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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 3
I. The State Confirms The Act Violates The First Amendment. 3
A. The State Confirms The Act Is Subject To Strict Scrutiny. 3
B. The State Confirms The Censorship Provisions Fail Even Commercial-Speech Scrutiny. 7
C. The State Confirms The Compelled-Speech Provisions Fail Even Commercial-Speech Scrutiny. 23
II. The State Confirms The Remaining Preliminary-Injunction Factors Also Favor Relief. 25
III. The State Confirms That The Proper Remedy Is A Remand With Instructions To Enjoin Enforcement Of The Entire Act. 27
CONCLUSION 29
CERTIFICATE OF COMPLIANCE
CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

303 Creative LLC v. Elenis,
600 U.S. 570 (2023).....6, 23

Adventure Communications, Inc. v. Kentucky Registry of Election Finance,
191 F.3d 429 (4th Cir. 1999).....5

Alabama Association of Realtors v. HHS,
594 U.S. 758 (2021).....27

Alvarez v. Lynch,
828 F.3d 288 (4th Cir. 2016).....13

Americans for Prosperity Foundation v. Bonta,
594 U.S. 595 (2021).....27, 28

Anheuser-Busch, Inc. v. Schmoke,
63 F.3d 1305 (4th Cir. 1995).....5

Billups v. City of Charleston,
961 F.3d 673 (4th Cir. 2020).....16, 23

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983).....6

Brnovich v. DNC,
594 U.S. 647 (2021).....18

Cohen v. California,
403 U.S. 15 (1971).....3

Dana's Railroad Supply v. Attorney General, Florida,
807 F.3d 1235 (11th Cir. 2015).....4

Edenfield v. Fane,
507 U.S. 761 (1993).....10, 16, 19

Edgar v. Haines,
2 F.4th 298 (4th Cir. 2021) 27

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978).....6

Free Speech Coalition, Inc. v. Paxton,
95 F.4th 263 (5th Cir. 2024) 23

Gordon v. Holder,
632 F.3d 722 (D.C. Cir. 2011).....26

Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,
879 F.3d 101 (4th Cir. 2018) 15

Greater New Orleans Broadcasting Association v. United States,
527 U.S. 173 (1999).....21

Greater Philadelphia Chamber of Commerce v. City of Philadelphia,
949 F.3d 116 (3d Cir. 2020) 4

International Outdoor, Inc. v. City of Troy,
974 F.3d 690 (6th Cir. 2020) 4

Junior Sports Magazines Inc. v. Bonta,
80 F.4th 1109 (9th Cir. 2023) 3

Kennedy v. Bremerton School District,
597 U.S. 507 (2022).....18

Legend Night Club v. Miller,
637 F.3d 291 (4th Cir. 2011) 26

Matal v. Tam,
582 U.S. 218 (2017).....3

Moody v. NetChoice, LLC,
603 U.S. 707 (2024).....27, 28

Murdock v. Pennsylvania,
319 U.S. 105 (1943).....6

National Institute of Family & Life Advocates v. Becerra,
585 U.S. 755 (2018).....23, 24, 25

Peel v. Attorney Registration & Disciplinary Commission of Illinois,
496 U.S. 91 (1990).....10, 14

In re R. M. J.,
455 U.S. 191 (1982).....10

Recht v. Morrisey,
32 F.4th 398 (2022) .....*passim*

Reed v. Town of Gilbert,
576 U.S. 155 (2015).....3

Reynolds v. Middleton,
779 F.3d 222 (4th Cir. 2015) 16

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995).....13, 20

Sines v. Hill,
106 F.4th 341 (4th Cir. 2024) 17

Snyder v. Phelps,
562 U.S. 443 (2011).....6

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011).....14, 17, 20

State v. Schuller,
280 Md. 305 (1977) 29

Stuart v. Camnitz,
774 F.3d 238 (4th Cir. 2014) 23

Thompson v. Western States Medical Center,
535 U.S. 357 (2002).....*passim*

United States v. Armstrong,
132 F.4th 736 (4th Cir. 2025) 18

United States v. Clay,
627 F.3d 959 (4th Cir. 2010) 17

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....22

Washington Post v. McManus,
944 F.3d 506 (4th Cir. 2019) 15

Statutes

Md. Code, Com. Law § 13-303 12

Md. Code, Env't § 2-1002 21

Md. Code, Pub. Util. § 7-510.2.....15

Md. Code, Pub. Util. § 7-510.3.....14

Md. Code, Pub. Util. § 7-701.....21

Md. Code, Pub. Util. § 7-707.....*passim*

Regulatory Materials

16 C.F.R. § 260.15(b) 9

Guides for the Use of Environmental Marketing Claims, Proposed Rule, 75 Fed. Reg. 63,552 (Oct. 15, 2010).....12

Guides for the Use of Environmental Marketing Claims, Rule,
77 Fed. Reg. 62,122 (Oct. 11, 2012) 9

Md. Code Regs. § 20.53.07.07.....14, 16

MPSC, Admin Docket No. PC65, Dkt. 38 26

MPSC, Case No. 9757, Dkt. 24 26

Other Authorities

David C. Vladeck, *Lessons from A Story Untold: Nike v. Kasky Reconsidered*, 54 Case W. Res. L. Rev. 1049 (2004) 19

Elements of RGGI, The Regional Greenhouse Gas Initiative.....21

Food & Water Watch, Poultry Litter Incineration: A False Solution to Factory Farm Pollution (Oct. 2015).....21

Testimony of Councilman Mark Conway 18

INTRODUCTION

Maryland's brief concedes much of the case against it. The State does not dispute that Senate Bill 1 ("the Act") restricts and compels speech. It does not dispute that those speech regulations are content-based. It agrees that those content-based speech regulations extend not only to commercial marketing but also to voter guides and charitable notices. And it effectively announces for the first time that its speech regulations—which it has touted for months as "consumer protection" measures—are viewpoint-discriminatory means to promote the State's views about "local" renewable energy. These concessions effectively resolve the case.

For one, they confirm that this Court should apply strict scrutiny. Because the Act regulates based on viewpoint, it is subject to strict scrutiny even if it only regulates commercial speech. And it is independently subject to strict scrutiny because the Act's "marketing" restrictions are not limited to commercial speech.

The State's brief also confirms that the Act's censorship provisions cannot stand. Maryland insists they are justified by "inherent" confusion about renewable energy credits ("RECs"). But it fatally undermines that claim by allowing green-power companies to market electricity using Maryland's preferred RECs. And it fails to show how banning words like "green" unless they are backed by RECs generated in the PJM region does anything to alleviate consumer confusion. That, combined with the utter lack of tailoring, confirms that the State's anti-deception

interest cannot justify its censorship.

Perhaps recognizing these deficiencies with its anti-deception interest, Maryland asserts a new one: that it must censor speech to incentivize "local" energy generation. But that interest is impermissible because it was forfeited below, was not asserted by the legislature, and pursues in-state protectionism that cannot serve as a substantial state interest. And the censorship provisions do not directly or materially advance local renewable-energy generation because the Act permits green marketing for energy as non-local as Illinois and as non-renewable as trash incineration. And the speech restrictions are inadequately tailored, given the many less-restrictive options Maryland could employ to increase local energy generation.

The State has also failed to justify its speech compulsions. It has not shown they remedy any non-hypothetical harms, and it concededly did not engage in any tailoring. Both flaws are dispositive.

Maryland confirms that the remaining preliminary-injunction factors favor relief. It does not dispute that Appellants have suffered irreparable economic harm—harm which will intensify on December 31, 2025 when all of Appellants' grandfathered pre-Act contracts will end, pursuant to a Public Service Commission order. The State's attempt to rebut Appellants' First Amendment harms fails because Appellants are likely to succeed on the merits. And Maryland, for its part, has no interest in enforcing an unconstitutional law.

Finally, Maryland confirms that the speech regulations are inseverable and are unconstitutional both as applied to Appellants and on their face.

ARGUMENT

I. THE STATE CONFIRMS THE ACT VIOLATES THE FIRST AMENDMENT.

A. The State Confirms The Act Is Subject To Strict Scrutiny.

Maryland cannot (and does not) deny that the Act restricts Appellants from expressing their "views" and "content" through "the censorship of particular words." *Cohen v. California*, 403 U.S. 15, 18, 26 (1971). Nor can Maryland deny that "[c]ontent-based laws" like the Act ordinarily "are subject to strict scrutiny" and therefore "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015); *see* Appellants' Br. 25-27.

Maryland claims (at 26-33) the Act should be subject to intermediate scrutiny because it regulates "commercial speech." But that "category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality," *Matal v. Tam*, 582 U.S. 218, 251 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring), and "[t]he Supreme Court has never invoked *Central Hudson* to apply intermediate scrutiny to a law that discriminates between viewpoints, even in the commercial context," *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1125 (9th Cir. 2023) (VanDyke, J., concurring).

Multiple circuits have recognized that laws regulating commercial speech based on viewpoint merit strict scrutiny. *See Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 139 (3d Cir. 2020) ("We realize, of course, that it may be appropriate to apply strict scrutiny to a restriction on commercial speech that is viewpoint-based."); *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015) ("merely wrapping a law in the cloak of 'commercial speech' does not immunize it from the highest form of scrutiny due government attempts to discriminate on the basis of viewpoint"); *cf. Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020) ("a regulation of commercial speech that is not content-neutral is still subject to strict scrutiny"). Maryland's observation (at 27) that this Court applied *Central Hudson* in *Recht v. Morrisey* is not responsive, as that case involved "a specific content-based burden," not viewpoint discrimination. 32 F.4th 398, 406 (2022); *see also id.* at 409 (citing with approval *Greater Philadelphia Chamber of Commerce*). Here, unlike there, Maryland proudly proclaims its viewpoint-discriminatory purpose of favoring speech that "promot[es] the development of regional renewable energy sources." Appellees' Br. 40; *see also infra* Section I.B.3. That triggers strict scrutiny.

Appellants showed (at 27-31) that the Act also merits strict scrutiny for the independent reason that its content-based regulation reaches noncommercial speech—including noncommercial speech intertwined with commercial speech.

Maryland responds (at 28-29, 32) that the term "market" is necessarily limited to commercial speech, but the Supreme Court did not think that conclusion obvious in *Sorrell* where a statute used the same word. *See* Appellants' Br. 27-28 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 559, 571 (2011)). And here, Appellants explained (at 28), the problem is worse than in *Sorrell* because "market" is undefined, and the State wields complete "discretion" to "determine whether an electricity supplier is marketing electricity" in violation of the Act. Maryland has no response.

Maryland even concedes the Act reaches CleanChoice's voter guides and Green Mountain's charitable notices. According to Maryland, the Act's censorship in these core First Amendment activities does "not trigger strict scrutiny" because it too "is commercial speech." Appellees' Br. 32; *see id.* at 32 n.7. That is untenable. There may be times when "the line between commercial and noncommercial speech [is] difficult to discern," *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 441 (4th Cir. 1999), but a statute that regulates voter guides and charitable efforts is not among them.[1] *See id.* at 441-42 ("the application of *Central*

[1] Maryland cites *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *cert. granted, judgment vacated*, 517 U.S. 1206 (1996), *and opinion adopted in part*, 101 F.3d 325 (4th Cir. 1996), but that case underscores Appellants' point that "commercial speech is speech which does 'no more than propose a commercial transaction.'" *Id.* at 1318. The speech restriction there was "directed only at commercial billboards advertising the sale of alcoholic beverages," and the city disclaimed intent to "enforce its ordinance against … public service messages." *Ibid.* Here, Maryland claims broad "discretion" to regulate "marketing," which it concedes reaches voter guides and charitable announcements.

Hudson would be inappropriate" to campaign advertisements); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values"); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) (applying strict scrutiny where "corporate advertising may influence the outcome of the vote").

Maryland denigrates (at 32, 29) Appellants as "for-profit entities whose overriding mission is to earn revenues." But again, "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 Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("the pamphlets of Thomas Paine were not distributed free of charge"). Thus, Appellants' economic motivation "clearly [is] insufficient by itself to turn the materials into commercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983).

Maryland asserts (at 28-29) that the Act regulates "only" "advertisements" about "a specific product suppliers may seek to sell, namely, green power." Even if that accurately described the statute, it would not necessarily make the restriction commercial. *See Bolger*, 463 U.S. at 66 ("that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech"); *ibid.* ("reference to a specific product does not by itself render the

pamphlets commercial speech"). And it is not an accurate description of the Act, as Maryland concedes it regulates voter guides and charitable activities.

Nor is Appellants' speech purely commercial even when only ads about product offerings are considered. Maryland says REAL members cannot call these offerings "green" because "[g]eneration of renewable electricity in distant states … does not" "benefit[ ] Marylanders." Appellees' Br. 44. Maryland's viewpoint is wrong—non-PJM-region RECs combat *global* climate change just like PJM-region RECs. Appellants' Br. 35. But, regardless, Maryland's stated objective shows that the Act is designed to do more than simply regulate speech addressing the terms of a commercial transaction. By policing what kinds of energy generation can be called "green" based on value judgments about the relative merits of local and global environmental benefits, Maryland is denying the expression of REAL members' viewpoints in favor of its own. That merits strict scrutiny both because it represents viewpoint discrimination and because it shows that the Act regulates more than commercial speech.

B. The State Confirms The Censorship Provisions Fail Even Commercial-Speech Scrutiny.

Maryland's censorship provisions fail any level of First Amendment scrutiny. Even under *Central Hudson*, Appellants are likely to succeed on the merits.

1. The Speech Regulated By The Act Is Neither Inherently Nor In Fact Misleading.

Appellants showed (at 23-25) that the Act regulates protected, truthful speech. The district court agreed and "d[id] not find … that the speech at issue [in this case] is itself inherently or in fact misleading." JA256; *see ibid.* ("the speech at issue is entitled to the requisite protection under the First Amendment").

Yet Maryland asserts (at 33-37) that the First Amendment does not apply here because the green marketing regulated by the Act is "inherently and in fact misleading." Maryland argues (at 34) that calling energy "100% wind electricity" is "untrue unless the customer's residence is physically connected to a windmill."

Maryland's argument fails at all levels. *First*, Maryland's theory of "inherent" deception is belied by the Act itself. The Act authorizes marketers to satisfy Maryland's "green power" requirement using "renewable energy credits" generated in or near the PJM region. Md. Code, Pub. Util. § 7-707(c)(1). And Maryland trumpets (at 6-9) the benefits of its renewable portfolio standard ("RPS") backed by PJM-region RECs. Maryland's embrace of RECs shows that it cannot possibly believe that green-energy claims are true only if made in connection with consumers connected directly to windmills. Plainly, the State would not affirmatively authorize speech backed by RECs if that speech was "self-evident[ly]" and "inherently misleading." Appellees' Br. 36.

Second, Maryland's theory of inherent deception has been flatly rejected by

the FTC—the federal agency dedicated to protecting the public from deceptive advertising. The FTC has explained that it is not deceptive to "mak[e] unqualified renewable energy claims" where the marketer "purchase[s] 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). The FTC's evidence-based judgment confirms that RECs are neither "inherently" nor "actually misleading." *Recht*, 32 F.4th at 411 (crediting FTC findings on inherent and actual deception).

The State misrepresents the FTC's findings in response. It asserts (at 35-36) that "the [FTC] has determined that consumers will likely be confused about RECs." The FTC did not say that. It instead said that "reasonable consumers may interpret renewable energy claims differently than marketers may intend," and thus marketers must "have substantiation" or qualifying disclosures for "their express and reasonably implied claims." 16 C.F.R. § 260.15(b). But, the FTC has explained, RECs *are a means to substantiate* such renewable-energy claims. *See id.* § 260.15(c). Thus, far from deceiving consumers, RECs are a government-approved standard to *avoid* deception.

Third, Maryland's isolated anecdotes fall far short of its categorical claim. Maryland asserts (at 34-35) some individual consumers thought they purchased electrons directly from renewable-energy sources. But Maryland's examples are a

far cry from inherent deception. Even if speech about renewable energy and RECs led to confusion "in certain circumstances," that does not show deception that is "so inherent or ubiquitous" to "remove[ ]" green marketing "from the ambit of First Amendment protection." *Edenfield v. Fane*, 507 U.S. 761, 766 (1993); *see also Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 102 (1990) (plurality) ("some degree of uncertainty" not "inherently misleading"). And, in any event, the Act reaches far more broadly than Maryland's claimed inherent deception, as it prohibits even marketing claims that clearly state that energy is "green because it is backed by non-PJM-region RECs."

Finally, Maryland is wrong to claim (at 34) that whether speech is inherently or in fact deceptive is "dispositive." That inquiry is the "[f]irst" step. *Recht*, 32 F.4th at 410, 412-16 (applying *Central Hudson* factors after concluding "each of the Act's prohibitions targets speech that is either inherently or actually misleading"). Indeed, Maryland cannot seriously contend that finding confusion gives it blanket license to regulate speech in a way that preserves (or worsens) that confusion. It must still "directly advance[ ]" an interest in abating purported deception "in a way that is not more extensive than is necessary." *Id.* at 413 (cleaned); *accord In re R. M. J.*, 455 U.S. 191, 203 (1982) ("absolute prohibition" impermissible if speech "may be presented in a way that is not deceptive").

2. The Anti-Deception Interest Cannot Justify The Censorship Provisions.

a. *The Censorship Provisions Do Not Further An Anti-Deception Interest.*

Appellants showed (at 32-42) that the Act's censorship provisions do not advance the State's interest in protecting consumers from deceptive green marketing. The reason is straightforward. The Act does not prohibit green-power companies from using RECs. It instead places a geographic limit on which RECs are permitted to be marketed as "green"—i.e., PJM-region RECs. Because that geography-based speech restriction does not prevent or remedy any deception, it does not further the State's anti-deception interest. Maryland does not seriously dispute any of this.

It instead argues (at 42) the Act alleviates "consumer confusion," defined as consumers "not … understand[ing] that the 'green' electricity they buy is backed by RECs." But the Act's censorship provisions do *nothing* to alleviate that supposed confusion because they *do not prohibit* REC-backed marketing. To the contrary, Maryland expressly allows marketers to satisfy Maryland's green-power definition using RECs. Md. Code, Pub. Util. § 7-707(a), (c)(1). All the censorship provisions do is place a *geographic* restriction on which RECs may be marketed as "green." So the State's complaints about the use of RECs generally, *see* Appellees' Br. 9-15, 34-36, 42, are beside the point. Maryland must show why restricting green marketing based on whether a REC comes from the PJM region prevents consumer deception.

On that score, Maryland's only "evidence" is a single comment filed by a losing party with the FTC 15 years ago. Maryland cites (at 15-16, 43) an FTC Notice observing that "one commenter" urged a "disclosure" because customers "may believe that the renewable energy they purchase is generated in their geographic location." *Guides for the Use of Environmental Marketing Claims*, Proposed Rule, 75 Fed. Reg. 63,552, 63,590 (Oct. 15, 2010). But Maryland omits that the FTC *rejected* that view. After studying the "consumer perception evidence," the agency concluded it lacked evidence that "consumers interpret renewable energy claims to mean that the energy was generated in their location." *Ibid.* It thus declined to recommend a blanket disclosure—much less a blanket speech *restriction*—based on geography. *Ibid.* A 15-year-old comment rejected by the FTC does not show that words like "green" deceptively imply local generation. *See* Appellants' Br. 40-41.

Maryland next obfuscates (at 43) with its requirement that energy be marketed as green only where it is at least 51% backed by RECs—a higher standard than "regular power." But Maryland has presented no evidence that Appellants—or other companies—were deceptively marketing "regular power" as green energy. And that is unsurprising: such deception was *already illegal*. *See* Md. Code, Com. Law § 13-303. Again, the State has asserted consumer confusion only about how RECs work. The 51% provision does nothing to advance that anti-confusion interest, nor does it cure the mismatch between the asserted confusion and the geography-based speech

restriction.

Maryland also concedes underinclusive, overinclusive, and downright self-defeating elements of its censorship provisions. It does not dispute that companies may market energy as "green" where it is 49% backed by coal power in Maryland and 51% by wind in Illinois—but does not allow companies to market energy as "green" where it is 100% backed by wind in New York. Appellants' Br. 37. Maryland also concedes the Act authorizes marketing as "clean" trash-incineration facilities that emit toxic pollutants into Maryland's air. *Id.* at 37-38. These elements of "irrationality" independently show that the censorship provisions "cannot directly and materially advance [Maryland's] asserted interest." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995). The "Government inexplicably ignored these arguments in its response brief" and thus "waiv[ed]" and forfeited any response. *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016).

The Act is also fatally underinclusive because it exempts the Department of General Services, community choice aggregators, and commercial suppliers from the Act. *See* Appellants' Br. 38-39 & n.4. The State baldly asserts (at 37 n.10) that these "entities are not similarly situated to" green-power companies but does not dispute that they all "connect Marylanders to their electricity supply and inform them about that supply." Appellants' Br. 39 n.4. While Maryland says (at 19) that "a community choice aggregator" is not a "retail supplier," Maryland law provides that

"residential customers" may "receive electricity supply through [a] community choice aggregator." Md. Code, Pub. Util. § 7-510.3(s)(1). At bottom, inconsistent messaging from suppliers about what counts as "green"—which is indisputably permitted by the Act—undermines the State's goal of reducing confusion about green marketing.

b. *The Censorship Provisions Are Inadequately Tailored To Further An Anti-Deception Interest.*

Appellants showed (at 44-47) that the censorship provisions are inadequately tailored because there are obvious alternative approaches that would be less speech-restrictive. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) ("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"); *Sorrell*, 564 U.S. at 575.

First, Appellants showed (at 44) that the Act's disclosure requirements would be sufficient to remedy any purported deception. And indeed, Maryland *agrees* (at 51) that its "disclosures" already "address the risk of confusion." Because Maryland can cure any purportedly "misleading statements" through disclosures rather than a "complete[ ] ban," the censorship provisions are unconstitutional. *Peel*, 496 U.S. at 110; *see also Thompson*, 535 U.S. at 376.

Second, Maryland could enforce its existing laws prohibiting misleading advertising. *See, e.g.*, Md. Code Regs. § 20.53.07.07(A)(2); Appellants' Br. 45. Maryland argues (at 47) that a "challenged law must 'stand or fall on its own merits

independent of whether it overlaps' with other laws." But "[t]hat being said," this Court has explained, "the duplication [of other laws] does serve to illustrate that … what Maryland wishes to accomplish through the Act can be done through better fitting means." *Washington Post v. McManus*, 944 F.3d 506, 523 (4th Cir. 2019). Thus, while duplication is not itself a constitutional problem, it can show a law is inadequately tailored. Applied here, "direct application of laws prohibiting misleading advertising" offer a less-speech-restrictive alternative. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 113 (4th Cir. 2018).

Third, Appellants showed (at 44-45) that Maryland could alleviate any deception by itself educating the public about RECs—including on its consumer-choice website. *See, e.g.*, Md. Code, Pub. Util. § 7-510.2(a), (b). Maryland cites (at 46-47) to *Recht*, but there, an educational campaign would not work because the "State [wa]s not regulating speech to convey a different message." 32 F.4th at 415. Here, it is. Maryland affirmatively *authorizes* RECs to comply with its speech restriction, *see* Md. Code, Pub. Util. § 7-707(c)(1), and seeks to educate "Maryland consumers" so that they "know that the 'green' power they buy is backed by RECs" and "know what RECs are," Appellees' Br. 43. Given this, educating consumers about RECs would be a less-restrictive alternative to the State's flat ban on certain words—and even more so if the State believes that certain RECs (like PJM-region

RECs) are somehow preferable to others.

The State "speculat[es]," *contra Edenfield*, 507 U.S. at 770, that green-power companies might "eradicate[ ]" the benefits of an educational campaign, Appellees' Br. 47. But it offers no evidence for that claim and elsewhere concedes that green-power companies already provide truthful "factual information" about RECs. *Id.* at 48-49.[2]

Finally, Appellants showed (at 46) that Maryland failed to demonstrate that it considered less-restrictive alternatives "before enacting the speech-restricting law." *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020). Maryland does not disagree. It instead says (at 45 n.14) its legislature did not have to consider alternatives because this case involves "commercial speech." But this Court has repeatedly held laws unconstitutional under "intermediate scrutiny" where the Government fails to provide evidence that it "actually tried or considered less-speech-restrictive alternatives." *Billups*, 961 F.3d at 687-88; *see also Reynolds v. Middleton*, 779 F.3d 222, 228-29 (4th Cir. 2015). That is the form of scrutiny applicable to viewpoint-neutral commercial speech. *Recht*, 32 F.4th at 405. Thus, Maryland's concession independently renders the censorship provisions unconstitutional.

[2] Further, Maryland retains authority over green marketing on its website. *See* Md. Code Regs. § 20.53.07.07(C)(2)(a).

3. The Newly Asserted Local-Energy-Generation Interest Cannot Justify The Censorship Provisions.

a. *The State Waived And Forfeited Its Local-Energy-Generation Interest.*

On appeal, the State asserts (at 39-40) that the Act "furthers the substantial state interest in promoting development of renewable energy sources in Maryland and the PJM region." This argument is meritless, *see infra*, and the State's resort to it in lieu of its "legislature's [anti-deception] rationale" only confirms "the vulnerability" of the latter, *Sorrell*, 564 U.S. at 577. But, in any event, the interest is waived.

First, the State forfeited this interest because it did not preserve it below. In the district court, Maryland asserted an "interest in protecting its citizens from *misleading commercial speech*." Dkt. 14 at 19 (emphasis added). Although the Government briefly mentioned local energy generation at oral argument after briefing was complete, JA221-222, it failed to develop that argument (e.g., by demonstrating tailoring to that interest). Such a "passing shot" "cannot preserve [an] issue for appellate review." *Sines v. Hill*, 106 F.4th 341, 349 (4th Cir. 2024); *accord United States v. Clay*, 627 F.3d 959, 966 n.2 (4th Cir. 2010) (holding "the government" waived "argument, made for the first time at oral argument"). And indeed, the lower court did not credit any local-energy-generation interest. *See*

JA257-258.[3] Because "the Government" raises this interest "for the first time on appeal," it should "not be considered." *United States v. Armstrong*, 132 F.4th 736, 738 n.4 (4th Cir. 2025).

Second, the local-energy-generation interest is impermissible because Maryland has not provided evidence it was "contemporaneous." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022); *Thompson*, 535 U.S. at 373-74. The contemporaneous evidence instead evinces a consumer-protection interest.[4] *See* Appellants' Br. 33-34; *see also* Appellees' Br. 9-16. This evidentiary gap is fatal.

Maryland's resort to a previously-unarticulated interest is telling. It shows that Maryland's months-long insistence that the Act was a consumer-protection measure was a fig leaf for the State's true purpose: the suppression of speech to push an in-state protectionist agenda. That conceded viewpoint-based motivation triggers strict scrutiny, *see supra* Section I.A, explains why the State's anti-deception interest is incoherent, *see supra* Section I.B, and compounds the constitutional problems, *see infra* Section I.B.3.b-c.

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[3] Judge Rubin noted, as background, that Maryland's RPS encourages "renewable electricity generation within the PJM Region." JA245; *see also* Appellees' Br. 39-40 (citing legislative purpose for RPS). The RPS was created 20 years ago and is not at issue in this litigation.

[4] While Maryland cites a letter from a non-legislator that uses the word "local," *but see Brnovich v. DNC*, 594 U.S. 647, 689 (2021), it does so in the context of advocating for "truthful" advertising, Test. of Councilman Mark Conway, https://tinyurl.com/337ye32s.

b. *The Censorship Provisions Do Not Further A Substantial Local-Energy-Generation Interest.*

Waiver aside, Maryland's local-energy-generation interest is not legitimate. As the *amici* coalition of States explained (at 12-13), "Dormant Commerce Clause jurisprudence makes clear that Maryland cannot claim a legitimate state interest in using its regulatory power to incentivize *where* renewably sourced electric power will be generated." (citing, *inter alia*, *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). And even if Maryland's in-state economic protectionism were legitimate, it is not substantial. *See, e.g.*, David C. Vladeck, *Lessons from A Story Untold: Nike v. Kasky Reconsidered*, 54 Case W. Res. L. Rev. 1049, 1056 (2004) (explaining "commercial speech" "[r]estraints … that [are] imposed for less-than-substantial reasons, such as economic protectionism ... [are] subject to invalidation" (collecting cases)).

Next, the State does not support its supposed interests with evidence. Maryland claims (at 43) that local energy generation advances Maryland's interests in "reducing local greenhouse gas emissions, improving local air quality and public health, and providing Marylanders with economic opportunities." However, Maryland has not offered any evidence to establish that the local economic and environmental "harms it recites are real." *Edenfield*, 507 U.S. at 770-71. That omission is dispositive because the State must prove every *Central Hudson* factor "for the [Act] to be found constitutional." *See Thompson*, 535 U.S. at 367.

Maryland's censorship provisions also do not "directly and materially advance" its supposed goals. *Rubin*, 514 U.S. at 488. For one, its theory of advancement is *per se* impermissible because it relies on depriving consumers of truthful speech for their own good. Maryland says it outlaws marketing that uses words like "green" and is backed by non-PJM-region RECs because consumers deprived of this truthful marketing will be more likely to purchase Maryland's preferred PJM-region RECs.

The Supreme Court has squarely held that this is not "a permissible way" to advance the State's "policy goals." *Sorrell*, 564 U.S. at 577. "The State" cannot "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing [green-power companies'] ability to influence [consumers' energy-purchase] decisions." *Ibid.* "[T]he fear that people would make bad decisions if given truthful information," the Court explained, "cannot justify content-based burdens on speech." *Ibid.* (cleaned); *see also Thompson*, 535 U.S. at 374-75. Thus, while Maryland can try to convince consumers that PJM-region RECs are superior, it cannot deprive consumers of truthful contrary speech. For this reason alone, the State's censorship neither directly nor permissibly advances its purported interest in local energy generation.

Further, Maryland has not shown that the censorship provisions advance a "local" interest. For example, the State has not shown how generating energy as far

away as Illinois or Kentucky will result in "local" economic benefits. And Maryland offers zero evidence of environmental benefits from energy generation in these but not other States—a gaping omission, given that more nearby States like Connecticut are excluded even while they participate in a cap-and-trade program with Maryland. *See* Md. Code, Env't § 2-1002(g); *Elements of RGGI*, The Regional Greenhouse Gas Initiative, https://tinyurl.com/um2ht566.

Compounding these fit issues is the attenuated nature of the State's "solution." Again, the censorship provisions do not require energy generation in the PJM region. They police how regulated parties can *speak about* green energy. Maryland has not shown that its speech restriction—a step removed from its purported localism goal—advances Maryland's protectionist interest in a direct and material way.

Finally, the local-generation interest is "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999). Maryland can hardly claim an interest in cleaning up its environment with renewable-energy-sector jobs when it counts toxic trash incineration, Md. Code, Pub. Util. § 7-701(s)(10), and "poultry litter-to-energy,"[5] *id.* § 7-701(s)(9), as "environmentally friendly"

[5] *See, e.g.*, Food & Water Watch, Poultry Litter Incineration: A False Solution to Factory Farm Pollution, at 2-3 (Oct. 2015), https://tinyurl.com/bdzhxrkh ("Government scientists in North Carolina determined that poultry litter combustion plants could result in higher emissions of carbon monoxide, particulate matter,

energy sources, *id.* § 7-707(a). And, as with the anti-deception interest, exempting certain suppliers and allowing "green" marketing by entities that derive 49% of their power from non-renewable sources significantly undermines local renewable-energy generation.

c. *The Censorship Provisions Are Inadequately Tailored To Further A Local-Energy-Generation Interest.*

Maryland also flunks tailoring because it has obvious less-speech-restrictive alternatives to increase local clean-energy generation. Subject to the Dormant Commerce Clause, which would independently limit Maryland's ability to favor local or regional interests, the State could increase the minimum PJM-region-REC requirement under its existing RPS. The State could subsidize additional private green-energy infrastructure. *See, e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (noting that "subisdiz[ing]" businesses was less restrictive). It could commit itself to purchasing more in-state RECs. It could increase taxes on "dirty" energy. It could itself encourage its residents to buy green, local energy. Subject to First Amendment limits, it could rely on disclosures to do the same.

The record lacks any evidence that Maryland considered these less-speech-restrictive alternatives. That omission is dispositive, as Maryland "carries the burden

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nitrogen oxides and carbon dioxide per unit of power generation than new coal plants.").

of justifying" its speech restriction by "expla[ining] why the Government believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests." *Thompson*, 535 U.S. at 373; *see also Billups*, 961 F.3d at 687-88.

C. The State Confirms The Compelled-Speech Provisions Fail Even Commercial-Speech Scrutiny.

As Appellants explained (at 30-31), the Act's speech compulsions are subject to strict scrutiny. They are content and viewpoint-based because they force green-power companies to "accommodate [Maryland's] views" about renewable energy. *303 Creative*, 600 U.S. at 596 (cleaned). And they are not limited to "purely factual and uncontroversial information about the terms under which services will be available." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 585 U.S. 755, 768-69 (2018) (cleaned).

Maryland does not dispute that its disclosures are, at best, tangential to the "terms under which services will be available," *ibid.* (cleaned), which is sufficient to apply strict scrutiny. Maryland claims (at 51), that they are not "politically charged." But the question is whether Maryland compels speakers to "convey[ ] a particular opinion" or to make statements with "ideological implications." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014); *accord Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 281-82 (5th Cir.) ("a compelled statement is 'uncontroversial' [where its truth] is not subject to good-faith scientific or evidentiary dispute and

where the statement is not an integral part of a live, contentious political or moral debate"), *cert. granted on other grounds* 144 S. Ct. 2714 (2024). Because the Act compels green-power companies to parrot Maryland's opinions on how best to promote sustainability and localism—issues that are the subject of good-faith political and ideological disagreement—strict scrutiny, not *Zauderer* review, applies for this reason too.

However, even under *Zauderer*, Maryland must show that each of its disclosures "remed[ies] a harm that is potentially real, not purely hypothetical." *NIFLA*, 585 U.S. at 776 (cleaned); *see Recht*, 32 F.4th at 417-18 (assessing provision-by-provision). Appellants' opening brief showed (at 47-49) that none of the disclosures remedy a non-hypothetical harm.

Maryland ignores this analysis and asserts (at 51) general confusion about "the concept of a REC, and how it is distinct from electricity itself," as a blunderbuss justification for every disclosure.[6] But most of the disclosures have nothing to do with that supposed confusion. For example, disclosing "how the electricity … is generated," Md. Code, Pub. Util. § 7-707(g)(2), its environmental "benefit," *id.* § 7-707(g)(3), its "eligib[ility] for inclusion in meeting the [RPS]," *id.* § 7-707(g)(4), and "the state" of "generat[ion]," *id.* § 7-707(g)(5), does not dispel confusion about

[6] Maryland does not invoke its local-energy-generation interest as a basis for the compulsions.

"the concept of a REC, and how it is distinct from electricity itself." These disclosures are thus unconstitutional.

Further, the State has failed to justify even the compelled disclosures about RECs as a concept. *See* Md. Code, Pub. Util. § 7-707(f)(2), (g)(1). As Appellants explained (at 48), RECs are not misleading as a general matter and are in fact a means to *cure* potential deception. And as the State points out (at 48-49 & n.15), green-power marketers disclosed "the same information" the Act requires *before* it took effect, belying any notion of real and ongoing deception in the market.

Appellants also showed (at 49-50) that the disclosures are inadequately tailored. Maryland agrees it did not show tailoring but claims (at 52 n.16) it did not have to under *Zauderer*. The Supreme Court disagrees. *See NIFLA*, 585 U.S. at 776-77 ("under *Zauderer*," the State "has the burden to prove that the [disclosure] is neither unjustified nor unduly burdensome" and "extend[s] no broader than reasonably necessary"). Maryland's conceded lack of tailoring thus independently renders its compulsions unconstitutional.

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

Appellants' opening brief showed (at 51-53) ongoing irreparable First Amendment harms, loss of business opportunities, and financial loss. Maryland (at 52) disputes only the first and thus concedes Appellants' unrecoverable economic losses. Those losses will worsen because grandfathered contracts entered into before

the Act took effect continue to expire and because, pursuant to the Maryland Public Service Commission's interpretation of the Act, *all* grandfathered pre-Act contracts will end on December 31, 2025. *See* MPSC, Admin Docket No. PC65, Dkt. 38 at 23-24, 28, *available at* https://tinyurl.com/yn2hkbh8 (last visited May 6, 2025). And because Maryland is wrong on the merits, *see supra*, Appellants suffer ongoing First Amendment harms.

Appellants also showed (at 53-54) that the equities and public interest favor relief. Maryland argues that Appellants delayed in bringing this suit, Appellees' Br. 52-53, but it ignores that they (i) required time to understand the law and attempt resolution with the State, and (ii) brought their suit with sufficient time for pre-enforcement review, *see* Appellants' Br. 52-53.[7] And regardless of timing, Appellants have shown ongoing irreparable harm. *Id.* at 53; *accord Gordon v. Holder*, 632 F.3d 722, 724-25 (D.C. Cir. 2011) ("delay in filing is not a proper basis for denial of a preliminary injunction").

Maryland next claims (at 53) it would suffer irreparable harm if the Act were enjoined, but "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 v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011).

[7] Maryland, for its part, did not issue its statutorily-mandated implementation order until December 30, 2024. *See* MPSC, Case No. 9757, Dkt. 24, *available at* https://tinyurl.com/2w2cnzn7 (last visited May 6, 2025).

Maryland says (at 53) "consumers risk being further deceived and financially harmed." But the State has failed to show that the Act will alleviate any such harm. *See supra* Section I.B.1-2. And even if it did, Maryland 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 STATE CONFIRMS THAT THE PROPER REMEDY IS A REMAND WITH INSTRUCTIONS TO ENJOIN ENFORCEMENT OF THE ENTIRE ACT.

1. The Act Is Unconstitutional Both On Its Face And As Applied To Appellants.

Appellants showed (at 55-56) that the Act's speech regulations are unconstitutional both facially and as applied.

Maryland wrongly argues (at 25) that for facial relief, Appellants "must show that 'no set of circumstances exists under which the law would be valid.'" But "[i]n First Amendment cases," the Supreme Court "has lowered that very high bar." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). In that context, courts facially invalidate a law "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021); *see also Edgar v. Haines*, 2 F.4th 298, 313 (4th Cir. 2021). Maryland has not denied that the Act regulates the speech of all retail-energy suppliers in exactly the same way. Therefore, if the Act's speech regulations violate the First Amendment as applied to Appellants, that would show

a "categorical" defect rendering the Act "facially unconstitutional." *Ams. for Prosperity Found.*, 594 U.S. at 615, 618. Further, Maryland has not disputed that the unconstitutional applications of the Act far outweigh any "legitimate sweep." *Id.* at 615. That too renders the Act facially unconstitutional.

Maryland also contends (at 24) Appellants cannot obtain relief for themselves because they did not challenge the Act "as applied to them." That too is wrong.

First, the Complaint and declarations squarely allege that the Act "violates the First Amendment right of freedom of speech *of REAL members and their subsidiaries*," including Green Mountain and CleanChoice. JA31 (Compl. ¶ 97) (emphasis added); *see also* JA9-10, JA17, JA19, JA22, JA28-29, JA30-32, JA35-36 (Compl. ¶¶ 8-9, 39-40, 49, 61, 87-89, 96-101, 117-121) (similar); JA59-69 (Green Mountain declaration); JA72-81 (CleanChoice declaration). Thus, Appellants clearly argued below that the Act is unconstitutional as applied to them.

Second, "[f]ederal courts are free to consider challenged statutes as applied to the plaintiff" even when a suit is "style[d] [solely] as a facial challenge." *NetChoice*, 603 U.S. at 757 n.1 (Thomas, J., concurring). If facial relief is unwarranted, courts can always "limit any relief" "to the plaintiff before them." *Ibid.* In this case, Appellants sought facial and as-applied relief. But even if they had not, Maryland's objection to as-applied relief would be foreclosed on this basis too.

2. The Unconstitutional Speech Restrictions Are Not Severable.

Appellants showed (at 56-58) that striking down the Act's speech regulations would collapse the green-power market into the standard, price-capped market—undermining a dual-market structure that the legislature deemed "critically important." Thus, severing the Act's speech regulations would be inappropriate because it would flout legislative intent and wrongly "extend [a] statutory [limitation] to a class which was intended to be excepted." *See State v. Schuller*, 280 Md. 305, 319-21 (1977).

Maryland responds (at 54) by baldly asserting that three isolated provisions are "independent." That non-response concedes that striking down the speech regulations would fatally undermine the "critically important" dual-market structure. Thus, the Court should hold that the speech regulations are inseverable from the rest of the Act—or, at minimum, the dual-market provisions.

CONCLUSION

The Court should reverse and remand.

Dated: May 6, 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)(ii) because this brief contains 6,491 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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May 6, 2025

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CERTIFICATE OF SERVICE

I certify that on May 6, 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.

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