. *Id.* at 159. The state guaranteed the legislature's target price for the supplier, as long as the plant cleared the auction. *Id.* . This encouraged and indemnified Maryland generators to bid lower than they might otherwise have, in order to win the PJM capacity auction. *Id*. . The program, in part, shifted the cost of in-state electric power from in-state ratepayers to other PJM ratepayers. *Id.* . By artificially setting the lowest bid to win PJM auctions, Maryland generators interfered with the market dynamics that favored the lowest-cost producers to fill capacity. *Id.* at 165. .

The Supreme Court held that Maryland's program was preempted as it "sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* at 163. . "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Id.* at 164. . Maryland, by "doubting FERC's judgment," guaranteed a "rate distinct from the clearing price for its interstate sales of capacity to PJM." *Id.* at 163. . The Court relied on *Mississippi Power & Light* and *Nantahala*, which "make clear that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Id.* at 165 (quoting *Miss.*

Power & Light Co. v. Mississippi, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U. S. 953 (1986)). .

The CFO intrudes on FERC's exclusive authority over wholesale rates in the same way. Just as in *Hughes*, the state guarantees a wholesale rate that may be above the FERC-approved market rate. Whether that is through regulating in-state generation, as in the case of Maryland, or by exercising "traditional authority over retail sales," as in this case, Vandalia has "interfere[d] with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable." *See id.* at 165.

Vandalia argues that there is no tether between the CFO and wholesale markets. R. at 15. There is no basis for this claim. All generators in Vandalia are connected to PJM and sell all the energy they produce into the PJM market. R. at 8. Further, Vandalia only uses about half of the electricity it generates. R. at 4. As the fifth largest generator sending its electricity out of state in 2021, artificially adjusting the bid price of Vandalia's coal-fired generators is directly and explicitly interfering with the FERC-approved wholesale rate. *See* R. at 4.

2. The CFO program conflicts with federal law that requires wholesale rates to be determined in approved auction markets.

The District Court erred by using the ZEC line of cases in its ruling in favor of Vandalia PSC's CFO. The ZEC line of cases rely on the final substantive paragraph of *Hughes*, in which Supreme Court stated that "[n]othing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation,'"and that "[s]o long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable." 578 U.S. at 166. However, *Hughes* also explicitly states that Section 824d(a) bars states from guaranteeing levels of wholesale compensation in disregard of FERC-authorized wholesale auction rates. *Id.* at 168. This is precisely what Vandalia is doing.

Vandalia's subsidy is fundamentally different from ZECs. ZEC programs are designed to offset the environmental attributes for each MW hour of zero-emission nuclear generation, where payment of ZECs is equal to the social cost of carbon. *Zibelman*, 906 F.3d at 51. The social cost of carbon is not valued in the PJM capacity market, and as such it does not infringe on FERC's jurisdiction. *Id.* at 52–3. . Unlike the ZEC line of cases, the CFO is directly impacting the bid price set by generators in the PJM market, which is clearly valued in the PJM capacity market.

The Defendants ask this Court to overlook the plain language of the FPA and create a massive loophole to allow States through a command-and-control process to compel wholesale sales of electricity under the guise of regulation of the construction of new generation. Under the guise of regulating utility purchasing decisions, States could simply take over the entire wholesale market, effectively eliminating FERC's regulatory power and supplanting its chosen regulatory approach. This will grossly undermine the authority of the FPA and violates the principles of preemption. As such, we ask that this court reverse the district court's ruling.

III. Vandalia's ROFR is preempted by the FPA and infringes on FERC's authority, as set out in Order 1000.

Order 1000 directed transmission owners to remove any provisions creating a federal right of first refusal over construction of a new facility included in a regional transmission plan. Transmission Planning & Cost Allocation (Order No. 1000) , 2011 FERC LEXIS 1387 (F.E.R.C. July 21, 2011). While it is not "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities," a State law creating a ROFR for facilities included in a regional transmission plan will be in direct conflict with federal law, and will therefore be preempted by implication. *See* Order No. 1000-A, 77 Fed. Reg. 32,184, 32,244 (May 31, 2012) (order on rehearing and clarification). FERC has clarified that the State's right of first refusal can exist when incumbents choose to build facilities within their service territories. *Id.* However, it cannot exist for facilities that are eligible for regional cost allocation, as a non-discriminatory regional process is required to ensure just and reasonable rates. *See* Order No. 1000 at 49,887; Order No. 1000-A, 77 Fed. Reg. at 32,244. Vandalia's ROFR is in direct conflict with Order 1000, and is therefore preempted, as it applies to facilities eligible for regional cost allocation.

A. **Vandalia's ROFR conflicts with FERC's Order 1000 as it applies an unduly discriminatory and preferential qualification for proposing a transmission project to facilities eligible for regional cost allocation.**

Order 1000 requires transmission regions to establish (1) "qualification criteria for determining an entity's eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation," and (2) those "qualification criteria must not be unduly discriminatory or preferential." Order No. 1000-A at 32,253. FERC requires PJM to treat incumbents and nonincumbents equally for the purposes of selection criteria. *See* Order No. 1000 at 49,897-900. ;

In direct conflict with this requirement, Vandalia's ROFR creates preferential bias towards in-state generators and discriminates against out-of-state generators. Vandalia's legislature passed the Native Transmission Protection Act in direct response to Order 1000, "to restore the 'status quo' before Order 1000." R. at 9. MAPCo's representative even described the bill as giving preferential treatment to Vandalia utilities in federal regionally planned transmission projects. R. at 9. By giving incumbents 18 months to decide if they want to exercise their right-of-first-refusal, Vandalia has created significant delays for a nonincumbent that make the project unviable. *See* R. at 9. Vandalia taken away nonincumbents' equal opportunity "to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation." *See* R. at 9; Order No. 1000-A at 32,250.

Vandalia's ROFR is discriminatory and contrary to the principle of open access to transmission facilities as mandated by Order 1000. *See* Order No. 1000 at 49,961. ;Order No. 1000 promotes the use of competitive markets to allocate the costs of new transmission facilities and establishes a framework for interregional transmission planning. *Id.* at 49,842. ;Vandalia has gone against these principles by creating an insurmountable barrier for nonincumbent generators. Vandalia is using its definition of a "public utility" to exclude any generators that do not provide utility services to the public. Right of Way Order, Dec. 13, 2022. The Mountaineer Express will never meet the definition of a public utility, and as such will have to significantly increase its costs in the absence of eminent domain. R. at 11. Vandalia blatantly ignores PJM's inclusion of the Mountaineer Express in its regional transmission plan, and distorts the competitive market required for regional facilities by Order 1000. Requiring ACES to prove that it "has, or can obtain, state approvals necessary to operate in a state, including… [getting] public utility status and the right to eminent domain" in order to qualify to propose a transmission project for inclusion in the regional transmission plan is an "impermissible barrier to entry." Order No. 1000-A at 32,254. Since the ROFR is in direct conflict with Order 1000, it is preempted under the Supremacy Clause.

B. <u>Any State ROFRs that FERC has approved are clearly distinguishable from Vandalia, as they apply only to local facilities, not facilities eligible for regional cost allocation.</u>

Vandalia misconstrues FERC's allowance of ROFR provisions in other States. FERC has allowed federal rights of first refusals when they apply to purely local transmission facilities, such as baseline reliability projects. *LSP Transmission Holding II, LLC v. FERC*, 45 F.4th 979

(D.C. Cir. 2022); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 73 (D.C. Cir. 2014). Incumbent transmission owners are permitted to retain federal rights of first refusal over non-regional, purely "local transmission facilities[,]" which (1) are located wholly within the incumbent's service territory, and (2) have their costs allocated entirely to the zone in which they are located. *S.C. Pub. Serv. Auth.*, 762 F.3d at 73 (quoting Order No. 1000 at 49,854, 49,886); *See also*, *LSP Transmission Holdings II*, 45 F.4th at 993 (allowed for baseline reliability projects which are classified as lower voltage projects that have a mostly local impact); *Coal. Of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1011 (D.C. 2022) (allowed because "the pricing zone in which a Baseline Reliability Project is located receives most of the benefits provided by that project.").

FERC has clearly drawn a distinction for projects whose costs are shared regionally, for which FERC has not allowed a right of first refusal. *See MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016) (allowed because "the costs of such a project to consumers are limited to the service area of the company that builds the project rather than allocated across an entire region"). A "transmission facility is not regional for purposes of cost allocation if all its costs are allocated to the pricing zone in which it is located." *Id.* at 336.

This situation is clearly distinguishable. ACES's Mountaineer Express line spans across multiple states, from Pennsylvania to North Carolina. R. at 1. While some parts of the line pass through Vandalia, it is by no means a "local" project. *See id*. With the Mountaineer Express, ACES aims to "increase capacity of the regional grid to accommodate the electrical output from the Rogersville Energy Center" in Pennsylvania. R. at 5. Since the Mountaineer Express will not be wholly within Vandalia's territory, and its costs will be allocated regionally, it will not be considered local under Order 1000. As such, unlike the cases relied upon by Vandalia, the right of first refusal being granted in this case is in direct conflict with FERC's Order 1000, and as such will be preempted.

IV. Vandalia's statutory Right of First Refusal (ROFR) violates the Dormant Commerce Clause

The Dormant Commerce Clause derives from Congress' constitutional role to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. Dormant Commerce Clause jurisprudence safeguards against state-enforced economic protectionism and is essential to maintaining a balanced federalist system. *Dep't. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). In the context of energy law, these principles have served as constitutional limits on states regulating extra-judicial energy transactions–otherwise known as the "Attleboro gap". *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) (invalidating a Rhode Island law that regulated the rates charged by an in-state plant to customers in Massachusetts and holding that it had a direct burden on interstate commerce).

Vandalia's statutory ROFR, the Native Transmission Protection Act ("NTPA"), for electric transmission lines gives incumbent transmission owners an exclusive right, for a prescribed period of time, to build new transmission lines within the state. R. at 2 and 9. The NTPA was enacted as a direct response to FERC Order 1000 to disincentivize third-party transmission owners. R. at 9. Moreover, the NTPA leads to unjust and unreasonable rates in the interstate market for energy transmission based largely on the economic interests of two companies, not the interests of the people of Vandalia. R. at 9-10. Accordingly, Vandalia's ROFR goes beyond the limits provided by the Dormant Commerce Clause and is unconstitutional.

A. **Vandalia's ROFR does not meet any Dormant Commerce Clause exemptions and is subject to its limitations.**

The type of economic coherence the Dormant Commerce Clause seeks to protect underlies the structure of the energy market. While the energy market has historically been the jurisdiction of states, Vandalia PSC cannot act beyond the scope of its authority to regulate retail markets and intrastate transmission by discriminatorily impeding the functionality of interstate energy transmission. *See NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 310 (5th Cir. 2022) (concluding that transmission lines carrying electricity across multiple states are "classic instrumentalities of interstate commerce.")

Furthermore, Vandalia's statutory ROFR does not fall under any of the Dormant Commerce Clause exemptions. Unlike *Hughes v. Alexandria Scrap Corp.*, Vandalia PSC is not a market participant in the energy industry: it merely acts as a market regulator favoring incumbent utility operators. 426 U.S. 794, 808-09 (1976) (upholding state law that burdens out-of-state automobile hulk processors with onerous documentation requirements, recognizing the right of states to favor their own citizens when acting as market participants). Moreover, there is no "unmistakably clear" authorization by Congress that state action related to transmission lines is not subject to the commerce clause. *See South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91 (1984) (holding that a federal law regulating processing and exportation of timber from federal lands is not an express statement of congressional intent to allow states to regulate state timber in violation of the Commerce Clause). Lastly, because the competing entities, here ACES and Vandalia incumbents MAPCo and Last Energy, are competing in the same market for the same products, they are competitive entities that are affected by Vandalia's discriminatory practices. Therefore, this case meets the threshold question of whether the companies are similarly situated. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (concluding that utilities are not immune from the Commerce Clause despite their monopolistic history and ruling that must be similarly situated in a competitive market to claim discrimination under the Dormant Commerce Clause.)

B. <u>The NTPA and Statutory ROFR fail to uphold the Dormant Commerce Clause and are discriminatory.</u>

Dormant Commerce Clause analyses examine state law for both overt and non-overt discrimination. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001). "A statute 'overtly discriminates' if it is discriminatory on its face, in its purpose, or through its effects." *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1027 (8th Cir. 2020) (internal quotations omitted). If a law is overtly discriminatory, it must withstand strict scrutiny; regardless, a law is discriminatory if it benefits in-state economic interests while substantially burdening out-of-state economic interests. *Id.*

LSP Transmission focused on the neutral language of Minnesota's law distinguishing incumbent actors from non-incumbent actors, rather than in-state and out of state actors to rule that the law was not facially discriminatory. 954 F.3d at 1029. In the case at hand, Vandalia PSC argues that because ACES is headquartered in Springfield, Vandalia, and the favored incumbents are both headquartered in Ohio, there is no discrimination at play. However, as the *NextEra Energy* court notes, the location of incorporation is not determinative of facial discrimination or determining dormant commerce clause violations; instead, what matters is whether state law prevents new entities entering the interstate transmission market from crossing into the state. 48 F.4th at 324; *See also*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 203-04 (1994) (holding that law benefitting dairy farms located in Massachusetts violated Commerce Clause without asking whether those farms were owned by Massachusetts citizens or companies).

Hence, the *LSP Transmission* court failed to recognize that facial discrimination also exists when state laws pose barriers for market participants from accessing the state's markets or place a heavy burden on an interstate transaction. While there may be a proscribed period for Vandalia's ROFR, there are still substantial costs that ACES must suffer in order to gain entry into the market including considering the cost of purchasing an incumbent entity, the sunk costs of planning an efficient transmission line, the potential cost of negotiating individual contracts with landowners to build the line, and many more. These considerations work against the PJM's authority to approve of projects and overtly burden interstate commerce.

Under a strict scrutiny analysis, burdening interstate commerce to this extent is unreasonable compared to MAPCo and Last Energy's lobbied interests to discourage third-parties and maintain the "status quo." R. at 9. Beyond the interests of incumbent utilities lying at the heart of the NTPA, the ROFR disadvantages consumers and distorts wholesale, and indirectly, retail energy market prices. The alternative for similarly situated companies like MAPCo and Last Energy is to submit competitive bids to PJM, to lobby for regulating retail market prices in the state, and any other alternatives that do not create an exclusive market.

Even if this Court rules that Vandalia's law is not facially discriminatory because incumbent utilities can only temporarily exercise their ROFR, Vandalia's statutory ROFR is discriminatory in its effects and purpose. A statute that restrains products from interstate commerce may violate the Commerce Clause. *See Brown-Foreman Dist. Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580, 584 (1986) ("While a state may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may have."); *See also H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (holding New

York's denial for additional facilities for out-of-state distributors of milk based on intent to "protect and advance local economic interests" as a violation of the Dormant Commerce Clause).

Here, ACES is effectively required to forfeit any competitive advantage it may have in terms of tax advantages, energy efficiency, and servicing a wide range of markets within the PJM interconnection. In addition to these concessions, unlike *Brown-Foreman*, Vandalia is not, in effect, seeking to lower prices for its consumers–it only seeks to flood energy markets with energy from the in-state coal plants operated by the incumbents. *See* R. at 9-10. Moreover, denying facilities, such as existing transmission routes and sites, to "protect and advance local economic interests," is not enough of a justification for violating consititonal limits to state action. Justifying, balancing, and assessing the legitimacy of local benefits versus burdens on interstate commerce is discussed below.

C. Beyond overt discrimination and discriminatory effects, the ROFR violates the Dormant Commerce Clause under *Pike* balancing test.

A statute that appears to regulate even-handedly may still be struck down if the statute burdens interstate commerce, if it does not promote a sufficiently legitimate local interest, and if there are available non-discriminatory alternatives. *Pike v. Bruce Church, Inc*., 397 U.S. 137, 143 (1970). Some local benefits such as promoting health and public safety weigh more heavily than others when balancing them against the functioning of interstate commerce, but even these interests are not conclusive of the *Pike* inquiry. *See Hunt v. Washington State Apple Advert. Commn*., 432 U.S. 333, 350 (1977).

Here, we are weighing the motivation behind the NTPA, which is driven largely by MAPCo and Last Energy, against the burden on interstate commerce which includes the financial loss suffered by ACES and the repercussions their sunk costs would have on the PJM interconnection market, national markets and global grids. *See* R. at 10-11. There are no specific local interests, other than a history of a dominant coal-industry, that underlies the statutory ROFR. R. at 4. However, advancing the coal industry is not practically implicated by the ROFR, nor is it protected. Only the energy companies are positively impacted by the ROFR–companies who could close their in-state coal plants should they choose. R. at 9. Furthermore, any alternatives that ACES attempted to pursue, such as qualifying as a public utility to access incumbent easements under Vandalia law, will likely be unsuccessful because ACES does not supply retailers in Vandalia. R. at 10-11. Although, for a wholesale electricity company like ACES, failure to supply to retailers will always be the case. The remaining alternatives amount massive transactional costs to seek access to land for their transmission line via contracts with individual landowners. R. at 10-11.

Therefore, under a Dormant Commerce Clause analysis whether this Court views Vandalia's statutory ROFR as overt discrimination, discriminatory in its effects or purpose, or under the *Pike* balancing test, it violates the Dormant Commerce Clause.

CONCLUSION

For these reasons, this Court should reverse the judgment of the United States District Court for the Northern District of Vandalia.

/s/ Team No. 36
Team No

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appalachian Clean Energy Solutions, Inc. 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. 36