No. 25-1012

United States Court of Appeals
for the
Fourth Circuit

RETAIL ENERGY ADVANCEMENT LEAGUE;
GREEN MOUNTAIN ENERGY COMPANY,

Plaintiffs-Appellants,

– v. –

ANTHONY G. BROWN, in his official capacity as Attorney General of Maryland; FREDERICK H. HOOVER, in his official capacity as Chair of the Maryland Public Service Commission; MICHAEL T. RICHARD, in his official capacity as member of the Maryland Public Service Commission; KUMAR P. BARVE, in his official capacity as member of the Maryland Public Service Commission; BONNIE A. SUCHMAN, in her official capacity as member of the Maryland Public Service Commission,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT BALTIMORE

OPENING BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 25-1012 Caption: Retail Energy Advancement League v. Brown

Pursuant to FRAP 26.1 and Local Rule 26.1,

Retail Energy Advancement League
(name of party/amicus)

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who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
   If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

There is no such member. REAL does not believe the outcome of the case could have a substantial effect on any publicly held REAL member's stock or equity value.

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Thomas M. Johnson, Jr. Date: February 27, 2025

Counsel for: Retail Energy Advancement League

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 25-1012 Caption: Retail Energy Advancement League v. Brown

Pursuant to FRAP 26.1 and Local Rule 26.1,

Green Mountain Energy Company
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☑YES ☐NO
If yes, identify all parent corporations, including all generations of parent corporations:

NRG Energy, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑YES ☐NO
If yes, identify all such owners:

The Vanguard Group, Inc. owns 10% or more of the shares of NRG Energy, Inc., the parent corporation of Green Mountain Energy Company.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Thomas M. Johnson, Jr. Date: February 27, 2025

Counsel for: Green Mountain Energy Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory Materials

Other Authorities

INTRODUCTION

"Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 567 U.S. 709, 723 (2012). But Maryland's new speech law would make Big Brother blush. Maryland has compiled a list of words—to include "clean, green, eco-friendly, environmentally friendly or responsible, carbon-free, renewable, 100% renewable, 100% wind, 100% hydro, 100% solar, 100% emission-free," and "similar" terms—and decreed that clean-energy companies may not use them to accurately describe renewable energy credits generated outside Maryland's preferred region.

Maryland claims its speech regulation prevents consumer deception. But the State's theory of deception is not tenable. It claims that consumers understand words like "green," "clean," and "renewable" to mean only one thing: the offering of electricity that is generated in a cluster of States that extends non-contiguously from New Jersey to northern Illinois and is at least 51% renewable. So, under Maryland's statute, electricity that is backed 100% by solar energy—50% from Maryland and 50% from Connecticut or New York—cannot be advertised as "100% solar." But electricity that is backed by 51% solar energy from Chicago—and 49% by coal power plants in Maryland—can be advertised as "clean" under the statute. That is nonsense. Research from the Federal Trade Commission's Green Guides shows that consumers understand terms like "green" and "renewable" exactly the way the

clean-energy companies use them—as representing electricity generated from an environmentally friendly energy resource, not as implying Maryland's regional preference.

Maryland's incoherent scheme cannot satisfy any First Amendment standard. The State has offered no evidence suggesting that consumers understand words like "green" to have the bizarre meaning Maryland ascribes to them. Nor has it offered evidence to suggest consumers are otherwise being misled. Absent evidence of deception, Maryland plainly cannot advance an interest in preventing deception. And even if it could, the Act's approach—a blunderbuss speech ban—is not remotely tailored to further that interest. The clean-energy companies are engaged in truthful speech; so, the First Amendment does not permit Maryland to "forbid particular words." *Cohen v. California*, 403 U.S. 15, 26 (1971); *see In re R. M. J.*, 455 U.S. 191, 205 (1982) (regulation was "an invalid restriction upon speech" where advertisements had "not been shown to be misleading").

Maryland's law also unconstitutionally compels speech. Under the statute, if clean-energy companies use words like "green" or "renewable," they must comply with a slew of disclosure requirements. For example, they must extol the environmental benefits of renewable energy and deliver a state-scripted explainer on how the State tracks renewable energy. But Maryland has offered no evidence to suggest that these disclosures are necessary to prevent or remedy any consumer

deception. While Maryland is free to disseminate to the public whatever message it wants, it may not co-opt private companies to do so. The disclosures too violate the First Amendment.

The district court dodged these issues below. It held Maryland may regulate misleading commercial speech to protect consumers from deception. True enough. But the district court erred in applying that principle without putting the State to its proof that consumers are in fact deceived when green-energy suppliers do not abide by Maryland's 51% regional benchmark. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real"). And the district court further erred by not requiring Maryland to tailor its speech regulations, and in failing to recognize that the Maryland statute reaches far more than commercial speech. Under any First Amendment standard, Maryland's speech regulations are flatly unconstitutional.

The other preliminary-injunction factors also favor relief. First Amendment harms are per se irreparable and Appellants, a trade association representing green-energy suppliers and a regulated company, have shown that the statute forbids them from truthfully marketing renewable-energy offerings to Maryland customers as "green." Even worse, those constitutional restrictions have inflicted unrecoverable economic losses on Appellants. The State has no interest in enforcing an

unconstitutional law, so the public interest and the equities also favor injunctive relief.

The Court should remand with instructions for the district court to preliminarily enjoin enforcement of the statute. Because Maryland categorically lacks any interest in mandating adherence to its arbitrary definition of terms like "green," the Act's speech regulations are unconstitutional in all potential applications. And the unconstitutional speech restrictions cannot be severed from the rest of the statute without gutting the so-called "green energy" market that the State sought to create.

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the denial of a preliminary injunction. 28 U.S.C. § 1292(a)(1). The district court denied Plaintiffs-Appellants' motion for a preliminary injunction on November 18, 2024, JA298; Appellants timely filed their notice of appeal on December 13, 2024, JA300. *See* Fed. R. App. P. 4(a)(1)(A). The district court had federal-question jurisdiction because the claims arise under the United States Constitution. 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

1. Whether a statute prohibiting Appellants from truthfully using the words "clean, green, eco-friendly, environmentally friendly or responsible, carbon-free, renewable, 100% renewable, 100% wind, 100% hydro, 100% solar,

100% emission-free, or similar" to describe their products likely violates the First Amendment.

2. Whether a statute compelling Appellants to convey Maryland's views about green power likely violates the First Amendment.

3. Whether the remaining preliminary-injunction factors favor relief.

STATEMENT OF THE CASE

A. Maryland Maintains A Competitive Market For The Supply Of Renewable Electricity.

The United States power grid is a complex system that facilitates the generation, transmission, and distribution of electricity to Americans. Electricity is *generated* from both non-renewable sources (like coal plants) and renewable sources (like wind farms). After generation, electricity is *transmitted* into and through the electric grid. Finally, electricity on the grid is *distributed* to end users like households and businesses.

Since the enactment of the Electric Customer Choice and Competition Act in 1999, Maryland has maintained a competitive market for the generation—or supply—of electricity. *See* Md. Code, Pub. Util. § 7-504(2); *see also id.* § 7-510. Under this market system, licensed companies are authorized to sell electricity to customers. *Id.* §§ 7-507, 7-509. Customers can choose from among suppliers in a variety of ways, including on "a customer choice shopping website" that shows each supplier's "cost of service" and other information, *id.* § 7-510.2(a), (b), including

whether the supplier's "plan … includes renewable energy," *About Electric Choice*, MD Electric Choice, https://tinyurl.com/4t46yznd (last visited Mar. 3, 2025); *accord* Md. Code, Pub. Util. § 7-510.2(b)(1)(vi).

Technical realities of the power grid generally do not allow a customer's chosen supplier to send electricity directly from a renewable source to a customer's house. Rather, because the power grid is interconnected, electricity—regardless of its source—travels along the same wires. Thus, as explained below, electricity supply must be tracked through a system of certificates that represent a provider's generation.

B. Electricity Suppliers Offer Clean Energy Through Renewable Energy Certificates.

Some electricity suppliers seek to differentiate themselves in the competitive energy-supply marketplace by offering energy from renewable sources. For example, Retail Energy Advancement League ("REAL") members, Green Mountain Energy Company[1] ("Green Mountain"), and CleanChoice Energy, Inc. ("CleanChoice") all compete in Maryland's energy-supply market by truthfully marketing their electricity as "green" and "renewable." JA62-63, JA74-76; *see infra*.

The nature of the electrical grid does not allow these companies to send

[1] Green Mountain is a wholly owned subsidiary of NRG Energy, Inc., which is a member of REAL. JA48.

renewable energy directly into a customer's home. Rather, because the power grid is interconnected, electricity produced at coal plants and electricity produced from a wind farm travel along the same wires. Thus, when the "physical electricity" arrives at a customer's house, "the utility grid says nothing of its origin or how it was generated." *Renewable Energy Certificates*, EPA, https://tinyurl.com/mryf7b44 (last visited Mar. 3, 2025) ("EPA RECs Page"); *see also Guides for the Use of Environmental Marketing Claims*, Proposed Rule, 75 Fed. Reg. 63,552, 63,589 (Oct. 15, 2010) ("FTC 2010 Notice") (similar).

That creates a problem for market-based electricity systems. If a company produces electricity through a solar array, it generally has no way to deliver that electricity directly to the customer. Conversely, if a customer wants to purchase energy generated by a solar array, he is out of luck. The energy being transmitted into his home comes straight from the grid, and "[c]onsumers, therefore, cannot determine for themselves the source of the electricity." FTC 2010 Notice, 75 Fed. Reg. at 63,589.

Renewable energy certificates or credits ("RECs") solve this problem. A REC is "a market-based instrument that represents" electricity "generated and delivered to the electricity grid from a renewable energy resource." EPA RECs Page; *see also* FTC 2010 Notice, 75 Fed. Reg. at 63,589 (explaining that RECs allow organizations to "match[ ] the certificates with the conventionally produced electricity").

Consider a practical example. When a supplier generates one megawatt-hour (MWh) of electricity from a solar farm, it puts that MWh of electricity on the grid. That electricity is then distributed and used by someone on the grid. As a result, the supplier can claim one MWh worth of RECs—an intangible representation of the electricity it generated through solar panels. With its RECs, the supplier can then sell to customers one MWh worth of green energy—either directly or through a retailer. Under this system, suppliers have a real incentive to produce clean energy because customers have a means to buy that energy through RECs. Further, marketing the electricity as solar-generated is truthful because the supplier can sell only the solar energy that is actually generated and transmitted onto the grid.

C. Renewable Energy Certificates Are An Accepted, Non-Deceptive Method To Sell Renewable Energy.

Maryland has long recognized the utility of RECs. In 2004, it "establish[ed] a market for electricity from [renewable energy] resources in Maryland." Md. Code, Pub. Util. § 7-702(a)(3). To do so, it created "a renewable energy portfolio standard," which it tracked through a system of RECs. *See id.* § 7-703(a)(1)(i), (b); *see also id.* § 7-701(m), (n); Md. Code Regs. § 20.61.04.01(A).

The Federal Trade Commission agrees with this approach. For decades, it too has recognized that "[t]he REC market … helps renewable energy generators by significantly expanding the number of potential renewable energy purchasers" and by "ameliorat[ing] supply and demand problems." *Guides for the Use of*

Environmental Marketing Claims, Announcement, 72 Fed. Reg. 66,094, 66,095 (Nov. 27, 2007).

The FTC has also found that marketing REC-backed energy as renewable is truthful. In 2008, the FTC announced a broad study "to gather data on consumer perception of environmental marketing claims." *Agency Information Collection Activities*, Notice, 73 Fed. Reg. 60,702, 60,704 (Oct. 14, 2008). In 2010, based on evidence it gathered, the FTC determined that companies could truthfully market REC-backed energy as renewable. FTC 2010 Notice at 63,592. In 2012, the FTC relied on that finding to hold in its "Green Guides" that "marketers" may "mak[e] unqualified renewable energy claims … if they purchase renewable energy certificates … to match their energy use." *Guides for the Use of Environmental Marketing Claims*, Rule, 77 Fed. Reg. 62,122, 62,124 (Oct. 11, 2012) ("FTC 2012 Rule"); *see also Green Guides*, FTC, https://tinyurl.com/2crn8zmp (last visited Mar. 3, 2025) (explaining that Green Guides provide guidance on "how consumers are likely to interpret particular claims and how marketers can substantiate these claims"). That determination is codified in the Code of Federal Regulations under a section called "Renewable energy claims," which provides that marketers may substantiate claims of renewable energy with "renewable energy certificates" consistent with federal law. 16 C.F.R. § 260.15.

D. Appellants Sell Electricity Backed By Renewable Energy Certificates In Maryland's Energy Market.

Consistent with the consensus that RECs are both useful and non-deceptive, Appellants have—for years—sold REC-backed clean energy in Maryland.

Before the Maryland statute at issue in this case took effect, Green Mountain provided electricity to nearly 2,000 residential customers in Maryland. JA60. The electricity Green Mountain sells is "paired 100% with Renewable Energy Certificates," which it acquires from various States. JA61. Although Green Mountain's "100% REC-backed electricity is more expensive to supply than non-renewable energy," customers that want "renewable" energy "are willing to pay a premium." JA65; *see also* JA66 (detailing customer testimonials). To obtain this premium in Maryland's competitive electricity market, Green Mountain truthfully advertised its energy as "green," "clean," "renewable," and similar terms. JA62-63.

CleanChoice, a REAL member, provided electricity to approximately 20,000 residential customers in Maryland before the Maryland statute at issue here took effect. JA73. It pairs 100% of its electricity supply with RECs "from wind- and solar-energy generation sources." JA73. Electricity generated through "100% solar and wind" sources is "more expensive" than energy generated through non-renewable means, but CleanChoice's customers are "willing to pay a premium" for renewable energy. JA77; *see also* JA78 (detailing customer testimonials). CleanChoice thus marketed its electricity as "clean," "pollution-free," "100%

renewable," and similar terms. JA74-75.

The efforts of Green Mountain, CleanChoice, and other REAL members help "driv[e] a national transition to a clean energy economy." JA48. Appellants' renewable energy is generated in a way that "doesn't damage the land," "uses little to no water," and "doesn't emit" greenhouse gases that cause "climate change." JA65 (alterations accepted); *see also* JA73, JA77. These benefits are made possible because when customers purchase electricity from Appellants, they "increase[ ] demand for, and generation of, renewable electricity." JA77.

E. Maryland Restricts Truthful Renewable-Energy Marketing Claims.

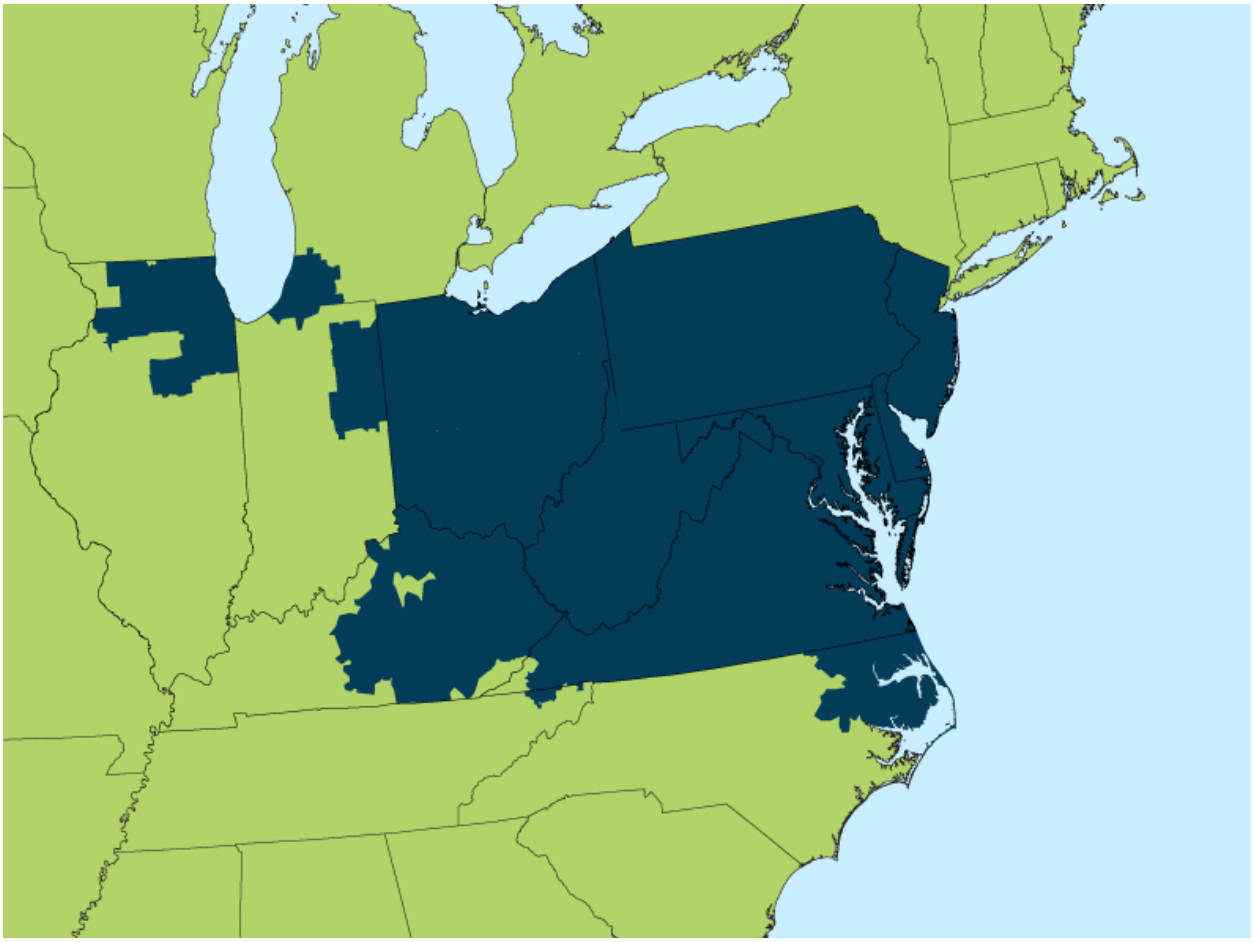
On May 9, 2024, Maryland enacted Senate Bill 1 ("the Act"), *see* 2024 Maryland Laws ch. 537; JA83-132, the subject of this litigation.

The Act amends Maryland's energy-market scheme to create two markets for residential electricity. The first is the standard market, which includes electricity "other than green power." Md. Code, Pub. Util. § 7-510(d)(2)(i). Suppliers in the standard market are subject to a rate cap. *Ibid.* The second market is the "green power" market, *id.* § 7-707(a), in which providers can sell electricity at rates above the standard-market cap, *id.* §§ 7-707(d)(2)(ii)(1), 7-510(d)(2)(i).

Whether electricity qualifies as "green power" turns on how much of the electricity is being backed by "renewable energy credits" that are "eligible for inclusion in meeting [Maryland's] renewable energy portfolio standard." *Id.* § 7-

707(c)(1). Credits qualify for Maryland's renewable energy portfolio only if the "renewable source … is located" (i) "in the PJM region," (ii) "adjacent to the PJM region" in certain circumstances, or (iii) "between 10 and 80 miles off the coast of the State" in certain circumstances. *Id.* § 7-701(m); *see also id.* § 7-703(d)(1). The "PJM region" refers to the regional grid "administered by the PJM Interconnection," *id.* § 7-701(i), which covers all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia, JA19. A map of the PJM region is displayed below.[2]

[2] *See Territory Served*, PJM, https://tinyurl.com/ybmwaxva (last visited Mar. 3, 2025).



The Act uses this scheme to restrict speech. It provides that "[a]n electricity supplier that supplies electricity to residential retail electric customers may not market electricity as green power unless" the electricity it offers is at least 51% backed by the above-described PJM-region RECs.[3] *Id.* § 7-707(c)(1)(i). Thus, if a company offers electricity that is backed 100% by RECs, the majority of which are generated outside the eligible region, it is prohibited from truthfully "market[ing]"

[3] The Act provides that the standard is the higher of either 51% or "1% higher than the renewable energy portfolio standard for the year the electricity is provided to the customer." Md. Code, Pub. Util. § 7-707(c)(1). However, the energy portfolio standard will remain under 51% until 2030. *See id.* §§ 7-701(n), 7-703(b)(25).

that electricity "as clean, green, eco-friendly, environmentally friendly or responsible, carbon-free, renewable, 100% renewable, 100% wind, 100% hydro, 100% solar, 100% emission-free, or similar claims." *Id.* § 7-707(a). Because these restrictions apply to all electricity suppliers, companies cannot use words like "green" even if they are in the standard, rate-capped market. *Id.* § 7-707(c), (a).

Maryland Public Service Commission ("the Commission") staff has interpreted this restriction to mean that only PJM-region RECs may be described as "green." *See* MPSC, Case No. 9757, Dkt. 27 at 2, *available at* https://tinyurl.com/2w2cnzn7 (last visited Mar. 3, 2025) ("Commission Staff Interpretation"). In other words, electricity backed 100% by wind energy—51% in the PJM region and 49% away from it—must be advertised the same as electricity backed 51% by PJM-region wind energy and 49% by fossil fuels. Although the former is cleaner than the latter, "in both cases the retail supplier could market their product as 51% green, but neither could market their product as 100% green." *Id.* at 2-3.

The Act also compels speech. Green power suppliers must "include in" their "marketing materials, a disclosure, written in plain language" that explains, *inter alia*, "how the electricity that the customer has purchased is generated," "how the green power will benefit the environment," "the percentage of electricity that would be provided by the electricity supplier that" is backed by PJM-region RECs, and "the

state in which the electricity was generated." *Id.* § 7-707(g). The Act also requires the following scripted disclosure:

> We deliver energy through the purchase of Renewable Energy Credits (RECs). A REC represents the social good that accompanies 1 megawatt-hour of renewable electricity generation. RECs may be sold separately from renewable electricity itself. Renewable electricity and RECs may be sold to different entities. The purchase of a REC does not indicate that renewable electricity itself has been purchased by the entity that purchased the REC.

Md. Code, Pub. Util. § 7-707(f)(2).

However, the Commission superseded that statutory script with an omnibus disclosure requirement in December 2024. *See* MPSC, Case No. 9757, Dkt. 24 *available at* https://tinyurl.com/2w2cnzn7 (last visited Mar. 3, 2025) ("Commission Order"). The Commission Order mandates that green-energy suppliers must use a two-paragraph scripted disclosure in all "marketing materials." *Id.* at 12. The Order does not allow any deviation from its script, which requires suppliers to, *inter alia*, extol the "regional" benefits of renewable energy. *Ibid.*

The Act exempts some energy suppliers from these speech regulations. Most notably, the State exempts itself—the Department of General Services—when it "sells energy." Md. Code, Pub. Util. § 7-707(b)(1). It similarly exempts government-run community choice aggregators when they supply electricity to the same residential customers served by green-power companies. *Id.* §§ 7-707(b)(2); 7-510.3. And it exempts energy suppliers that sell to "commercial retail electric customers," i.e. businesses. *See id.* § 7-707(b)(3). In other words, the Act places no

limits on the kinds of energy that these speakers can market as "green."

The Commission, in turn, has "discretion" to "determine whether an electricity supplier is marketing electricity in accordance with" the Act's speech requirements. *Id.* § 7-707(h). The Act applies to all electricity supply contracts entered into on or after January 1, 2025. 24 Maryland Laws ch. 537, § 9.

F. Appellants Bring This Suit To Vindicate Their First Amendment Rights, And The District Court Erroneously Denies Their Motion For A Preliminary Injunction.

The Act forces Appellants to change how they speak about their green-energy offerings. Although Appellants sell products that are 100% backed by RECs, the electricity is not backed by at least 51% PJM-region RECs. JA61, JA67, JA73, JA78. Thus, even though Appellants do in fact sell electricity that is "green," "clean," and "renewable," they are forbidden by the Act from making those and similar truthful claims about their electricity offerings. JA66; JA78. And even if Appellants were allowed to engage in such marketing, they would be compelled to serve as the State's mouthpiece by, for example, telling consumers "how the green power will benefit the environment." Md. Code, Pub. Util. § 7-707(g)(3); JA68; JA79-80.

Appellants filed suit to vindicate their First Amendment rights on October 1, 2024. Appellants simultaneously moved for a preliminary injunction to obtain relief before the Act took effect on January 1, 2025. Appellants explained that the Act

regulated their speech in violation of the First Amendment because prohibiting truthful speech does not further the State's purported interest in preventing consumer deception and is not adequately tailored.

The district court verbally denied Appellants' motion at a hearing on November 18, 2024 after finding that Appellants were not "likely to succeed on the merits of their First Amendment claims." JA273. The court further "assum[ed] without deciding that Plaintiffs have sufficiently demonstrated the risk of irreparable harm based on a loss of business opportunities" but opined that it was "not persuaded that Plaintiffs have established that the balance of equities and public interest favor injunctive relief." JA274. Appellants timely appealed.

The law's speech restrictions took effect on January 1, and REAL members, including Green Mountain's parent company NRG and CleanChoice, are now subject to them. As a result, they may no longer use terms like "green" and "clean" when they market their residential electricity offerings to Marylanders. The State did not dispute below that "[a]s of today, no energy suppliers" may market their electricity as green under the Act. Dkt. 2-1 at 9.

SUMMARY OF ARGUMENT

Appellants are likely to succeed in showing that the Act's speech regulations violate the First Amendment.

The Act's speech regulations are "content-based" and thus "subject to strict

scrutiny." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). First, consider the censorship provisions. Under the Act, Appellants may not truthfully market their renewable-electricity offerings as "renewable," "green," and similar terms unless they are at least 51% backed by RECs generated in or near the PJM region. Md. Code, Pub. Util. § 7-707(a), (c). Because the prohibition bans specific words (and "similar claims"), the regulation targets "speech with a particular content" and is therefore "content-based." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011). The same is true of the Act's disclosure requirements. "By compelling individuals to speak" a state-mandated script, these requirements "alter the content of" regulated parties' "speech." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 585 U.S. 755, 766 (2018).

The district court erred in applying a lower form of scrutiny reserved for "commercial" speech. JA253. Although the Act covers "marketing," that undefined term is not limited solely to "commercial" marketing, and state enforcers have unbridled "discretion" to "determine whether an electricity supplier is marketing electricity." Md. Code, Pub. Util. § 7-707(h). Thus, the Act reaches Appellants' non-commercial speech too—for example, speech about their charitable and political-advocacy efforts that also conveys a message about their commercial offering. Because the Act "admit[s] of no exception for noncommercial speech," *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 68 n.3 (2022), it

is subject to strict scrutiny, *see Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988) ("we cannot parcel out the speech, applying one test to one phrase and another test to another phrase").

Regardless, the Act's speech restrictions fail any level of First Amendment scrutiny. Even under the commercial-speech test, Maryland must show that "the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572.

Maryland fails to show that the Act's speech restrictions advance a substantial interest. The only one it has put forward is an "interest in protecting consumers from misleading information related to the marketing of green power." JA257. Under Maryland's theory, calling electricity "green" is deceptive unless it is at least 51% backed by PJM-region RECs. But to satisfy its First Amendment burden, Maryland must not only "recite" a "harm," it also "must demonstrate that the harm[ ]" is "real." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

Maryland has not demonstrated that its consumer-protection harms are real. It has not offered a shred of evidence to suggest that any consumer understands terms like "green," "clean," and "renewable" to describe electricity that is at least 51% backed by PJM-region RECs, let alone that consumers are deceived by Appellants' conventional use of these words. In fact, Maryland's evidence shows the opposite. The State's lead piece of evidence—a report from the Abell Foundation—describes

Appellants' electricity, backed mostly by non-PJM-region RECs, as "100 percent renewable." JA166 n.15. That is consistent with the FTC's finding in the Green Guides that marketing REC-backed electricity as "green" is non-deceptive, FTC 2012 Rule, 77 Fed. Reg. at 62,124, and does not inherently convey to consumers that the "energy was generated in their location," FTC 2010 Notice, 75 Fed. Reg. at 63,592. Because the "speech" at issue is not "misleading," a speech restriction aimed at curing deception cannot survive First Amendment scrutiny. *In re R. M. J.*, 455 U.S. 191, 206-07 (1982).

Maryland's speech prohibitions are also inadequately tailored. Obvious alternative approaches would allow Maryland to "achieve its [purported] interests in a manner that does not restrict speech, or that restricts less speech." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). For example, the Government could itself alleviate any confusion by providing disclosures on its statutorily-mandated "customer choice shopping website." Md. Code, Pub. Util. § 7-510.2(a), (b). It could also enforce its existing prohibition on deceptive advertising. Md. Code, Com. Law § 13-303. That the State did not even consider these options confirms that the speech restrictions were a first resort, not a last.

Maryland's speech compulsions suffer from the same constitutional defects. Maryland requires a slew of disclosures, but it has not identified "a nonhypothetical justification" for imposing them. *NIFLA*, 585 U.S. at 777. Again, the State's interest

is supposedly preventing deception, but it offers nothing except rank speculation for that claim. And the disclosures are not at all tailored, as the State could easily make these disclosures itself.

Not only are Appellants likely to succeed on the merits, but the other preliminary-injunction factors also favor relief. On irreparable injury, it is blackletter law that "First Amendment infringements … 'are per se irreparable' injuries." *In re Murphy-Brown, LLC*, 907 F.3d 788, 801 (4th Cir. 2018). And that irreparable constitutional injury is buttressed by the "loss of valuable business opportunities" Appellants will continue to suffer absent an injunction. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). The public interest and the equities also favor relief because the constitutional "injury to [Appellants] easily outweighs" the utter lack of interest Maryland has in "enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011).

This Court should remand with instructions for the lower court to enjoin enforcement of the entire Act. Plainly, the law's speech regulations are unconstitutional as applied to Appellants because their "marketing" is not "misleading." *See* JA256. These provisions are also facially unconstitutional because the State's failure to show an interest in mandating compliance with its idiosyncratic definition of "green" is a "categorical" flaw present "in every case." *Ams. for Prosperity Found. (AFP) v. Bonta*, 594 U.S. 595, 615 (2021). And the Act's

"unconstitutional" applications far exceed any (hypothetical) constitutional applications that would fall within the Act's "legitimate sweep." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (cleaned).

These unconstitutional provisions are not severable. In Maryland, provisions may not be severed when the Legislature would not have passed the rest of the statute without them. *Park v. Bd. of Liquor License Comm'rs for Balt. City*, 658 A.2d 687, 695 (Md. 1995). Here, the Legislature endeavored to "create[ ] two different markets," one of which is a "green power products market," Sen. Augustine Statement, Mar. 26, 2024 at 08:00-08:25, https://tinyurl.com/yfdpcn9f, that the Act's supporters considered "critically important." Del. Boafo Statement, Mar. 26, 2024 at 14:15-14:25, 14:55-15:02, https://tinyurl.com/yfdpcn9f. If this Court were to enjoin only the green-marketing provisions, it would collapse these two markets and render the "critically important" green market a nullity. Because that outcome is flatly inconsistent with legislative intent, enforcement of the entire Act must be enjoined.

STANDARD OF REVIEW

A "preliminary injunction is warranted where the plaintiff has established that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *dmarcian, Inc. v. dmarcian Eur. BV*, 60 F.4th

119, 138 (4th Cir. 2023) (quotations omitted). When "review[ing] the denial of a preliminary injunction," the question of "whether" a state law "is constitutional" is a "legal question[ ] reviewed de novo." *Grimmett v. Freeman*, 59 F.4th 689, 692 (4th Cir. 2023) (quotations omitted).

ARGUMENT

I. THE ACT LIKELY VIOLATES THE FIRST AMENDMENT.

A. The Act Censors And Compels Protected Speech.

All agree the Act regulates protected speech. It is beyond dispute that "the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit." *303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023); *see Citizens United v. FEC*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations"). And none contend that speech about the competitive energy supply concerns "unlawful activity." *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). Therefore, as the district court rightly held, "the speech at issue [here] is entitled to the requisite protection under the First Amendment." JA256.

The Act regulates speech in two obvious ways. *First*, the Act "forbid[s] particular words." *Cohen v. California*, 403 U.S. 15, 26 (1971). Before the Act, Green Mountain advertised its REC-backed electricity to Marylanders as "green," "clean," and "renewable." JA62-63. REAL-member CleanChoice used similar

terms, including "clean," "pollution-free," and "100% renewable." JA74-75. But under the Act, Green Mountain, CleanChoice, and other electricity suppliers may no longer engage in this truthful marketing in Maryland. Specifically, the Act prohibits them from using the words "clean, green, eco-friendly, environmentally friendly or responsible, carbon-free, renewable, 100% renewable, 100% wind, 100% hydro, 100% solar, 100% emission-free, or similar" because half or more of the RECs backing their claims are generated outside the Maryland's desired region. *See* Md. Code, Pub. Util. §§ 7-707(a), (c)(1)(i). The "censorship of particular words," *Cohen*, 403 U.S. at 26, is a paradigmatic speech restriction.

Second, the Act infringes on the First Amendment "right to refrain from speaking." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018). Under the Act, a supplier who advertises "green power" in Maryland must recite a government-mandated script about RECs. Md. Code, Pub. Util. § 7-707(f)(2); *see also* Commission Order at 12. And regardless what factors the green-power supplier believes are most important for a consumer considering whether to choose green energy and how that supplier would prefer to shape its own message about its service offering, the Act requires the supplier to address topics of Maryland's choosing: "how the electricity that the customer has purchased is generated," "how the green power will benefit the environment," and "the state in which the electricity was generated." Md. Code, Pub. Util. § 7-707(g); *see also*

Commission Order at 12. Because "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind,'" *Riley*, 487 U.S. at 797, "measures compelling speech are at least as threatening" as speech restrictions, *Janus*, 585 U.S. at 892.

B. The Act Is Subject To Strict Scrutiny.

1. The Speech Regulations Are Content- and Viewpoint-Based.

In deciding the appropriate level of First Amendment scrutiny, courts "distinguish between content-based and content-neutral regulations of speech." *Vidal v. Elster*, 602 U.S. 286, 292 (2024) (quotations omitted). A content-based regulation is "presumptively unconstitutional and may be justified only if the government proves that [the regulation is] narrowly tailored to serve compelling state interests." *NIFLA*, 585 U.S. at 766 (quoting *Reed*, 576 U.S. at 163).

The Act is clearly content-based. It identifies a list of words—"clean, green, eco-friendly, environmentally friendly or responsible, carbon-free, renewable, 100% renewable, 100% wind, 100% hydro, 100% solar, 100% emission-free, or similar," Md. Code, Pub. Util. § 7-707(a)—and then prohibits their non-deceptive use. A law "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163; *see Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016). Prohibiting specific words is a blatant and obvious form of content regulation. *See, e.g.*, *Cohen*, 403 U.S. at 26 ("we cannot

indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"); *Snyder v. Phelps*, 562 U.S. 443, 454-55 (2011) (regulating speech "because of the words" used would restrict "[t]he 'content' of" that speech); *Reed*, 576 U.S. at 164 (holding law "content based on its face" where its restrictions "depend[ed] entirely on the communicative content").

The Act is also viewpoint-based. "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 576 U.S. at 168-69. The Act discriminates based on viewpoint because its prohibition on using terms like "green" applies only to speech that disagrees with Maryland about what constitutes "green power." But if the electricity being marketed as "green power" complies with Maryland's preferred understanding of that term, the restrictions do not apply. Maryland is thus using its regulation to favor and enforce its own view about the types of energy production that count as "green," and to punish and drive competing views out of both the literal Maryland energy market and the figurative marketplace of ideas.

Like its speech restrictions, the Act's speech compulsions are also content- and viewpoint-based. When a state "compel[s] individuals to speak a particular message," the state necessarily "alter[s] the content of their speech" and thus

engages in content-based regulation. *NIFLA*, 585 U.S. at 766 (quoting *Riley*, 487 U.S. at 795). Here, as explained, the Act requires electricity suppliers to make several mandatory disclosures that reflect the State's preferred ideas about green energy. And Maryland has dictated a specific script under which suppliers must make those disclosures. Commission Order at 12. The Act, in short, alters in a content-based and viewpoint-discriminatory manner speech by Appellants and other electricity suppliers.

2. The District Court Erred In Refusing To Apply Strict Scrutiny Because The Act Regulates More Than Commercial Speech.

Although the district court recognized "that 'in the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory,'" JA253-254, the district court declined to apply strict scrutiny because it believed that the Act regulates only "commercial" speech, JA253. That was wrong.

The Act regulates speech that is not purely commercial because it is not "related *solely* to the economic interests of the speaker and its audience." *Maryland Shall Issue, Inc. v. Anne Arundel Cnty.*, 91 F.4th 238, 248 (4th Cir. 2024) (cleaned) (emphasis altered). In *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 559 (2011), the Supreme Court invalidated a Vermont statue that purported to regulate "Marketing" speech, a term that statute defined as "'advertising, promotion, or any activity' that is 'used to influence sales.'" The Supreme Court found "no need to determine"

whether that provision "burden[ed] only commercial speech" because "the outcome [was] the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 571.

Here, the word "market" is undefined, and the statute expressly vests the Commission with "discretion" to "determine whether an electricity supplier is marketing electricity" in violation of the Act. Md. Code, Pub. Util. § 7-707(h). If the Vermont statute in *Sorrell* presented a close question, then the Maryland statute here—which does not limit "marketing" to only sales-related advocacy—plainly oversteps the line. *See, e.g.*, *Norton Outdoor Advert., Inc. v. Vill. of St. Bernard*, 99 F.4th 840, 849, 851 (6th Cir. 2024) (holding content-based restriction on "advertising" extended beyond "commercial messages" and was thus "subject to strict scrutiny").

Consider some practical examples. Green Mountain's website highlights its charitable work so that its customers can "take action beyond using renewable energy." *About Us*, Green Mountain Energy Sun Club, https://tinyurl.com/5cv8bvsc (last visited Mar. 3, 2025). CleanChoice's website "help[s] every climate-focused voter prepare" for "Election Day" by explaining the "massive implications for the environment, climate change, and clean energy." *Climate Voter Guide 2024*, CleanChoice, https://tinyurl.com/yc7wt5tk (last visited Mar. 3, 2025). This is not commercial speech because it does not "propos[e] a commercial transaction,"

"promot[e] the product or service," or include commercial "advertising." *Maryland Shall Issue*, 91 F.4th at 248. But because the speech uses words like "green" and discusses energy, the Act gives the State "discretion" to punish this speech as "marketing." Md. Code, Pub. Util. § 7-707(h).

Even Appellants' conventional advertising is intimately linked with fully-protected expression. Green Mountain and CleanChoice both have Maryland's outlawed terms in *their company names*. The apparent result is that any advertising that identifies the company risks legal penalties. Further, Green Mountain's advertising materials profess its desire to "make the planet a cleaner, greener place to live," promote "a greener lifestyle," and express its intent to "inspire hope and motivate action through the use of clean energy." JA60, JA64. CleanChoice's advertising materials similarly express the company's desire to "create a world free of catastrophic climate change" and convey to customers that CleanChoice "strive[s] toward a cleaner future powered by energy generated at [the company]'s own solar farms." JA73. While these statements refer to the companies' products, they also convey non-commercial "ideas and beliefs" about climate change and environmentalism that lie "[a]t the heart of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Because the Act is not limited to commercial speech, strict scrutiny applies. Where a statute "implicat[es] [a party]'s commercial and noncommercial speech

alike"—"admit[ting] of no exception for noncommerical speech"—it is inappropriate to apply "intermediate scrutiny." *Austin*, 596 U.S. at 68 n.3. Rather, the Court must "apply [the] test for fully protected expression." *Riley*, 487 U.S. at 796 (explaining that where commercial and non-commercial elements are "inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase"); *see also Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189 (4th Cir. 2013) (en banc) (similar).

The Act's speech compulsions are also not limited to commercial speech. Disclosures are commercial when they merely provide factual "information" relevant to "the product or service," such as "warnings on health and safety" or "user instructions." *Maryland Shall Issue*, 91 F.4th at 248. But disclosures are non-commercial where they seek to "prescribe what shall be orthodox in … matters of opinion." *Ibid.*; *accord X Corp. v. Bonta*, 116 F.4th 888, 901-02 (9th Cir. 2024) ("Even a pure 'transparency' measure, if it compels non-commercial speech, is subject to strict scrutiny."). Maryland's compulsions require Appellants and other electricity suppliers to say that RECs are a "social good," Md. Code, Pub. Util. § 7-707(f)(2), explain "how the green power will benefit the environment," *id.* § 7-707(g)(3), explain how much of the electricity is backed by Maryland's preferred PJM-region RECs, *id.* § 7-707(g)(4), and identify "the state in which the electricity was generated," *id.* § 7-707(g)(5); *accord* Commission Order at 12. Maryland thus

compels statements of opinion (e.g., that RECS are a "social good"; RECs help with "regional" air pollution) and disclosures that are at-best tangential to the service offering (e.g., where the energy was produced). Because these are not "purely factual and uncontroversial" disclosures related to the commercial offering, they are subject to strict scrutiny. *NIFLA*, 585 U.S. at 768-69; *see also 303 Creative*, 600 U.S. at 596; *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014).

* * *

Taken together, Maryland's censorship and compulsion provisions are plainly intended to co-opt private parties "to support the state's" preferred view on green-energy policy. *Stuart*, 774 F.3d at 246. Maryland prefers renewable energy in or near the PJM region. It thus prohibits regulated parties from truthfully expressing that their energy is "green" or "renewable" unless they adhere to the State's preferred regional mix. And when parties do market their energy as green, they have to advance the State's agenda on the topic by extolling the benefits of Maryland's own peculiar mix of green-power sources, highlighting the reduction of "regional air pollution," Commission Order at 12, instead of, for example, global climate change. While Maryland may "share [its] views freely and criticize particular beliefs," it "cannot … use the power of the State to punish or suppress disfavored expression." *NRA v. Vullo*, 602 U.S. 175, 188 (2024). Doing so here subjects Maryland's speech regulations to strict scrutiny.

C. The Censorship Provisions Fail Even Commercial-Speech Scrutiny.

The Act's censorship provisions are unconstitutional under any level of scrutiny. Even under a commercial speech analysis, the State cannot "show … that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Therefore, "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 571.

1. The Censorship Provisions Do Not Directly Advance Maryland's Asserted Interest.

Maryland claims the Act's speech restrictions are justified by its "interest in protecting consumers from misleading information related to the marketing of green power." JA257. But Maryland failed to show either that this alleged harm exists or that the statute would address it, and so the district court erred in denying the preliminary injunction.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373. Accordingly, where "the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured." *FEC v. Cruz*, 596 U.S. 289, 307 (2022) (quotations omitted). "It must instead point to record evidence or legislative findings demonstrating the

need to address a special problem." *Ibid.* (quotations omitted); *see also Edenfield*, 507 U.S. at 770-71 ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real"). Where the Government asserts an interest in preventing deceptive commercial speech, it must show that the speech at issue is "misleading." *In re R. M. J.*, 455 U.S. at 205; *Sorrell*, 564 U.S. at 579; *accord Recht v. Morrisey*, 32 F.4th 398, 410 (4th Cir. 2022). And the Government's speech "prohibitions" must "serve" its "purposes in a direct and material manner." *Edenfield*, 507 U.S. at 773.

Evidence of the Government's interest must be "contemporaneous" because "justifications for interfering with First Amendment rights" may not be "invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022); *see also Thompson*, 535 U.S. at 373-74 (rejecting "hypothesized justifications"); *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020) (explaining that government must justify restriction "before enacting the speech-restricting law").

The only interest the State purports to advance with the Act is an alleged consumer-protection interest in preventing deceptive green-energy marketing. Indeed, the title of the statute is "Electricity and Gas – Retail Supply – Regulation and *Consumer Protection*." *See* 24 Maryland Laws ch. 537 (emphasis added). The Act's sponsor, Senator Malcolm Augustine, testified "the bill is around consumer

protection and making sure that we are doing right by our people." Sen. Augustine Statement, Mar. 26, 2024 at 22:54-23:02, https://tinyurl.com/yfdpcn9f. The sponsor of the House version of the bill agreed, testifying that the "bill is about consumer protection, plain and simple." Del. Crosby Statement, Feb. 15, 2024 at 1:53:31-35, https://tinyurl.com/y8saf2n3. And the only interest advanced in the State's brief below was an "interest in protecting its citizens from misleading commercial speech through its consumer protection" legislation. Dkt. 14 at 19-20.

Maryland has failed to show that the Act's speech prohibitions advance the asserted consumer-protection interest. Under the Act's prohibitions, no electricity supplier can market its electricity offering as "clean," "green," "renewable," or with "similar claims," Md. Code, Pub. Util. § 7-707(a), unless its offering is 51% backed by PJM-region RECs, *id.* § 7-707(c)(1)(i). In other words, a supplier can still call its energy "green" if it is backed by RECs. But those RECs must be sourced from in or, in some cases, near the PJM region—a cluster of States that extends non-contiguously from New Jersey to northern Illinois. Therefore, Maryland's theory must go, green marketing implies generation mostly in or near the PJM region, and thus using RECs generated mostly outside of that region is deceptive.

The State has offered no evidence to suggest that the prohibited marketing terms mislead consumers about the geographic source of the RECs. *See Edenfield*, 507 U.S. at 770 ("The party seeking to uphold a restriction on commercial speech

carries the burden of justifying it." (alteration accepted)). The State's lead piece of evidence below was a report on Maryland's energy costs prepared by the Abell Foundation. *See generally* JA154-185. But that report did not assess whether green-energy marketing was deceptive and in fact did "*not include ... 'green' energy suppliers* in estimating costs." JA161 n.1 (emphasis added); JA164. In fact, the report mentioned without fanfare that most "'green energy' options" are backed by "RECs" generated "in states like Texas and Iowa," JA164 n.8, and it nevertheless described Appellants—by name—as offering "*100 percent renewable products*," JA166 n.15 (emphasis added). Thus, if the report has any relevance, it confirms that electricity backed by RECs outside the PJM region are accurately described as "100 percent renewable."

Maryland next points to a submission by several advocacy groups. Those groups assert that "most RECs are unbundled from Texas wind farms … and offer no 'environmental benefits' for Maryland." JA189. But, for one, that is false. Buying non-PJM-region REC-backed products helps "mitigate the effects of climate change"—a global phenomenon. JA69, JA73. And in fact, Maryland's own evidence shows that consumers are principally motivated by these *global* environmental issues. JA196 ("I am deeply concerned about the ever-more urgent threat climate change poses to our world."); JA198 ("we are taking many steps in our life to live more sustainably, hoping to ensure a healthy planet for all future

generations"). And even if the advocacy groups were right that RECs generated outside the PJM region do not result in local environmental benefits, that does not render deceptive terms like "green" or "clean." Although the advocacy groups may prefer local RECs, they do not claim that green marketing inherently implies local energy generation and local benefits. Absent that missing link, there is simply "no finding that [the prohibited] speech [i]s misleading." *In re R. M. J.*, 455 U.S. at 206.

Maryland's other evidence fares even worse. Two individual consumers testified that they did not understand renewable-energy offerings are backed by RECs; they assumed, instead, that the physical electrons going into their house came directly from renewable sources. *See* JA196, JA198. But two consumers that do not understand the mechanics of the electrical grid can hardly justify a broad speech prohibition. *See Cruz*, 596 at 307 (rejecting "a handful of media reports and anecdotes"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (rejecting "anecdotal evidence and educated guesses").

But, more fundamentally, the Act does *nothing* to alleviate that confusion. Under the Act, suppliers are still permitted to use RECs to substantiate claims of "green" or "clean" energy. The Act simply puts a geographic limitation on which RECs count. That means consumers will still receive their energy—marketed as "green" or otherwise—from "the same mix of the local power grid supply as [their] neighbors." JA196. Thus, the Act's speech prohibitions do nothing to alleviate the

purported confusion of these two individual customers.

A dose of "simple common sense" also severely undermines Maryland's purported consumer-protection interest. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). Under the Act, it is legal to market electricity as "clean" if it is backed 51% by wind power in the PJM region, with the other 49% generated by fossil fuels. Md. Code, Pub. Util. §§ 707(a), (c)(1)(i). But it is *illegal* to market electricity as "clean" if it is backed 100% by wind power generated outside of the PJM region. It defies reason to suggest words like "clean" can include coal power plants in Illinois but not wind farms in Connecticut or New York. And even green-power suppliers that *do* satisfy Maryland's 51% regional benchmark are constrained by nonsensical restrictions. Commission staff have explained that electricity backed 51% by PJM-region wind energy and 49% by non-PJM-region wind energy must be marketed identically to electricity backed 51% by PJM-region wind energy and 49% by coal—even though the former is plainly cleaner than the latter. *See* Commission Staff Interpretation at 2–3.

Other anomalies abound. Maryland permits "waste-to-energy" to be marketed as green power. Md. Code, Pub. Util. §§ 7-707(c)(1), 7-701(m), (s)(10). Yet nobody could seriously contend that consumers understand "green" to encompass "[t]rash incinerators" that "emit … toxic pollutants" and "climate-warning carbon dioxide" into the air. *See* Aman Azhar, *Maryland Lawmakers Remain Uncommitted to Ending*

Subsidies for Trash Incineration, Prompting Advocate Concern, Inside Climate News (Mar. 12, 2024), https://tinyurl.com/yfanrpbe. Stranger still, Maryland's 51% PJM-region benchmark will jump to 53% in 2030. Md. Code, Pub. Util. §§ 7-707(c)(1)(ii), 7-701(n), 7-703(b)(25). But Maryland has offered no evidence to suggest consumers will understand terms like "renewable," "eco-friendly," and "100% hydro" to mean something different in five years. These elements of "irrationality" show that Maryland's speech prohibitions "cannot directly and materially advance its asserted interest" in preventing deception. *Rubin*, 514 U.S. at 488.

Relatedly, the Act's "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011). For example, the Act omits from its green-marketing restrictions energy offered by Maryland's "Department of General Services" or a government-run "community choice aggregator"—even where the latter serves the *exact same customers* as green-power companies. *See* Md. Code, Pub. Util. § 7-707(b)(1), (2). Thus, for example, a Maryland community choice aggregator could call electricity "100% wind" where it is backed entirely by RECs generated from wind farms in South Carolina, while a green-power company could not say the same for an identical offering. But if the restrictions truly sought to prevent deception inherent in terms like "green" or "clean," then it would make little

sense to allow government speakers to use those terms when they provide energy that does not meet Maryland's idiosyncratic definition. Similarly, the Act exempts those "supplying electricity to commercial retail electric customers," *id.* § 7-707(b)(3), even though, presumably, small businesses are also susceptible to deception. Maryland's failure to "apply[ ] its prohibitions evenhandedly" confirms that its "selective ban" on green marketing does not "accomplish[ ] its stated purpose."[4] *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190 (1999) (finding law "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it").

Further, while the burden to prove a genuine consumer-protection harm lies entirely with Maryland, "the literature on" RECs also independently "belies" the State's purported harm. *Edenfield*, 507 U.S. at 772. The FTC, a federal agency with "expertise in deceptive advertising cases," *Kraft, Inc. v. FTC*, 970 F.2d 311, 320 (7th Cir. 1992), concluded in its Green Guides, based on consumer-perception evidence,

[4] The district court claimed these "suppliers are not similarly situated" because they "do not sell directly to residential consumers." JA264. But under Maryland's theory of deception, allowing government-run energy programs and commercial suppliers to call energy "green" when it does not meet the State's geographic definition would also be deceptive, and authorizing inconsistent uses of these terms promises to spawn confusion. Thus, all parties are similarly situated in the only ways that matter: they connect Marylanders to their electricity supply and inform them about that supply.

that "marketers may make" "unqualified renewable energy claims … if they purchase [RECs] to match their energy use." FTC 2012 Rule, 77 Fed. Reg. at 62,124; *see also* FTC 2010 Notice, 75 Fed. Reg. at 63,592 (finding no "sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs"); *accord Recht*, 32 F.4th at 411 (crediting findings from FTC to assess whether term was "misleading"). To this day, the FTC's position remains that it is not deceptive to market products as renewable where a company "match[es]" energy "with renewable energy certificates." 16 C.F.R. § 260.15(a). And indeed, Maryland agrees because it has used RECs for decades and still allows sellers to advertise electricity as "green," "renewable," and the like when backed by PJM-region RECs.

This literature also disproves Maryland's theory that green-energy marketing conveys a misleading geographic representation. In 2010, the FTC found that it lacked evidence that consumers generally "interpret renewable energy claims to mean that the energy was generated in their location and, thus, yields local benefits." FTC 2010 Notice, 75 Fed. Reg. at 63,592. Rather, the FTC explained, such an interpretation "will depend on the specific advertisement" and whether it "impl[ies] that the renewable energy was generated locally." *Ibid.* And that makes good sense. If a supplier claimed that it was offering "*local* green energy" or "100% wind energy *generated in the PJM region*"—when, in fact, the energy was backed by RECs in Texas—that would be deceptive. But that is neither what the Act prohibits nor how

Appellants market their electricity offerings in Maryland. At bottom, the FTC did not have evidence to conclude that simply calling energy "green" or "renewable" inherently implies "local" too. Neither does Maryland here.[5] *See Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 644-46 (1985) (explaining "that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce" is fact-specific); *see also* JA256 (finding any deception "determination would be … factual and context-specific").

The district court erred because it credited Maryland's consumer-protection interest without requiring the State to "demonstrate that the harms it recites are real." *Contra Edenfield*, 507 U.S. at 771. The court held Maryland has an "interest in protecting consumers from misleading information related to the marketing of green power." JA257. But that conclusion goes to the "harms" Maryland "recites." It says nothing of whether they are "real." *See Ibanez v. Florida Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 144-46 (1994) (holding "rote invocation of the words 'potentially misleading'" cannot "supplant the [Government]'s burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" (quotations omitted)); *Zauderer*, 471 U.S. at 648 (rejecting "unsupported assertions" about "potential abuses" in "advertising"). On

[5] Further, because the PJM region covers a vast territory from New Jersey to northern Illinois, the Act does not require "local" generation in any sense of the word.

that score, the district court, like the State, paid lip service to the Abell Foundation report and the handful of anecdotes in the record, but it did not explain how that evidence supported the idea that (i) green marketing deceives consumers into thinking their renewable energy is mostly produced in or near the PJM region, and (ii) the Act works to remedy that deception in a material way. *See* JA258-263.

In fact, the district court elsewhere found the exact opposite. It credited a concession by the State to candidly acknowledge that "[t]he court does not find that the speech" regulated by the Act "is itself inherently or in fact misleading." JA256. That is dispositive. Where "[t]here is no finding that" the "speech" at issue is "misleading," a speech restriction aimed at curing deception cannot survive First Amendment scrutiny. *In re R. M. J.*, 455 U.S. at 206-07; *Sorrell*, 564 U.S. at 579 (holding statute failed intermediate scrutiny where it failed to show "provision challenged" would "prevent false or misleading speech"); *Ibanez*, 512 U.S. at 144-46 (holding unconstitutional penalty for using a specific "word" where there was "complete absence of any evidence of deception"); *compare with Recht*, 32 F.4th at 410-11, 414 (allowing prohibition where State offered evidence that speech "can and d[id] mislead viewers").

2. The Act's Speech Prohibitions Are Inadequately Tailored.

Even if Maryland showed that consumers are deceived by words like "green" and "clean" (it has not) and even if the Act dispelled such deception (it does not),

the Act is still unconstitutional because it is inadequately tailored.

Where the Government restricts commercial speech, it "must demonstrate narrow tailoring of the challenged regulation to the asserted interest." *Educ. Media Co. at Virginia Tech, Inc. v. Insley*, 731 F.3d 291, 300 (4th Cir. 2013). Thus, "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson*, 535 U.S. at 371. Further, the State must "present evidence showing that … it seriously undertook to address the problems with less intrusive tools readily available to it." *Billups*, 961 F.3d at 688. "In other words, the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives[.]" *Ibid.*; *accord Thompson*, 535 U.S. at 357. Thus, even if Maryland were correct that its prohibited words are "potentially misleading to some consumers," it still bears a "heavy burden of justifying a categorical prohibition against the dissemination of" those words. *Peel v. Att'y Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 109 (1990) (plurality).

The Government falls far short of this showing because there are multiple obvious "alternatives … which could advance the Government's asserted interest in a manner less intrusive to [Appellants'] First Amendment rights." *Rubin*, 514 U.S. at 488; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality).

First are Maryland's disclosure requirements. Prior to the Act, Maryland already required electricity suppliers to explain that they could satisfy the State's renewable-energy requirements with RECs. Md. Code Regs. § 20.61.04.01(B). And Maryland's new disclosure requirements require a detailed explanation about how RECs work, Md. Code, Pub. Util. § 7-707(f)(2), and information about where geographically a supplier's RECs are generated, *id.* § 7-707(g)(4), (5); *see also* Commission Order at 12. If there were any geographic deception inherent in words like "green," these disclosures would plainly be sufficient to dispel it.[6] *See Peel*, 496 U.S. at 110 (explaining "disclaimer" can resolve "misleading statements" without resort to "complete[ ] ban").

Next, the Government could cure any deception with its own speech, which would not implicate the First Amendment. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The Government has for years maintained a statutorily-required "customer choice shopping website" that displays "electricity suppliers" with "open offers … in a customer's service area." Md. Code, Pub. Util. § 7-510.2(a), (b). This website is the natural first place for Marylanders to look when browsing electricity suppliers. Thus, if the State thought there was consumer confusion about green marketing, it could easily employ its own disclaimer about

[6] Because there is no such deception, the disclosures are also unconstitutional. *See infra*.

how RECs work—either on the website homepage, on a clickthrough notice when consumers browse green-power suppliers, or on the "customer education webpage," *id.* § 7-510.2(4), which already includes information about the "renewable energy supply," *id.* § 7-510.1(b)(2)(I)(3)(A). Such "educational" efforts by the State are a less restrictive alternative, *44 Liquormart*, 517 U.S. at 507, and here the State already has significant infrastructure to educate consumers about their energy supply.[7]

Maryland could also apply its existing "laws against misleading advertising." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 112 (4th Cir. 2018). Indeed, it is already against state law to "engage in any … deceptive trade practice." Md. Code, Com. Law § 13-303. If suppliers falsely tell consumers that they are buying electricity generated in the PJM region, Maryland could simply enforce its law against those bad actors. "There has been no showing" that Maryland cannot "distinguish[ ] between" green-energy claims "that are bona fide and those that are bogus." *Peel*, 496 U.S. at 109. That the FTC's Green Guides employ this case-by-case approach confirms that it is workable. FTC 2010 Notice, 75 Fed. Reg. at 63,592 (rejecting broad localism-based prohibition because implied localism claims "will depend on the specific advertisement").

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[7] These educational efforts are commonplace in Maryland and beyond. *See, e.g.*, *FAQ*, MD Electric Choice, https://tinyurl.com/2bjzkn53 (last visited Mar. 3, 2025); *Renewable Energy Products*, Energy Switch Massachusetts, https://tinyurl.com/2vh49xnt (last visited Mar. 3, 2025); *Green Products*, Plug In Illinois, https://tinyurl.com/334y87p6 (last visited Mar. 3, 2025).

Despite these obvious less-restrictive means, "there is no hint that the Government even considered these or any other alternatives." *Thompson*, 535 U.S. at 373. That is independently dispositive because the Government's burden is to show that it considered less-restrictive alternatives "*before* enacting the speech-restricting law," *Billups*, 961 F.3d at 688 (emphasis added), and the "government's burden in this regard is satisfied only when it presents actual evidence supporting its assertions," *ibid.* (cleaned). Absent any such evidence here, the Government has failed to demonstrate narrow tailoring.

The district court erred several times over in holding otherwise. First, the court found that the preexisting prohibition on deceptive speech "did not or does not address the issues within the existing [energy market] structure, a structure that the Abell report called dysfunctional." JA268. But, as already explained, the Abell report excluded green energy from its analysis, JA161 n.1; JA164, and agreed that Appellants' electricity was "100 percent renewable," JA166 n.15. The Abell report does not say that Maryland's prohibition on deceptive practices is ineffective in countering deceptive practices.

Next, the district court was "doubtful that a public awareness campaign would be effective" because it would be "difficult to address" "misleading" "commission-based-in-person sales practices utilized by many retail electricity suppliers." JA268-269. But the district court cited nothing for this proposition, the State did not make

this argument, and the record shows no such practices by green-power companies. Further, the district court failed to explain how the Act's onerous censorship provisions would be more effective than consumer education at preventing in-person deception. Thus, the district court erred because it cannot *sua sponte* satisfy the Government's burden with "speculation or conjecture." *Edenfield*, 507 U.S. at 770.

At bottom, Maryland "has failed to show that" the Act's speech prohibitions "are not more extensive than necessary to advance the State's" purported interest. *Lorillard*, 533 U.S. at 565.

D. The Compelled-Speech Provisions Fail Even Commercial-Speech Scrutiny.

As with the Act's censorship provisions, Maryland fails to show that the Act's compelled-speech provisions pass muster even under a commercial-speech inquiry—much less a more rigorous standard.

1. The Speech Compulsions Are Not Justified By A Non-Hypothetical Harm.

The Act's speech compulsions suffer from many of the same deficiencies as its prohibitions. First, consider Maryland's asserted interest. Even in the commercial context, a compelled disclosure must "remedy a harm that is potentially real, not purely hypothetical." *NIFLA*, 585 U.S. at 776 (quotations omitted).

Here, Maryland's consumer-protection harms are purely hypothetical. Consider the requirement for green-power suppliers to disclose "the percentage of

electricity that would be provided by" PJM-region RECs, Md. Code, Pub. Util. § 7-707(g)(4), and "the state in which the electricity was generated," *id.* § 7-707(g)(5); *see also* Commission Order at 12. These disclosures, like the prohibitions, wrongly assume that green marketing inherently implies creation mostly in or near the PJM region. Absent any substantiation for that nonsensical assumption, Maryland offers nothing more than a hypothetical harm.

Next, Maryland requires green-power suppliers to make a scripted disclosure explaining how RECs work, *id.* § 7-707(f)(2), and to disclose "what the customer will actually be paying for when the customer purchases green power from the electricity supplier," *id.* § 7-707(g)(1); *see also* Commission Order at 12. Both requirements assume that customers purchasing green energy are somehow deceived by RECs as a general matter. But, as explained, that assumption flatly contradicts the FTC's conclusion that "consumer perception evidence" does not "support th[e] view" that consumers misunderstand RECs. FTC 2010 Notice, 75 Fed. Reg. at 63,592. Maryland offers nothing to counter this research-backed claim by an expert agency except the "anecdotal evidence and educated guesses" described above. *Rubin*, 514 U.S. at 488. Thus, these disclosures seek to address a hypothetical harm at best—a flatly disproven one at worst. *See NIFLA*, 585 U.S. at 777 (rejecting asserted harm where State "point[ed] to nothing suggesting" public did "not already know" information to be disclosed).

Maryland also requires electricity suppliers to disclose "how the[ir] green power will benefit the environment," Md. Code, Pub. Util. § 7-707(g)(3), and "how the electricity that the customer has purchased is generated," *id.* § 7-707(g)(2); *see also* Commission Order at 12. Maryland has offered no evidence—contemporaneously or during litigation—that consumers are confused about renewable energy's environmental benefits or about how their electricity is generated. Absent any suggestion of deception, Maryland has not shown even a hypothetical harm. *See, e.g.*, *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) ("consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement").

The district court erred because it again gave the Government a pass on its burden. It ruled that "the disclosure requirement[s]" help "avoid communication of misleading information about green energy to consumers as supported by Defendants' exhibits." JA273. But, as explained, those exhibits fail to show that a single consumer had received a single piece of misleading information. And the court did not even try to tie the exhibits to any one—much less all—of the discrete disclosure requirements. Absent evidence of deception in the record, the district court was wrong to credit the State's deception harm.

2. The Act's Speech Compulsions Are Inadequately Tailored.

Even if Maryland "had presented a nonhypothetical justification for" its

disclosures (it did not), the Act still "unduly burdens protected speech." *NIFLA*, 585 U.S. at 777. Even in the commercial context, the State may not rely on "broad prophylactic rules." *Id.* at 776. Rather, its disclosures may "extend no broader than reasonably necessary." *Ibid.* (quotations omitted).

Maryland's disclosures extend far broader than reasonably necessary. As explained, the State has for years maintained a centralized website that *already* includes consumer resources for renewable-energy offerings. Thus, Maryland could easily make the disclosures itself in a forum where consumers are highly likely to see them.

That the disclosures "cover[ ] a curiously narrow subset of speakers" also confirms that they "unduly burden[ ] protected speech." *NIFLA*, 585 U.S. at 777. The Act exempts from its compulsions the Maryland Department of General Services, government-run community choice aggregators, and commercial electricity suppliers. Md. Code, Pub. Util. § 7-707(b). If there were truly widespread deception about green power's geographic origin, use of RECs, generation method, and environmental benefits, then disclosures by these speakers would presumably help alleviate that deception. Yet they are not covered. This "[s]peaker-based" exception thus confirms that the disclosures' burdens are undue. *NIFLA*, 585 U.S. at 777-78.

II. THE REMAINING PRELIMINARY-INJUNCTION FACTORS ALSO FAVOR RELIEF.

A. Appellants Will Be Irreparably Harmed Absent A Preliminary Injunction.

The court below "assum[ed] without deciding that Plaintiffs have sufficiently demonstrated the risk of irreparable harm." JA274. That assumption was correct. Without a preliminary injunction, Appellants are suffering two distinct, ongoing forms of irreparable harm.

First, "all First Amendment infringements … 'are per se irreparable' injuries." *In re Murphy-Brown*, 907 F.3d at 801. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Under the Act, Appellants cannot market their renewable electricity to Marylanders the same way they did before—i.e., by calling their offerings "green," "renewable," "pollution-free," "clean," "eco-friendly," "environmentally responsible," and other similar terms. JA66, JA78. And if Appellants do sell green energy to Marylanders, they will be required to make the State's preferred disclosures. JA68-69, JA79-81; *accord* Commission Order at 12. These speech burdens are irreparable First Amendment harms.

Second, Appellants are suffering an ongoing "loss of valuable business opportunities" absent an injunction. *Giovani Carandola*, 303 F.3d at 521.

Appellants showed below that if the Act took effect, they would be forced to censor their marketing materials. They explained that the result would be a severe competitive disadvantage that would "undermine [their] continued participation as a retailer in Maryland," JA67, and force them to "cancel many of [their] existing clean energy contracts," JA78-79. Those harms are no longer hypothetical. Now that the Act has taken effect, Green Mountain and CleanChoice have been forced to discontinue all sales and marketing efforts in Maryland, and they are unable to renew existing customers' contracts as they expire. Thus, the companies have collectively lost thousands of customers in the two months since the Act took effect, with more on the way absent an injunction. These "significant and unrecoverable financial losses" are "irreparable injury." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 217-18 (4th Cir. 2019).

Lastly, although the district court assumed irreparable harm, it wrongly asserted that "Plaintiffs' timing of the motion … undermines their irreparable harm argument." JA275. The timeline of events here was consistent with an imminent irreparable injury beginning on a date certain. The Act was signed into law in May 2024, but the speech regulations did not take effect until January 2025. Appellants required some time to understand the impact of a complex law, attempt to negotiate a resolution with the State, and prepare their papers, but they moved for preliminary relief on October 1 and requested a decision by December 1. That timing allowed

two months for briefing and a decision, and one month to undertake compliance in the event of an adverse opinion. Appellants were diligent. And even if this allegation of "delay" was "sound" (it is not), Appellants have nevertheless shown that their "injuries constitute[ ] irreparable harm" that will continue "in the absence of" preliminary relief. *Maryland v. King*, 567 U.S. 1301, 1303-04 (2012); *see also Candle Factory, Inc. v. Trade Assocs. Grp., Ltd.*, 23 F. App'x 134, 138-39 (4th Cir. 2001).

B. The Balance Of The Equities And Public Interest Favor Injunctive Relief.

The balance of the equities and the public interest favor injunctive relief. When the Government is the opposing party, these factors "merge." *Roe v. DOD*, 947 F.3d 207, 230 (4th Cir. 2020).

Because the Act violates the First Amendment, the "injury to [Appellants] easily outweighs whatever burden the injunction may impose." *Legend Night Club*, 637 F.3d at 302. On one hand, electricity suppliers face the deprivation of their First Amendment rights, which are "a fixed star in our constitutional constellation, if there is one." *Janus*, 585 U.S. at 917 (quotations omitted). And, as explained, that deprivation has undermined their businesses and inflicted significant economic harm. On the other hand, "the State of Maryland is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club*, 637 F.3d at 302-03. Indeed, "upholding constitutional rights is

in the public interest." *Id.* at 303; *see also Centro Tepeyac*, 722 F.3d at 191 (en banc) ("If anything, the system is improved by … an injunction" against First Amendment violations (quotations omitted)).

The district court erred in ruling that it was "not persuaded that Plaintiffs have established that the balance of equities and public interest favor injunctive relief." JA274. The court's analysis rested on its flawed conclusion that Appellants had "not demonstrated a likelihood of success on the merits of their First Amendment claims." JA277. Because that conclusion was in error, so too was the court's analysis of the equities that flowed from it.

The district court also asserted that there would be a "public consequence of enjoining the law from taking effect." JA276. But the basis for that consequence was the State's "evidence" of consumers being "financially harmed and misled." JA276. As explained above, that "evidence" simply does not show that green marketing has harmed consumers. The district court was thus wrong to suggest any consumer-protection consequences from an injunction. To the contrary, consumers are harmed *absent* an injunction because the Act deprives them of truthful information about their electricity. And, in all events, the State has no interest in "act[ing] unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021).

III. THE COURT SHOULD REMAND WITH INSTRUCTIONS TO ENJOIN ENFORCEMENT OF THE ACT.

The proper remedy in this case is to enjoin the State from enforcing the Act. The Act is unconstitutional both "as applied to" Appellants, *Insley*, 731 F.3d at 298, and on its face. As applied to Appellants, the district court held that prior to the Act, REAL members engaged in "marketing" that was not "inherently or in fact misleading" and was thus entitled to "protection under the First Amendment." JA256. But under the Act, Appellants are forbidden from employing this truthful speech when they market to Maryland consumers, Md. Code, Pub. Util. § 7-707(a), because their electricity is not at least 51% backed by PJM-region RECs, *id.* § 7-707(c); JA61, JA67; JA73, JA78. And Appellants are required to make disclosures as a condition of supplying electricity to Maryland consumers. Md. Code, Pub. Util. § 7-707(f)(2), (g); *see also* Commission Order at 12. For the reasons explained above, applying these broad, prophylactic speech regulations on indisputably truthful, non-misleading speech violates Appellants' First Amendment rights.

The Act's speech regulations are also facially unconstitutional. For one, the Act's First Amendment defects are "categorical." *AFP*, 594 U.S. at 615. Because the State has not established that its banned words—"green," "clean," "renewable," etc.—are deceptive unless they describe electricity that is at least 51% backed by PJM-region RECs, the State has no interest in policing speech to ensure it matches that idiosyncratic definition. Thus, the State fails to directly advance a substantial

interest "in every case." *AFP*, 594 U.S. at 615; *X Corp.*, 116 F.4th at 899 (finding law facially unconstitutional where offending "provisions raise[d] the same First Amendment issues for every … [regulated] company"); *accord Insley*, 731 F.3d at 300 (explaining direct-advancement analysis is the same in facial and as-applied challenges).

The speech regulations are also facially invalid because the unconstitutional applications vastly outweigh the (hypothetical) constitutional applications. The unconstitutional applications are legion. Appellants, who sell electricity backed by non-PJM-region RECs, are nondeceptive in representing that their energy is "clean," "green," "renewable," and the like. Thus, every green-energy company engaging in truthful speech substantiated by non-PJM-region RECs is unconstitutionally regulated by the Act. In response, the State has produced no evidence, anecdote, or reason to believe that *any* companies were deceptively marketing electricity as green before the law went into effect. *See AFP*, 594 U.S. at 615-16 (rejecting hypothetical constitutional applications where statute imposed broad First Amendment burden). The Act's unconstitutional applications are plainly excessive in relation to any legitimate sweep. *See Moody*, 603 U.S. at 723.

Those facially unconstitutional speech regulations are not severable from the Act. Under Maryland law, *see, Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996), an unconstitutional provision is not severable when "the remaining valid provisions

alone are incomplete and incapable of being executed in accordance with the legislative intent." Md. Code, Gen. Provs. § 1-210 (2014) (derived "without substantive change" from former Md. Code, Art. 1 § 23). The analysis turns on "what *would have been the intent* of the legislative body, if it had known that the statute could be only partially effective." *Davis v. State*, 451 A.2d 107, 114 (Md. 1982) (quotation omitted).

The Act's unconstitutional speech regulations are not severable from the Act's dual-market structure. Through the Act, the Maryland Legislature intended to "create[ ] two different markets"—a baseline, price-capped market tied to the incumbent utility product and a "green power products market that … may exceed that price cap." Sen. Augustine Statement, Mar. 26, 2024 at 08:00-08:25, https://tinyurl.com/yfdpcn9f. Legislators emphasized that "the green power market is critically important," and "we want to continue to encourage folks to be in that market." Del. Boafo Statement, Mar. 26, 2024 at 14:15-14:25, 14:55-15:02, https://tinyurl.com/yfdpcn9f.

Severing the unconstitutional speech regulations would undermine the green market, contrary to the Legislature's aims. The Legislature defined "green power" by reference to how the energy is "marketed." Md. Code, Pub. Util. § 7-707(a), (c). That means without the unconstitutional marketing provisions, there can be no separate green-power market, and suppliers of green energy would be subject to the

standard-market price cap. Because green-energy suppliers "cannot operate in a commercially viable way in the standard, price-capped market," JA51; *see also* JA67, JA78-79, the result would be to undermine participation in the "critically important" green-power market that the Legislature sought to exempt from the price cap. *See State v. Schuller*, 280 Md. 305, 319-21 (1977) (finding no severability where severing unconstitutional provision "would extend the statutory [limitation] to a class which was intended to be excepted"). Because that outcome would flout legislative intent, the entire law—or, at minimum, the dual-market provisions—must be enjoined. *Accord New Jersey Thoroughbred Horsemen's Ass'n v. NCAA*, 584 U.S. 453, 481-82 (2018) (conducting severability analysis as to individual provisions).

CONCLUSION

The Court should reverse and remand with instructions to preliminarily enjoin enforcement of the Act.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully submit that oral argument would assist the Court in this case. *See* Local Rule 34(a). Given the complexity of the issues, oral argument will afford the parties and the Court an opportunity to explore these issues fully.

Dated: March 3, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,916 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point font.

March 3, 2025

/s/ Thomas M. Johnson, Jr.
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CERTIFICATE OF SERVICE

I certify that on March 3, 2025, I electronically filed the foregoing brief with the Clerk of court using the CM/ECF system, which will send notice of the filing to all counsel of record.

/s/ Thomas M. Johnson, Jr.
Thomas M. Johnson, Jr.

ADDENDUM

STATUTORY ADDENDUM

Md. Code, Pub. Util. § 7-701: Definitions (except)

In general

(a) In this subtitle the following words have the meanings indicated.

…

PJM Interconnection

(h-1) "PJM Interconnection" means PJM Interconnection, LLC or any successor organization that services the PJM region.

PJM region

(i) "PJM region" means the control area administered by the PJM Interconnection, as the area may change from time to time.

…

Renewable energy credit or credit

(m) "Renewable energy credit" or "credit" means a credit equal to the generation attributes of 1 megawatt-hour of electricity that is derived from a Tier 1 renewable source or a Tier 2 renewable source that is located:

(1) in the PJM region;

(2) outside the area described in item (1) of this subsection but in a control area that is adjacent to the PJM region, if the electricity is delivered into the PJM region; or

(3) on the outer continental shelf of the Atlantic Ocean in an area that:

(i) the United States Department of the Interior designates for leasing after coordination and consultation with the State in accordance with § 388(a) of the Energy Policy Act of 2005; and

(ii) is between 10 and 80 miles off the coast of the State.

…

Tier 1 renewable source

(s) "Tier 1 renewable source" means one or more of the following types of energy sources:

(1) solar energy, including energy from photovoltaic technologies and solar water heating systems;

(2) wind;

(3) qualifying biomass;

(4) methane from the anaerobic decomposition of organic materials in a landfill or wastewater treatment plant;

(5) geothermal, including energy generated through geothermal exchange from or thermal energy avoided by, groundwater or a shallow ground source;

(6) ocean, including energy from waves, tides, currents, and thermal differences;

(7) a fuel cell that produces electricity from a Tier 1 renewable source under item (3) or (4) of this subsection;

(8) a small hydroelectric power plant of less than 30 megawatts in capacity that is licensed or exempt from licensing by the Federal Energy Regulatory Commission;

(9) poultry litter-to-energy;

(10) waste-to-energy;

(11) refuse-derived fuel;

(12) thermal energy from a thermal biomass system; and

(13) raw or treated wastewater used as a heat source or sink for a heating or cooling system.

Tier 2 renewable source

(t) “Tier 2 renewable source” means hydroelectric power other than pump storage generation.

Md. Code, Pub. Util. § 7-707: Green power

Green power defined

(a) In this section, "green power" means energy sources or renewable energy credits that are marketed as clean, green, eco-friendly, environmentally friendly or responsible, carbon-free, renewable, 100% renewable, 100% wind, 100% hydro, 100% solar, 100% emission-free, or similar claims.

Application of section

(b) This section does not apply to:

(1) the Department of General Services when the Department of General Services sells energy under § 7-704.4 of this subtitle;

(2) a community choice aggregator under § 7-510.3 of this title; or

(3) an electricity supplier when supplying electricity to commercial retail electric customers.

Marketing as green power

(c) An electricity supplier that supplies electricity to residential retail electric customers may not market electricity as green power unless:

(1) the percentage of the electricity being offered, or the equivalent number of renewable energy credits associated with the electricity being marketed as green power, that is eligible for inclusion in meeting the renewable energy portfolio standard equals or exceeds the greater of:

(i) 51%; or

(ii) 1% higher than the renewable energy portfolio standard for the year the electricity is provided to the customer;

(2) the Commission approves the price of the electricity being marketed as green power in accordance with subsection (d) of this section; and

(3) the electricity supplier submits an application to the Commission that:

(i) describes the electricity being marketed as green power, including the green power source and percentage of the electricity that is green power;

(ii) describes how the green power complies with State law and regulations; and

(iii) includes any other information the Commission considers necessary.

Setting of prices

(d)(1) The price approved by the Commission under subsection (b)(2) of this section shall be determined through:

(i) a proceeding held in accordance with paragraph (2) of this subsection; or

(ii) a proceeding held in accordance with paragraph (3) of this subsection.

(2)(i) Each year the Commission shall hold a proceeding to set a price per megawatt-hour for electricity marketed as green power under this section that may not be exceeded by an electricity supplier except as provided in paragraph (3) of this subsection.

(ii) Subject to paragraph (4) of this subsection, the price set by the Commission under subparagraph (i) of this paragraph may:

1. exceed the maximum price per megawatt-hour that is authorized under § 7-510(d)(2)(i) of this title; and

2. differ based on the amount and source of the electricity generation.

(iii) During a proceeding held under subparagraph (i) of this paragraph, the Commission:

1. shall consider:

A. the price of the energy purchased, including the total cost of the renewable energy credits;

B. the amount of electricity that is eligible for inclusion in meeting the renewable energy portfolio standard;

C. the state in which the electricity was generated; and

D. applicable market data; and

2. may consider whether the purchase of renewable energy credits was bundled with a power purchase agreement from the energy sources associated with the credit.

(3)(i) On request by an electricity supplier, the Commission shall hold a proceeding to set a price per megawatt-hour for electricity marketed as green power for that electricity supplier.

(ii) Subject to paragraph (4) of this subsection, at a proceeding held under this paragraph the Commission may set a price per megawatt-hour that is higher than the price determined in the proceeding held under paragraph (2) of this subsection for an electricity supplier if:

1. the electricity supplier demonstrates to the Commission's satisfaction, based on an independent third-party audit, that the actual cost to the electricity supplier for the generation or supply of electricity exceeds that of the price determined through the proceeding held in accordance with paragraph (2) of this subsection;

2. the increased price reflects only the cost of the electricity marketed as green power and is not associated with any of the electricity supplier's other costs; and

3. the electricity supplier demonstrates to the Commission's satisfaction that the electricity supplier has a significant long-term investment in renewable energy

that meets the renewable energy portfolio standard under § 7-703 of this subtitle.

(iii) During a proceeding held under this paragraph, the Commission shall consider:

1. whether the purchase of renewable energy credits was bundled with a power purchase agreement from the energy sources associated with the credit;

2. the price of the energy purchased, including the total cost of the renewable energy credits or power purchase agreements;

3. the amount of electricity that is eligible for inclusion in meeting the renewable energy portfolio standard;

4. the state in which the electricity was generated; and

5. applicable market data.

(4)(i) A price approved by the Commission under this subsection may not exceed 150% of the maximum price per megawatt-hour that is authorized under § 7-510(d)(2)(i) of this title unless the Commission determines that the actual cost of the green power exceeds that amount.

(ii) Within 120 days after approving a price for green power that exceeds 150% of the maximum price per megawatt-hour that is authorized under § 7-510(d)(2)(i) of this title, and annually for as long as the price exceeds that amount, the Commission shall submit a report to the General Assembly, in accordance with § 2-1257 of the State Government Article, that:

1. demonstrates that the approved price represents only the actual price of the green power; and

2. includes the Commission's order authorizing the price of the green power.

(iii) If the Commission has approved for 3 consecutive years a price for green power that exceeds 150% of the maximum price per megawatt-hour that is authorized under § 7-510(d)(2)(i) of this title, the Commission shall include in the annual report required under subparagraph (ii) of this paragraph:

1. information on market conditions that necessitate the approved price of the green power that exceeds 150% of the maximum price per megawatt-hour that is authorized under § 7-510(d)(2)(i) of this title; and

2. a recommendation of whether to increase the limitation on the maximum price of green power above which the Commission is required to make a determination under this paragraph.

(5) The Commission:

(i) shall annually review a price approved under paragraph (3) of this subsection; and

(ii) may, on its own initiative, or on petition by the Office of People's Counsel, require an electricity supplier offering green power under a price established under paragraph (3) of this subsection to demonstrate that the price continues to meet the requirements of paragraph (3) of this subsection.

Renewable energy credits

(e)(1) On and after January 1, 2025, an electricity supplier shall purchase renewable energy credits for each year the electricity supplier offers green power for sale to residential retail electric customers.

(2) A renewable energy credit an electricity supplier purchases under paragraph (1) of this subsection shall be retired in a PJM Environmental Information Services, Inc., generation attribute tracking system reserve subaccount accessible by the Commission.

Form disclosure

(f)(1) This subsection does not apply to:

(i) the Department of General Services when the Department of General Services sells energy under § 7-704.4 of this subtitle; or

(ii) a community choice aggregator under § 7-510.3 of this title.

(2) An electricity supplier that claims in the electricity supplier's marketing of electricity to residential retail electric customers that the customer will be purchasing green power shall include the following disclosure or a similar disclosure approved by the Commission:

"We deliver energy through the purchase of Renewable Energy Credits (RECs). A REC represents the social good that accompanies 1 megawatt-hour of renewable electricity generation. RECs may be sold separately from renewable electricity itself. Renewable electricity and RECs may be sold to different entities. The purchase of a REC does not indicate that renewable electricity itself has been purchased by the entity that purchased the REC.".

Disclosures in marketing materials

(g) In addition to the disclosure required under subsection (f) of this section, the Commission shall adopt regulations that require an electricity supplier, other than the Department of General Services when the Department of General Services sells energy under § 7-704.4 of this subtitle or a community choice aggregator under § 7-510.3 of this title, that offers green power for sale to residential retail customers to include in the electricity supplier's marketing materials a disclosure, written in plain language, that explains:

(1) what the customer will actually be paying for when the customer purchases green power from the electricity supplier;

(2) how the electricity that the customer has purchased is generated;

(3) how the green power will benefit the environment;

(4) the percentage of electricity that would be provided by the electricity supplier that is eligible for inclusion in meeting the renewable energy portfolio standard; and

(5) the state in which the electricity was generated.

Determination of compliance

(h) The Commission, in its discretion, may determine whether an electricity supplier is marketing electricity in accordance with this section.