C.A. No. 22-0682

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF VANDALIA

BRIEF FOR THE APPELLEES

TEAM NUMBER 38
COUNSEL FOR APPELLEES

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JURISDICTIONAL STATEMENT

This appeal follows a final order of the United States District Court for the Northern District of Vandalia granting the Vandalia Public Service Commission's ("PSC") Motion to Dismiss on August 15, 2022. (R. at 16). Appellant Appalachian Clean Energy Solutions, Inc. ("ACES") below challenged PSC's Capacity Factor Order as a Federal Power Act ("FPA") violation under the Supremacy Clause, which gave the district court federal question subject matter jurisdiction. *See* (R. at 1–2); U.S. CONST. art. III, § 2. ACES likewise challenged Vandalia's statutory right of first refusal ("ROFR") as a federal question under the Supremacy Clause and Dormant Commerce Clause of the Constitution. *See* (R. at 2); U.S. CONST. art. VI, cl. 2; U.S. CONST. art. I, § 8, cl. 3. ACES timely filed appeal on August 29, 2022. (R. at 16); *see* Fed. R. App. Proc. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether ACES has standing to challenge the PSC's Capacity Factor Order;
2. Whether the 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;
3. Whether Vandalia's statutory ROFR is preempted by FERC Order 1000 and violates the Supremacy Clause of the U.S. Constitution; and
4. Whether the ROFR violates the Dormant Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

ACES sued the PSC members in their official capacity in the United States District Court for the Northern District of Vandalia on June 6, 2022 to challenge the Capacity Factor Order and the ROFR. (R. at 14–15). The Capacity Factor Order, ACES argued, violates the Supremacy

Clause of the Constitution because the FPA preempts such schemes that set interstate wholesale rates and contravene FERC division of authority between federal and state regulators. (R. at 14). Additionally, ACES argued the order interferes with the FPA's goal of efficient energy market prices by distorting signals and forcing coal-burning utilities to sell energy. (R. at 14).

ACES likewise argued the ROFR is preempted because state ROFLs essentially nullify FERC-set rates and obstruct the Order 1000 competitive solicitation process. (R. at 15). Last, ACES asserted the ROFR violates the Dormant Commerce Clause because it prohibits new entrants into the interstate transmission market that could cross into the Vandalia market. (R. at 15). This ROFR scheme, ACES argued, is essentially no different from the Texas ROFR that was struck down by the Fifth Circuit as violating the Dormant Commerce Clause. (R. at 15).

The PSC moved to dismiss ACES claims against the Capacity Factor Order and the ROFR on June 27, 2022. (R. at 14). Regarding the Capacity Factor Order, the PSC argued first ACES lacked standing because it is not subject to the order and is not a ratepayer affected by the Order. (R. at 14). Second, the PSC argued the order is not preempted because there is no tether to the wholesale market, and states are permitted to encourage new and clean energy generation. (R. at 15). As to the statutory ROFR, the PSC asserted many other states have enacted similar ROFRs without objection by FERC. (R. at 16). Last, the PSC argued the Dormant Commerce Clause is not implicated by the ROFR because there is no discrimination against out-of-state entities. (R. at 16). The district court granted the PSC's motion to dismiss on August 15, 2022 on four issues regarding both the Capacity Factor Order and the ROFR. (R. at 15–16). In granting the motion to dismiss, the district court rejected the Fifth Circuit's approach to the Dormant Commerce Clause and instead applied traditional *Pike* balancing to find for the PSC. (R. at 16).

II. STATEMENT OF THE FACTS

ACES's claims injury because it has proposed a construction plan for a Rogersville Energy Center. *See* (R. at 5.) Vandalia PSC's Capacity Factor Order is binding on coal-powered electric utilities—not natural gas-powered electric utilities like ACES's planned Rogersville Energy Center. *See* (R. at 5, 8).

Before the Capacity Factor Order, the Vandalia legislature directed the "PSC to ensure coal's continued dominance" by encouraging coal-fired electric utilities to operate "at maximum reasonable output." (R. at 6–7). Subsequently, Vandalia PSC issued orders in power cost adjustment ("PCA") proceedings that expressed concern over the low capacity factors of LastEnergy and MAPCo, two coal-powered electrical utilities, and encouraged MAPCo to maximize output from its coal-powered plants. *See* (R. at 7–8). After Vandalia PSC initiated a general proceeding focused entirely on "Coal Plant Capacity Factors and Electricity Rates," it issued a Capacity Factor Order that specifically directed "LastEnergy and MAPCo [to] operate their coal-fired plants" at significantly higher capacity factors than previously operated. (R. at 8). ACES's alleged injury stems from the Capacity Factor Order's impact on "the economics of building and operating its Rogersville Energy Facility." *See* (R. at 14). Vandalia PSC's Capacity Factor Order mandates increased capacity production from Vandalia's coal-powered retail utilities, specifically the five plants that LastEnergy and MAPCo operate. *See* (R. at 4, 8). LastEnergy and MAPCo's Fixed Resource Requirement status requires that the coal-powered retail utilities "exclusively sell into PJM." (R. at 8 n.7). Load-serving entities (LSEs) are "obligated to obtain sufficient capacity" at competitive auctions where PJM accepts bids based on prices that the sellers set. (R. at 3, 8 n.7).

Congress wrote the FPA to fill the gap between federal and state regulation in the wholesale electricity market. (R. at 13). Electricity generated in Vandalia is used to service a

network of interstate electrical lines. *See* (R. at 4). Vandalia's ROFR prefers pre-existing transmission facilities. *See* (R. at 16-17). Vandalia's incumbents and ACES all have operations in other states. (R. at 17). The ROFR does not pose an outright ban on new entrants. (R. at 10). The ROFR is additionally limited to eighteen months. (R. at 10–12). The legislature of Vandalia approved the law granting incumbents an ROFR in 2014, while ACES did not decide to construct its new facilities until 2022. (R. at 10). Coal-fuelled plants in Vandalia provide half of their energy to other states. (R. at 4). Vandalia is one of the top five electricity exporters in the nation. (R. at 4). Incumbents in Vandalia have a local presence but are not exclusively in-state corporations. (R. at 17). New market entrants are allowed in the Vandalia market by either waiting eighteen months without objection or by purchasing a current utility. (R. at 2). Vandalia allows for independent transmission facilities to become incumbents. (R. at 2). All incumbents in Vandalia are out-of-state companies. (R. at 17). Neither incumbent utility has exercised their ROFR, and the PSC has not forbidden ACES from proposing a new facility. (R. at 11–12).

SUMMARY OF THE ARGUMENT

ACES, a foreign energy company with no roots in Vandalia, lacks standing to bring its claims against the Vandalia PSC, an energy regulator, in federal court. For this reason, the Court should affirm the district court's dismissal of ACES's claims. First, ACES, which owns no retail electric utilities, experienced no concrete injury from the Vandalia PSC's Capacity Factor Order because the order regulated coal-powered retail electric utilities. Second, the Capacity Factor Order's application to coal-powered retail electric utilities' generation did not have an actual or imminent impact on ACES's plans to construct a natural gas-powered plant in Pennsylvania. Lastly, a proper judicial remedy is not available to ACES because ACES did not add Vandalia's coal-powered retail electric utilities as parties to its suit challenging the Capacity Factor Order.

The Court should affirm the district court's holding that FERC's actions under the FPA do not preempt the Capacity Factor Order if ACES has standing to bring its claim. First, the Capacity Factor Order expressly regulates the retail energy market within states' reserved authority under the FPA. Second, the minimal effect that the Capacity Factor Order has on wholesale energy prices results from the natural relationship between retail energy markets and wholesale energy markets. Lastly, even without the Capacity Factor Order, Vandalia's in-state coal-powered utilities are obligated to sell into the PJM Interconnection.

FERC Order 100 does not preempt Vandalia's ROFR. First, Congress does not prohibit state instituted ROFRs because the FPA only prohibits federal ROFRs. Second, the federal government has no dominant interest in state electric transmission facilities because FERC admits that states hold power over permitting, siting, and construction of electric transmission facilities. Third, Vandalia's ROFR does not oppose active federal legislation. For these reasons, the Court should affirm the ROFR Supremacy Clause claim's dismissal.

Vandalia's ROFR does not violate the Dormant Commerce Clause because it is not overtly discriminatory, and it does not impose an undue burden on interstate commerce. As Vandalia's statute affects both in-state and out-of-state entities similarly, it is not facially discriminatory. The ROFR's statute's purpose is not discriminatory because the legislative history indicates that the law ensures the longevity of a system that worked before Order 1000. Because entry into the market is possible by waiting eighteen months or purchasing a current utility, there are no discriminatory effects from Vandalia's ROFR. Under the *Pike* balancing test that is used to determine a law's relative benefits and burdens, the Vandalia ROFR only poses an incidental barrier to entry because of the potential for competition within Vandalia and the PJM.

As such, the law places no undue burden on interstate commerce. For the foregoing reasons, this Court should affirm the ROFR Dormant Commerce Clause claim's dismissal.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

A district court's dismissal of a complaint for failure to state a claim is reviewed *de novo*. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016). The dismissed complaint is construed "liberally" with the "factual allegations accepted as true, and . . . all reasonable inferences [drawn] in the plaintiff's favor." *Id.* A complaint does not overcome a motion to dismiss unless the complaint has "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Any exhibits attached to the complaint or documents "incorporated in it by reference" are considered within the complaint. *Nicosia*, 834 F.3d at 230 (quoting *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 97 n.13 (2d Cir. 2017)).

II. BECAUSE THE CAPACITY FACTOR ORDER DID NOT APPLY TO ACES'S PROPOSED GENERATING PLANT, THE DISTRICT COURT CORRECTLY HELD THAT ACES LACKED STANDING TO BRING ITS SUPREMACY CLAUSE CLAIM.

The Constitution vests all "judicial [p]ower" in the federal courts. U.S. CONST. art. III, § 1. The federal judicial power only extends to "[c]ases" and "[c]ontroversies." *Id.* § 2, cl. 1. This principle is fundamental to the federal government's separation of powers. *Allen v. Wright*, 468 U.S. 737, 750 (1984). But not all cases and controversies are entitled to federal jurisdiction. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–76 (1982)). "[B]efore a federal court can consider" a legal claim's merits, the party invoking federal jurisdiction "must establish the requisite standing to sue." *Id.* at 154. Essentially, the standing doctrine aids federal

courts in determining the types of cases and controversies that belong on the federal docket. *See Whitmore*, 495 U.S. at 154–55. A plaintiff has standing to bring a legal claim in federal court when the plaintiff suffered an "injury in fact" that was a "concrete and particularized, actual or imminent invasion of a legally protected interest;" the defendant's alleged conduct caused the plaintiff's injury; and "a favorable decision" can likely redress the plaintiff's injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976)) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

Here, the Court should hold that ACES does not have standing to sue the Vandalia PSC in federal court. First, ACES did not suffer an actual, imminent injury because its Rogersville Energy Center is merely a proposed construction plan. *See* (R. at 5.) Second, the Vandalia PSC's regulatory action did not cause ACES's alleged injury because the Capacity Factor Order did not apply to ACES's plans for a natural gas-fuelled plant. *See* (R. at 5, 8). Lastly, ACES's alleged injury cannot be redressed by the Court because ACES did not bring a claim against coal-fired plants in the instant proceeding. (R. at 14).

In *Lujan*, the Supreme Court held that conservation organizations did not have standing to challenge the Department of the Interior's revised regulation dropping the requirement that federal agencies consult the Interior Secretary regarding any "actions taken in foreign nations" to ensure the protection of endangered species. 504 U.S. at 558. Because the conservation groups were not subject to the Interior Department's challenged regulatory action, their third party status makes standing "'substantially more difficult' to establish." *Id.* at 562 (quoting *Allen*, 468 U.S. at 758). The conservationist groups' members had "a cognizable interest" in observing endangered species abroad at an unknown future date. *Id.* But they did not suffer an "'actual or imminent'

injury" through the allegedly harmful effect that the federal government's activity abroad would have on species. *Id.* at 564.

Like the conservation groups in *Lujan*, ACES is challenging a government regulatory action affecting a third party, which makes it more difficult for ACES to establish standing than if it had been subject to Vandalia PSC's regulation. *Id.* at 562; *see* (R. at 14). The Vandalia PSC's Capacity Factor Order was legally binding on in-state coal-powered electric utilities—not natural gas-powered electric utilities like ACES's planned "Rogersville Energy Center" or any utilities within ACES's power portfolio. *See* (R. at 5, 8). Before the Vandalia PSC issued the Capacity Factor Order, Vandalia's Legislature directed the agency "to ensure coal's continued dominance" by encouraging coal-fired electric utilities to operate "at maximum reasonable output." (R. at 6–7). Subsequently, the Vandalia PSC issued orders in power cost adjustment proceedings that expressed concern over the low capacity factors of LastEnergy and MAPCo, two in-state coal-powered electric utilities. *See* (R. at 7–8). After holding a general proceeding on "Coal Plant Capacity Factors and Electricity Rates," the Vandalia PSC issued a Capacity Factor Order that specifically directed "LastEnergy and MAPCo [to] operate their coal-fired plants" at significantly higher capacity factors than previously operated. (R. at 8). As such, the Capacity Factor Order and its legal background indicate that the order directly applied to LastEnergy and MAPCo's in-state coal-powered electrical plants. *See* (R. at 6–8). Because ACES did not "own any retail electric utilities" or coal-powered plants in Vandalia, the Capacity Factor Order did not impact ACES. *See* (R. at 4–5).

ACES's alleged injury stems from the Capacity Factor Order's supposedly adverse impact on "the economics of building and operating its Rogersville Energy Facility." *See* (R. at 14). But the Capacity Factor Order's legally binding effect on two coal-powered electric utilities

did not cause "actual or imminent" injury to ACES. *Lujan*, 504 U.S. at 562, 564. The proposed Rogersville plant was a natural gas-powered electric utility in Pennsylvania and not subject to the Vandalia PSC's Capacity Factor Order. *See* (R. at 5, 7–8). If the Capacity Factor Order incidentally affected ACES's plans for the proposed Rogersville plant, any alleged impact is not an actual or imminent injury because the ACES's plant is merely a construction plan with no completion date. *See* (R. at 5). Like the conservation groups' members' interest in observing wildlife abroad at an unknown future date in *Lujan*, ACES's "'some day' [sic] intentions" to build the Rogersville plant do not rise to an "'actual or imminent' injury." *Lujan*, 504 U.S. at 564; (R. at 5). Because ACES has no concrete or imminent plans to complete its proposed Rogersville plant, the Capacity Factor Order did not cause ACES to suffer an injury in fact. *See* (R. at 5).

In *Simon v. Eastern Kentucky Welfare Rights Organization*, the Supreme Court held that indigency groups did not have standing to sue the Treasury Department over the tax treatment of non-profit hospitals that refused medical services to the indigent. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 28, 32, 37 (1976). The injury that the indigency groups alleged directly resulted from the hospitals' service denials, but only government agencies were defendants to the suit. *Id.* at 41. The indigency groups attributed their alleged injury to the government based on the rationale that a tax decision "encouraged" the hospitals to deny services, but that rationale was "purely speculative." *Id.* at 42–43. As such, the indigency groups did not sufficiently demonstrate that the government agencies caused their alleged injury. *See id.* at 41 (majority opinion), 55 n.6 (Brennan, J., concurring). Like the indigency groups in *Simon*, ACES attributed its injury to a government defendant, the Vandalia PSC, based on an attenuated causal connection between the Capacity Factor Order and the proposed Rogersville plant. The Capacity

Factor Order did not directly impact ACES's construction plans for the natural gas-fuelled Rogersville plant in Pennsylvania because the order applied to coal-fuelled electrical plants in Vandalia. (R. at 5, 8). Accordingly, ACES cannot sufficiently demonstrate that the Capacity Factor Order caused its alleged injury.

In *Lujan*, a favorable decision for the conservation groups would not have rectified their alleged injury. 504 U.S. at 568. The Interior Secretary's original regulation that "required" consultation with federal agencies about activities abroad had an uncertain legal effect on other federal agencies. *Id.* at 569. As such, if a court ordered the Interior Secretary to reinstate the initial regulation, as the conservation groups requested, the regulation would not legally bind other federal agencies. *Id.* Likewise, a favorable decision for ACES would have an uncertain effect on the capacity market because Vandalia's coal-fuelled electric utilities may still continue to maximize output despite the Capacity Factor Order's invalidation. *See* (R. at 8). If the Interior Secretary's regulation, in *Lujan*, was actually binding on other federal agencies, a favorable decision still could not properly redress the conservation groups' alleged injury. *Lujan*, 504 U.S. at 569. Because the other federal agencies were not parties to the legal action, "an incidental legal determination" would not legally bind the agencies. *Id.* at 569–70. Like the federal agencies in *Lujan*, LastEnergy and MAPCo were not included as parties to ACES's legal claim against Vandalia PSC. *Id.* at 571. A favorable decision for ACES invalidating the Capacity Factor Order would not produce a legal determination requiring Vandalia's coal-powered electric plants to restore their capacity factors to pre-Capacity Factor Order levels. As such, ACES's alleged injury is not "amenable to judicial remedy." *Valley Forge Christian Coll.*, 454 U.S. at 475.

Because the Capacity Factor Order's regulation of coal-fuelled electrical plants did not impact ACES's proposed natural gas-fuelled Rogersville plant, ACES does not have standing to sue the Vandalia PSC.

III. THE FPA DOES NOT PREEMPT THE CAPACITY FACTOR ORDER BECAUSE THE VANDALIA PSC MERELY REGULATED IN-STATE COAL-POWERED UTILITIES' ELECTRICAL GENERATION.

The FPA reserves to states the authority to regulate power facilities generating electricity "in intrastate commerce." 16 U.S.C. § 824(b)(1). FERC has jurisdiction over wholesale electric energy transactions "in interstate commerce." *See id.* FERC's authority over interstate wholesale transactions includes establishing the wholesale price of electricity through competitive "auctions administered by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs)." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 150 (2016). As such, FERC only has authority to ensure a "just and reasonable rate" for electric energy sales to entities "for resale." §§ 824(d), 824d(a). But "[s]tates alone" have exclusive authority to regulate "'any other sale'—i.e., any retail sale—of electricity." *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 265 (2016) (emphasis omitted) (quoting 16 U.S.C. § 824(d)). When a state regulation "incidentally affect[s] areas within FERC's domain," the FPA permits states to regulate "within their assigned domain." *Hughes*, 578 U.S. at 151. Because the wholesale markets regulated by FERC and the retail markets regulated by states "are inextricably linked," the line between federal and state jurisdiction yields to Congressional intent. *Electric Power Supply Ass'n*, 577 U.S. at 265; *see Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978).

The Supremacy Clause dictates that "federal law preempts contrary state law." *Hughes*, 578 U.S. at 162; U.S. CONST. art. VI, § 2. But a threshold assumption governs that contrary state law does not yield to federal law unless Congress intended the federal law to supersede the state law. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Federal law supersedes state

law when Congress occupies a "field to the exclusion of states." *Malone*, 435 U.S. at 504. A Congressional intent to preempt state law is inferred from a comprehensive federal regulatory scheme that prevents states from supplementing it. *Rice*, 331 U.S. at 230. Alternatively, Congress may "implied[ly]" preempt a state law when a conflict between the federal law and state law makes compliance impossible with both laws. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

Here, the Court should hold that FERC's actions under the FPA do not preempt the Vandalia PSC's Capacity Factor Order. First, the Capacity Factor Order directly regulates the retail energy market and does not implicate interstate wholesale rates. *See* (R. at 8). Second, in-state coal-powered utilities' increased energy production under the Capacity Factor Order minimally affects wholesale energy prices but does not alter FERC's method of achieving FPA's goals. *See* (R. at 3). Lastly, the Vandalia PSC's regulation does not compel coal-powered electric utilities to sell energy into the PJM Interconnection because Vandalia's coal-powered utilities' regulatory status obligates the plants to sell into PJM. *See* (R. at 3, 8).

The Vandalia PSC's regulatory scheme exemplifies permissible regulation of intrastate retail utilities that does not cross the line into impermissible regulation of the interstate wholesale energy market. In *Hughes v. Talen Energy Marketing, LLC*, the Supreme Court held that Maryland's energy regulatory "scheme impermissibly intrude[d] upon the wholesale energy market." 578 U.S. at 153. Maryland's energy regulator issued a Generation Order because of its concern that FERC's competitive auctions for energy capacity insufficiently incentivized new energy production in the state. *See id.* at 158. The order resulted in the construction of a new gas-powered electric plant and required LSEs, which are auction participants, to enter into a "contract for differences" with the new plant that guaranteed a set contract price for capacity

irrespective of FERC's auction-clearing price. *See id.* at 150, 158–59. If the auction-clearing price for capacity was below the contract price, Maryland LSEs were required to pay the new plant the price difference under the contract. *See id.* at 159. But if the auction-clearing price was above the contract price, then the new plant would pay the price difference to Maryland LSEs. *See id.* Essentially, the Maryland contract conditioned payments between LSEs and the new plant on the plant's capacity auction-clearing price, which was connected to the interstate wholesale energy market. *See id.* at 163 n.9. Although Maryland's regulatory goal of promoting new in-state energy production was "legitimate," its Generation Order "disregarded interstate wholesale rates" by guaranteeing the new plant a contractually established rate irrespective of the capacity auction-clearing price. *See id.* at 164–65.

Unlike Maryland's Generation Order, the Vandalia PSC's Capacity Factor Order did not contractually "condition payment of funds on capacity clearing the [PJM] auction." *Id.* at 166. Although the Capacity Factor Order allowed in-state coal-powered utilities to recover costs when the market-clearing price was lower than electrical generation costs, the price difference was directly levied on retail ratepayers, instead of LSEs as with Maryland's contract for differences. *See* (R. at 8); *Hughes*, 578 U.S. at 159. Because consumers pay the price difference, the cost recovery measure's dependence on the market-clearing price does not affect LSEs' participation in capacity auctions. *Hughes*, 578 U.S. at 165. Unlike the Maryland Generation Order's contract for differences, the Capacity Factor Order's cost recovery measure for coal-powered utilities does not "operate[] within the auction." *Id.* Because other in-state LSEs that purchase capacity at auction do not directly bear the costs of electricity generation required by the order, the Capacity Factor Order's cost recovery measure does not have the effect of a rate. *Cf. id.* at 159 n.5 (explaining that "[t]otal capacity-auction expenses for Maryland LSEs . . . include[d] both the

payment to CPV . . . and the full cost of purchasing capacity from PJM . . .”). The Vandalia PSC’s order directly affects retail rates, which is the domain that the FPA reserves to states. *See* § 824(b)(1). Because the Vandalia PSC’s regulation does not intrude on the federal government’s interstate wholesale market domain, FERC’s actions governing capacity auctions under the FPA do not field preempt the Capacity Factor Order. *Hughes*, 578 U.S. at 154.

Vandalia’s coal-powered utilities’ increased capacity production under the Capacity Factor Order does not distort FERC’s auction price signals. In *FERC v. Electric Power Supply Ass'n*, the Supreme Court held that a FERC order aimed at promoting “‘meaningful demand-side participation’ in the wholesale markets” did not infringe on states’ authority to regulate retail rates, despite the order’s actual effect on the retail energy market. 577 U.S. at 265, 296 (quoting 76 Fed. Reg. 16658, 16658 (Mar. 24, 2011) (codified at 18 C.F.R. pt. 35). FERC’s order required wholesale market operators to pay equal compensation to retail consumers for demand responses, which are “commitments not to use power at certain times,” and generators for producing electricity. *Id.* at 265 (emphasis omitted). FERC acknowledged that “heightened demand response participation” in response to the order would decrease generators’ bid prices at capacity auctions. *See id.* at 279. The order’s direct effect on wholesale energy prices naturally had consequences for retail consumers. *See id.* at 281. Regardless of its effect on the retail market, the order’s subject matter was within FERC’s jurisdiction because it dealt exclusively with wholesale market transactions. *See id.* at 282.

Unlike FERC’s demand response order, the Vandalia PSC’s Capacity Factor Order only addresses the in-state retail market that is properly within states’ FPA-reserved domain because the order mandates increased capacity production from Vandalia’s coal-powered retail utilities, specifically the five plants that LastEnergy and MAPCo operate. *See* (R. at 4, 8). Necessarily,

coal-fuelled plants' increased electrical generation and the price-recovery measure under the Capacity Factor Order would incidentally effect retail utilities' wholesale energy pricing at capacity auctions, but existing FERC policies such as minimum offer price rules (MOPR) would "protect against bids skewing the market." *See* John S. Moot, *Subsidies, Climate Change, Electric Markets and the FERC*, 35 ENERGY L.J. 345, 351 (2014). Like the FERC demand response order's effect on retail rates, the Capacity Factor Order's direct effect on the in-state retail market would naturally affect the wholesale energy market because both markets "are not hermetically sealed from each other." *Electric Power Supply Ass'n*, 577 U.S. at 281. Irrespective of its effect on the wholesale energy market, the Capacity Factor Order does not "seriously distort the PJM auction's price signals." (R. at 14). Unlike Maryland's contract for differences in *Hughes*, which guaranteed a contract price for all energy transactions, the Capacity Factor Order encourages increased energy production through a mandate and cost recovery measure that are "untethered to a generator's wholesale market participation." *Hughes*, 578 U.S. at 166 (quoting Br. Resp'ts 40). Because the Capacity Factor Order's only "incidentally affect[s]" wholesale energy prices, it does not conflict with Congress's goal of maintaining an "efficient market" through FERC's auctions. *Id.* at 164; *Electric Power Supply Ass'n*, 577 U.S. at 268.

Lastly, the FPA does not preempt the Capacity Factor Order because the order does not compel coal-powered utilities to sell their energy into PJM. In *Rochester Gas & Electric Corp. v. Public Service Commission*, the Second Circuit held that a New York energy regulator's policy of imputing an in-state retail utility's wholesale energy sales into the utility's revenue base did not conflict with FERC's regulation of the wholesale market. *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 754 F.2d 99, 101, 105 (2d Cir. 1985). Because the imputation policy merely recognized wholesale energy sales and reasonably estimated sales revenue, the policy did not

compel utilities to achieve wholesale energy sales. *See id.* at 102–03. Accordingly, the policy did not regulate the wholesale energy market. *Id.* at 103. Like the imputation policy, the Capacity Factor Order recognized the wholesale energy market because the order merely alludes to PJM's market-clearing price as a variable in cost recovery ultimately benefitting in-state utilities. *See* (R. at 8). Vandalia's coal-burning utilities would still be selling capacity into the PJM "but for the" Capacity Factor Order. *Rochester Gas & Elec. Corp.*, 754 F.2d at 102. LastEnergy and MAPCo's Fixed Resource Requirement status requires that the coal-powered retail utilities "exclusively sell into PJM." (R. at 8 n.7). On the demand-side, even without the Capacity Factor Order, LSEs would still be "obligated to obtain sufficient capacity" at competitive auctions where PJM accepts bids based on prices that the sellers set. (R. at 3, 8 n.7). Although the cost recovery measure "may provide some incentive to" maintain high operating costs reflected in bid prices, neither it nor the mandate to increase capacity coerces utilities into achieving an outcome that is related to the wholesale energy market. *See Rochester Gas & Elec. Corp.*, 754 F.2d at 102. As such, the Capacity Factor Order does not regulate wholesale energy sales.

In *Electric Power Supply Ass'n v. Star*, the Seventh Circuit held that Illinois's policy of subsidizing nuclear-powered utilities through "zero emission credits [(ZECs)]" that other in-state retail utilities were required to purchase at a variable state-adjusted price was not preempted by the FPA. *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 521–22, 524 (7th Cir. 2018). Because ZEC owners all received the same market-clearing price at auction, the policy's effect on wholesale energy prices through an increased energy supply was within the scope of state authority over power generation. *See id.* at 523–24. Like Illinois's ZEC policy, the Capacity Factor Order's cost recovery measure is, in effect, a subsidy that encourages increase coal-powered electrical generation. *See* (R. at 8). Although Vandalia's increased energy supply

indirectly affects wholesale energy prices, the FPA permits Vandalia to regulate in-state electrical generation through measures that are untethered to the wholesale energy market. *See Star*, 904 F.3d at 523–24. Similarly, the Second Circuit held in *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman* that New York's ZEC program, which also required utilities to purchase credits from nuclear-powered utilities, was not tethered to the wholesale energy market because ZEC sales between in-state utilities were distinct from wholesale sales. *See Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 48, 51–52 (2d Cir. 2018). Like New York's ZEC program, the Capacity Factor Order's price recovery measure is, essentially, an intrastate transaction between coal-powered utilities and retail ratepayers. *See* (R. at 8). It reflects Vandalia's public policy of encouraging coal-powered electric utilities to operate "at maximum reasonable output." (R. at 7). Because Vandalia's public policy preference does not intrude on FERC's regulation of the wholesale energy market, "FERC . . . should give effect to [that] preference[] to the greatest extent possible." Michael Panfil & Rama Zakaria, *Uncovering Wholesale Electricity Market Principles*, 9 MICH. J. ENV'T & ADMIN. L. 145, 181 (2019). Accordingly, FERC's actions under the FPA do not preempt the Capacity Factor Order.

IV. VANDALIA'S ROFR DOES NOT VIOLATE THE SUPREMACY CLAUSE BECAUSE FERC ORDER 1000 DOES NOT LIMIT STATES' AUTHORITY TO ENACT ROFRS.

Vandalia's ROFR does not violate the Supremacy Clause because neither Congress nor FERC has limited Vandalia's ability to enact a state level ROFR. The Supremacy Clause notes federal laws and the Constitution supersede state laws. U.S. CONST. art. VI, § 2. A state law violates the Supremacy Clause when: (1) Congress expressly prohibits states from regulating a specific area; (2) where a federal interest in a field is superior to a state law in the same field, or (3) where a state's regulation directly conflicts with a federal regulation. David S. Keenan, *The Difference a Day Makes: How Courts Circumvent Federal Immigration Law at Sentencing*, 31

SEATTLE U. L. REV. 139, 148 (2007); (R. at 12). Congress grants FERC power over wholesale of electricity and its transmission in interstate commerce. 16 U.S.C. § 824. This Court should uphold the decision of the district court and reaffirm PSC's motion to dismiss ACES's ROFR claims. Congress does not expressly limit Vandalia's ability to implement a state ROFR, nor can one infer Vandalia's law is contrary to federal objectives based on its terms and prior legislation.

A. Since Congress Does Not Limit a State's Power To Enact State Level ROFRs, Title Twenty-Four Of Vandalia's Code Does Not Violate Order 1000.

Congress does not limit Vandalia's ability to regulate its electrical transmission system. If Congress's intent to limit the powers of a state through legislation is ambiguous, it is inferred that the states are not limited. *Rice.*, 331 U.S. at 230. Originally, states oversaw the "generation, transmission, and distribution" of electricity. (R. at 13). However, the Supreme Court determined the Commerce Clause bars states from regulating certain aspects of the electricity market, including the wholesale of electricity among the states. *Id.*; *Pub. Util. Comm'n v. Attleboro Steam & Elec. Co*., 273 U.S. 83, 89–90 (1927). This ruling created the "Attleboro gap," which Congress corrected through the FPA. (R. at 13). Through the FPA, Congress created FERC's predecessor. *Id*. Congress expressly limits the scope of FERC's authority to the "transmission" of electricity in interstate commerce at the wholesale level. 16 U.S.C. § 824(a). Congress dictates in the FPA that states have a measure of regulatory authority regarding their electricity. *Id.* The FPA also provides states with authority over all areas not granted to federal authority. *See id.* (indicating Congress's intent by limiting FERC's power to areas that states are not constitutionally able to regulate). In addition to the limiting language of the statute, there is a contrast between the congressional power granted to FERC to regulate electricity and FERC's power to regulate other utilities.

Congress granted FERC authority over the gas industry through the Natural Gas Act (NGA) in 1938. Matthew R. McGuire, *(Mis)understanding "Undue Discrimination": FERC's Misguided Effort to Extend the Boundaries of the Federal Power Act*, 19 GEO. MASON L. REV. 549, 583 (2012). However, Congress prohibits the states' ability to regulate the gas industry through the siting, construction, and permission of natural gas facilities. 15 U.S.C. § 717b. No similar language exists in the statute governing electricity. 16 U.S.C. § 824. In 2012, the Commissioner of FERC clarified the purpose of Order 1000 was solely to limit "Commission-jurisdictional tariffs" and not to preempt state or local laws. Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utilities, 139 FERC ¶ 61,132, 61,962 (2012). Therefore, the Commission elaborates that even if the tariffs/agreements are removed at the regulatory level, they have no effect on the laws of states. *Id.*

Congress made the FPA to fill the gap between federal and state regulation in the wholesale electricity market. (R. at 13). Given the express authority granted to FERC over the federal gas industry in the NGA, the language of the FPA should not be overextended to cover the same powers. 15 U.S.C. § 717b; 16 U.S.C. § 824(a). Both the NGA and the FPA were enacted in the same decade. (R. at 13); *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996). If Congress intended for FERC to have more control over the electric industry, they would have amended the FPA to grant this authority. *See* 16 U.S.C. § 824(a). Congress's difference in precise language between the FPA and the NGA indicates they did not intend to regulate the electricity industry as intensely. 15 U.S.C. § 717b; 16 U.S.C. § 824(a). Order 1000 does not limit Vandalia's ROFR since Congress implies states have all authority over electricity not granted to FERC in the FPA. *See* 16 U.S.C. § 824(a). The FPA is expressly more limiting than the NGA, and even if the terms of the FPA were deemed ambiguous, they would lead to an

inference that Vandalia has permission to enact a state level ROFR. *See Rice*, 331 U.S. at 230. Therefore, Congress does not limit Vandalia's power to enact a state ROFR.

B. Vandalia's ROFR Is Not Preemtpted By Order 1000 Because There Is Not A Superior Federal Interest And Vandalia's Statute Does Not Conflict With An Existing Federal Law Or Objective.

The Court cannot infer Order 1000 preempts Vandalia's ability to enact an ROFR because legislative history does not indicate the federal interest in state electricity transmission is dominant, or that Vandalia's statute is an obstacle to federal objectives' completion. Congress draws a "bright line" distinction between state and federal powers in energy regulation. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964). An agency may not preempt valid state legislation unless Congress intended. *New York v. FERC*, 535 U.S. 1, 18 (2002). When an agency's statutory power is ambiguous, courts look to the text and the "broader context of the statute as a whole." *Piedmont Env't Council v. FERC*, 558 F.3d 304, 313 (4th Cir. 2009) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). An agency has reasonable deference to decide the scope of its powers. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Order 1000 gives FERC the duty to remove federal ROFRs. (R. at 14). FERC acknowledges it must yield to state law regarding the construction, siting and permitting of transmission facilities. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 FR 49842-01, 49861 (2011). FERC encourages state and regional stakeholders to participate in the regional planning process of the RTOs, so that they will not conflict with state regulations. *Id.* at 49842. The FPA provides states authority over all areas not granted expressly to federal authority. *See* 16 U.S.C. § 824(a). The Supreme Court notes FERC's jurisdiction begins when electric power is comingled with transmission lines that facilitate interstate transmission. *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 463

(1972). Further, the Court determined that state regulators could not interfere with wholesale power transactions. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 953 (1986).

Both appellate courts and FERC have upheld state ROFRs. Midwest Indep. Transmission Sys. Operator, Inc. Cleco Power LLC Energy Arkansas, Inc., 150 FERC ¶ 61,037, 61,174 (2015); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016) (stating Order 1000 does not affect any state ROFRs). Moreover, FERC cannot expand its own authority via Order 1000 under the ruse of stopping discrimination. *Piedmont*, 558 F.3d at 312–13. The Ninth and D.C. Circuits have thwarted FERC's attempts to indirectly accomplish activities outside their powers in the FPA. *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010); *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996). In *Arlington*, a case revolving around the ambiguity regarding an agency's authority, the Supreme Court analogized FERCs supremacy over state law to the Federal Communications Commission's ("FCC") power over state law. *Arlington*, 569 U.S. at 299.

Challengers argue that an ROFR is unreasonable because it impacts the FERC-set rate achieved through the competitive bidding process. (R. at 16); *see Hughes*, 578 U.S. at 164 (striking down a Maryland provision that interfered with interstate wholesale rates). However, the same Court in *Hughes* said states may enact regulations that indirectly affect FERC's domain. *Id.* at 164; *see also Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015) (holding state regulations that might have affected the prices of the interstate wholesale market for gas were not preempted by FERC's powers); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989) (providing that the Court tends to not invalidate the laws of states that protect producers on the chance wholesale rates in the market might be affected).

Allowing RTOs/ISOs to grant incumbents federal ROFRs was prohibited because these grants could have been contrary to achieving state objectives. The purpose of banning federal ROFRs was to prevent discrimination on regional and interstate levels. Like the FCC in *Arlington*, FERC regulates a utility. (R. at 3); *Arlington*, 569 U.S. at 290. Unlike the way the FCC was responsible for the construction of communications transmission lines in *Arlington*, FERC is not responsible for the construction of electricity transmission facilities and regulating them would be outside FERC's authority. Transmision Planning, 76 FR at 49861; *see Arlington*, 569 U.S. at 293. Multiple circuits denied FERC's attempts to act outside their prescribed duties; the Supreme Court notes laws with incidental effects on the wholesale prices of utilities are not relevant to federal interests, and do not warrant preemption. *Hughes*, 578 U.S. at 164; *S. Coast Air*, 621 F.3d at 1092; *Altamont*, 92 F.3d at 1248. This Court should take a similar approach here since FERC has noted it does not have an interest in the siting and permitting of transmission facilities. Transmision Planning, 76 FR at 49861. ACES's claim that the ROFR affects rates is merely speculatory and under the rationales in *Hughes* and *Nw. Cent.*, this is not sufficient to warrant preemption. *Hughes*, 578 U.S. at 164; *see also Nw. Cent.*, 489 U.S. at 514. Denying Vandalia's ROFR would be an infringement of FERC's limited powers articulated in 16 U.S.C. § 824. The fact the FPA designates all powers not listed are delegated to the states coupled with the fact that FERC has not used their deference to disallow state ROFRs indicates that both case law and legislation do not allow one to infer that Vandalia is preempted from enacting an ROFR. 16 U.S.C. § 824; *Arlington*, 569 U.S. at 296. The words in Order 1000 only eliminate federal ROFRs and the broader context surrounding FERC's powers indicate that they cannot indirectly achieve goals not within their prescribed powers. 16 U.S.C. § 824; *Altamont*, 92 F.3d at 1248.

Unless Congress expands FERC's authority to regulate this matter, FERC is overstepping its prescribed duties, and therefore, cannot overturn Vandalia's statute.

V. VANDALIA'S STATUTE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECASUE IT IS NOT OVERTLY DISCRIMINATORY NOR DOES IT UNDULY BURDEN INTERSTATE COMMERCE.

Vandalia's ROFR does not violate the Dormant Commerce Clause because it is not overtly discriminatory, nor does it pose a burden on interstate commerce under *Pike* balancing. The Commerce Clause gives Congress the exclusive power to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. In addition, the Supreme Court prohibits states from enacting laws that unduly burden interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). The Dormant Commerce Clause prohibits states from enacting policies that penalize out-of-state competitors. *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695, 704 (D. Minn. 2018). State laws are scrutinized if they offer preferential treatment to in-state businesses. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). For Dormant Commerce Clause issues, courts examine if state laws are overtly or non-overtly discriminatory. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1026 (8th Cir. 2020).

When determining if state law is overtly discriminatory in relation to the Dormant Commerce Clause, modern courts ask three questions: (1) does the statute openly discriminate against interstate commerce; (2) if not facially discriminatory, is the purpose of the law to discriminate against out-of-state actors; and (3) if not facially discriminatory, does the law cause a disparate effect on out-of-state actors. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (noting a facially discriminatory tax violated the Commerce Clause); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (noting a state tax was not facially discriminatory but had a discriminatory purpose); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352

(1977) (noting a facially neutral law may be prohibited if it has a disparate impact). If discriminatory, a state law will be invalidated unless, there are not reasonable alternatives to achieve the same interests. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). These non-discriminatory alternatives must be "reasonable" and must "conserve legitimate local interests." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

If a law does not overtly discriminate but imposes an undue burden on interstate commerce, it is invalidated. *Sieben* 954 F.3d at 1026. Courts utilize the test in *Pike*, where a challenger must prove commerce is excessively burdened in comparison to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This method considers less restrictive alternatives but does not nullify a state law unless it is overly restrictive. *See id.* at 142.

A. Vandalia's ROFR Is Not Facially Discriminatory Because It Equally Affects In-State And Out-Of-State Entities.

Vandalia's law is not facial discriminatory because it treats transmission companies both in and out of the state equally. A state law discriminates on its face based on the text of the statute. *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 321 (5th Cir. 2022). The party claiming a law is facially discriminatory has the burden of proving its effects. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The Supreme Court dictated that electricity is part of interstate commerce under the Commerce Clause because it is transmitted among the states on an international grid. *New York*, 535 U.S. at 7. The Supreme Court does not examine where an entity is incorporated for the Dormant Commerce Clause to apply. *See Dean Milk*, 340 U.S. at 356 (holding an ordinance discriminating based on the location of pasteurization facilities violated the Commerce Clause). In *Tracy*, the tax exemption was not facially discriminatory because it operated in a "noncompetitive, captive market in which the local utilities alone operate[d]." 519 U.S. at 303–

04. In *Sieben* the appellate court held that the plain language of Minnesota's ROFR statute was not facially discriminatory. *Sieben*, 954 F.3d at 1029; Minn. Stat. Ann. § 216B.246 (West) ("An incumbent . . . has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan."). However, one may note that a circuit split exists with *NextEra* who stated that Texas's ROFR statute facially violated the Dormant Commerce Clause. 48 F.4th at 325–26.

Like the case in *NextEra* and unlike the case in *Tracy*, Vandalia's statute affects a singular market, the transmission market, and therefore it is subject to Commerce Clause challenges. *Id.* at 320; *Tracy*, 519 U.S. at 300. Like the case in *NextEra*, the electricity generated in Vandalia is used to service a network of interstate electrical lines. 48 F.4th at 310; *see* (R. at 4). Both the Minnesota and Vandalia ROFRs treat in-state and out of state actors equally, providing preference to people who own transmission facilities already. *Sieben*, 954 F.3d at 1027–29; *see* (R. at 16-17). It is irrelevant that the transmission agencies are incorporated in other states as noted in *NextEra*. 48 F.4th at 323. Also, it cannot be said that this law favors in-state businesses since Vandalia's incumbents and ACES all have operations in other states. *Granholm*, 544 U.S. at 472; (R. at 17).

One may cite that *NextEra* prohibits a statute like Vandalia's, however this is a misconception. *NextEra*, 48 F.4th at 326. Vandalia's statute, unlike Texas's statute in *NextEra* does not pose an outright ban on new entrants. *Id.* at 310; (R. at 10) (stating incumbents have eighteen months to exercise their ROFR); Tex. Util. Code Ann. § 37.056 (West). The court in *NextEra* determined that the law was facially discriminatory because of the unlimited aspect of the ban, whereas the laws in Vandalia and *Sieben* are only for a limited duration. *NextEra*, 48 F.4th at 323 (noting Texas has an outright ban and Minnesota's incumbents have a ninety-day

window to use an ROFR); (R. at 10) (demonstrating the ban is substantially less than in *NextEra*).

The record states no reasonable alternatives to the statute. ACES must prove the statute is facially discriminatory. *Oklahoma*, 441 U.S. at 336. Simply claiming it is discriminatory is not enough. *Id.* If it is claimed that ACES should be allowed to build a transmission line, this alternative is not reasonable, and may be more expensive. (R. at 12). ACES does not possess an eminent domain right because it is not a public utility under Vandalia Code section 24-8-1(h). (R. at 11–12). Without this right, it is truly ambiguous whether the project is viable due to logistics and expenses. (R. at 12). Vandalia's ROFR gives ACES eighteen months to be granted a right of way easement or procure the necessary capital for the lines. *See* (R. at 11–12). The *Sieben* decision permitting the ROFR was denied certiorari, while *NextEra*'s certiorari petition is under consideration, which could overturn their ROFR denial. *LSP Transmission Holdings, LLC v. Sieben*, 141 S. Ct. 1510 (2021); *NextEra*, 48 F.4th at 306, *petition for cert. filed,* (U.S. Dec. 30, 2022). Because Vandalia's statute's text equally applies to in-state and out-of-state actors and there are no reasonable alternatives, the law is not facially discriminatory.

B. The Legislative History and Circumstances Surrounding Vandalia's ROFR Do Not Indicate The Law Has A Discriminatory Purpose.

When investigating discriminatory purpose, courts look to "direct and indirect evidence," which includes items such as: "statements by lawmakers," the events preceding and following the legislation, and if the statute employs "ineffective means" to achieve state interests. *Sieben*, 954 F.3d at 1029 (citing *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 604 (8th Cir. 2006)). Additionally, a law's timing response to a new market entrant can be evidence of a discriminatory purpose. *NextEra E* 48 F.4th at 327.

In *Sieben* despite incumbent utilities supporting the bill's passage and the fact most electric companies were native to the state, it was found that since states have discretion over siting, permitting, and construction of transmission lines, the state law did not have a discriminatory purpose. *Sieben*, 954 F.3d at 1029. In *NextEra*, the case ACES relies on for its argument, the court found that there may have been a discriminatory purpose because the statute was enacted as a response to a specific new market entrant. *NextEra*, 48 F.4th at 327.

The Vandalia's ROFR statute's legislative history indicates that LastEnergy's representative said the law's purpose was to maintain the "status quo" that existed before Order 1000's enactment, and another incumbent, MAPCo, stated the law's purpose was to permit state utilities to protect their ability to invest in regional transmission projects. (R. at 10). Although, these are not the statements of lawmakers. (R. at 10). Unlike *NextEra*, which was a response to a specific new entrant, the bicameral legislature of Vandalia approved the law granting incumbents an ROFR in 2014, while ACES did not decide to construct its new facilities until 2022. *NextEra*, 48 F.4th at 327; (R. at 10). Like *Sieben*, Vandalia's statute does not intend to protect in-state interests, but it aims to protect the PJM because the coalfired plants in Vandalia provide half of their energy output to states outside of Vandalia. *Sieben*, 954 F.3d at 1031; (R. at 4). Specifically, Vandalia is one of the top five electricity exporters in the nation. (R. at 4). Furthermore, like *Sieben*, the incumbents in Vandalia have a local presence but are not exclusively in-state corporations, so it is unfair to say they are favored. (R. at 17); *see Sieben*, 954 F.3d at 1029–30. The Court here should find that like *Sieben*, the purpose of the ROFR is to maintain a reliable system that predates Order 1000. *Sieben*, 954 F.3d at 1031; (R. at 10). Therefore, since the relative history and circumstances indicate that ACES was only incidentally impacted, Vandalia's ROFR does not have a discriminatory purpose.

C. Vandalia's ROFR Does Not Have A Discriminatory Effect Because It Only Poses An Incidental Hurdle To Entry.

A statute has discriminatory effects when its legislative history indicates favoritism of in-state interests over out-of-state interests. *Sieben*, 954 F.3d at 1030; *see NextEra,* 48 F.4th at 327. Vandalia's statute only poses incidental barriers to entry and is not discriminatory.

In *NextEra*, the court ruled it was possible that Texas's statute had discriminatory effects because there was an outright ban on entry. *Id.* at 327–28. The statute's opponents demonstrated the local benefits were insignificant. *Id.* In *Sieben*, the Minnesota statute's opposition believed the statute had discriminatory effects because eleven of sixteen incumbents were in-state companies. *Sieben*, 954 F.3d at 1030. The court found that the ownership of the companies was irrelevant because the statute only provided an "incidental hurdle," for new market entrants. *Id.*

Unlike the ban in *NextEra*, a new market entrant is allowed in the Vandalia market by either waiting eighteen months or purchasing a current utility. *NextEra*, 48 F.4th at 310; (R. at 2). Vandalia's ROFR has the same effect as the statute in *Sieben*, which only incidentally burdens entry. *NextEra*, 48 F.4th at 314. Vandalia's ROFR's purpose is not to preserve incumbents, but to preserve the coal industry, their largest economic industry and to maintain a historically reliable system. (R. at 4, 10). This industry provides electricity for Vandalia and a variety of states in the PJM. (R. at 4). The correct standard that should be applied is the standard used in *Sieben*, where incumbents can prevent new entrants if the barriers to entry are not limitless. *Sieben*, 954 F.3d at 1030. *NextEra* is distinguished once again because there is a limitless barrier on nonincumbents to build lines within Texas. *NextEra*, 48 F.4th at 323. Additionally, like the case in *Sieben*, Vandalia allows for independent transmission facilities to become incumbents under Vand. Code § 24-12.3(d). *Sieben*, 954 F.3d at 1030. Unlike the incumbents in *Sieben*, Vandalia's incumbents are all out-of-state companies. *Id.* at 1029; (R. at 17). The incidental

hurdle to entry in Vandalia is not specific to out-of-state entities and applies to incumbents and ACES, which all service multiple states and are headquartered elsewhere. (R. at 5). Because it is possible for ACES to obtain a transmission facility in Vandalia, and the only hurdle to entry is incidental, the Vandalia statute has no discriminatory effect.

D. Vandalia's ROFR Does Not Impose An Undue Burden On Interstate Commerce Because Vandalia Does Not Ban New Market Entry.

In the alternative that ACES claims Vandalia's ROFR imposes an undue burden on interstate commerce, the *Pike* test indicates the benefits to Vandalia outweighs these concerns. A claim fails the *Pike* balancing test when the harms to interstate commerce outweigh the local benefits. *Pike*, 397 U.S. at 142. Additionally, if there is a reasonable alternative, courts will take the alternative into consideration when balancing these concerns. *Pike*, 397 U.S. at 142. According to the Fifth Circuit, it is not clear what the difference in the analysis is between a discriminatory effects test and *Pike* balancing. *NextEra*, 48 F.4th at 327 n.12.

In *Sieben*, the court found that the purpose of the Minnesota statute was to "preserve the . . . status quo," of the state prior to FERC Order 1000, and the court found the law did not unduly burden interstate commerce. *Sieben*, 954 F.3d at 1031. In *MISO Transmission*, the Seventh Circuit ruled that FERC can honor state and local laws regarding ROFRs. *MISO*, 819 F.3d at 336. The *MISO* court implies the D.C. Circuit should agree with this holding because the D.C. Circuit believes states regulate the construction of transmission facilities. *See id.* Further, if an organization is not banned from proposing a project by state law, the law is not unduly burdensome on interstate commerce. *See id.* at 337 (noting requiring public utility status or eminent domain rights for entry are outright barriers to entry).

Like the statute's proponents in *Sieben*, Vandalia's ROFR's proponents stated its intent was to return the state to its "status quo," which is within states' authority under the FPA. *Sieben*,

954 F.3d at 1031; (R. at 10). The Seventh Circuit notes that FERC should honor this right because the ROFR does not ban non-incumbents from proposing a project. *MISO*, 819 F.3d at 336–37. Neither utility exercises their ROFR, and the PSC does not prevent ACES from proposing to build a facility; the PSC does not require ACES to obtain public utility status or the right to eminent domain, which are barriers to entry. (R. at 11–12); s*ee MISO*, 819 F.3d at 337. The Fifth Circuit notes, the analysis examining discriminatory effects applies to *Pike* balancing tests, and the arguments above should apply here. *NextEra*, 48 F.4th at 327 n.12. The incumbents in question still must compete with other transmission facilities in the PJM, so similar to the rationale in *Sieben*, there is no clear effect of the state's law unduly burdening competition in the wholesale market. *Sieben*, 954 F.3d at 1031. A state has a legitimate interest in preserving the reliability of their system and regulation of utilities has primarily been a function of the states. *Id.* Furthermore, ACES has not stated a viable alternative. Without a right of way easement, it is only speculative that ACE's construction will be able to occur at all because of expenses and logistical issues. (R. at 12). Because there are no absolute barriers to entry and the right of siting remains with the states, the aggregate burden on interstate commerce from Vandalia's ROFR is not apparent and cannot said to be greater than the benefits the state derives.

CONCLUSION

For these reasons, this Court should AFFIRM the order from the Northen District of Vandalia granting Defendants' Motion to Dismiss ACES's claims for lack of standing. Even if ACES has standing, this Court should dismiss ACES's complaint because Vandalia's Capacity Factor Order and statutory ROFR do not violate the Supremacy Clause, and the statutory ROFR likewise does not violate the Dormant Commerce Clause.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appellee, the Vandalia Public Service Commission, 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. 38