No. 25-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RETAIL ENERGY ADVANCEMENT LEAGUE, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY G. BROWN, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Maryland
(Julie R. Rubin, District Judge)

BRIEF OF APPELLEES

ANTHONY G. BROWN
Attorney General of Maryland

HOWARD R. FELDMAN
JAMES D. HANDLEY
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
jhandley@oag.state.md.us
(410) 576-6993
(410) 576-6995 (facsimile)

Attorneys for Appellee Anthony G. Brown

MILES H. MITCHELL
General Counsel
COLIN GLYNN
Associate General Counsel
Maryland Public Service Commission
6 Saint Paul Street, 16th Floor
Baltimore, Maryland 21202
colin.glynn@maryland.gov
(410) 576-8039
(410) 333-1270 (facsimile)

Attorneys for Appellees Frederick H. Hoover, Michael T. Richard, Kumar P. Barve, and Bonnie A. Suchman

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JURISDICTIONAL STATEMENT

Plaintiffs are a retail supplier of electricity, Green Mountain Energy Company ("Green Mountain"), and an industry group of electricity suppliers, the Retail Energy Advancement League ("REAL"). Plaintiffs filed a complaint in the district court challenging the constitutionality of certain provisions of Maryland Senate Bill 1 ("S.B. 1"), codified at § 7-707 of the Public Utilities Article of the Maryland

Annotated Code. The district court had jurisdiction under 28 U.S.C. § 1331 because the complaint raised federal claims.

The district court held a hearing and denied plaintiffs' motion for preliminary injunction on November 18, 2024. (J.A. 43-45, J.A. 241-278.) The plaintiffs filed a timely notice of appeal on December 13, 2024. (J.A. 300-302.) This Court has jurisdiction to review the district court's order under 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED FOR REVIEW

Did the district court correctly deny plaintiffs' motion for preliminary injunction where (1) S.B. 1's restriction on marketing green power directly furthers the State's interests in preventing consumer confusion and promoting development of regional renewable energy sources; and (2) the disclosures that S.B. 1 mandates in connection with the marketing of green power are purely factual and ensure that consumers know what they are purchasing?

STATEMENT OF THE CASE

This case concerns a challenge to a Maryland law that (1) designates when electricity may be marketed as "green power"; and (2) requires that electricity suppliers who market green power to residential customers disclose information that will help customers make informed purchasing decisions. S.B. 1 was enacted against the backdrop of regulatory changes that allowed competition among retail suppliers of electricity, sought to promote the development of renewable energy

sources, but were accompanied by suppliers' use of misleading sales tactics in marketing "green" electricity to residential consumers.

The Regulatory Regime For Retail Electricity Supply in Maryland

Although the federal government, through the Federal Energy Regulatory Commission ("FERC"), has "exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce,'" the States alone are vested with the authority to regulate retail supply of electricity. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016) (quoting 16 U.S.C. § 824(b)(1)); *see also New York v. Federal Energy Regul. Comm'n*, 535 U.S. 1, 24 (2002) ("FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled."). The States' reserved authority includes the power to regulate facilities used for the generation of electric energy. *See Hughes*, 578 U.S. at 154; *see also Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); *Pacific Gas Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

Maryland Deregulates the Electricity Supply Market to Establish Customer Choice

Maryland's 1999 enactment of the Electric Customer Choice and Competition Act ("the Choice Act") marked a "sea change" in the electricity supply market in the State. *In re Smart Energy Holdings, LLC*, 486 Md. 502, 515 (2024). Previously, supply and distribution of electricity were bundled together and were provided by consumers' local utilities, such as Baltimore Gas & Electric Company. *Id*. To establish "customer choice," the Choice Act created a competitive market for retail electricity supply by requiring that electricity supply be unbundled from electricity distribution. *Id*.; *see also, e.g.*, Md. Code Ann., Pub. Util. § 7-504 (LexisNexis 2020) (setting forth legislative findings and purposes); *id.* § 7-505 (providing for restructuring of electric companies); *id.* § 7-510 (LexisNexis Supp. 2024) (providing for implementation of customer choice).

Under Maryland's system of customer choice, consumers may receive the default electricity supply, known as "standard offer service," from their local utility. *Smart Energy*, 486 Md. at 516; *see also* Pub. Util. §§ 7-506(e), 7-510(c) (requiring utilities to provide standard offer service); COMAR 20.52.01.01 – 20.52.01.05. Standard offer service rates are approved by the Maryland Public Service Commission ("the Commission") based on the results of a competitive procurement process undertaken by utilities. COMAR 20.52.04.01, 20.52.04.02. Alternatively, consumers may purchase their electricity on the competitive open market from

suppliers who hold licenses issued by the Commission. *Smart Energy*, 486 Md. at 516, 521; *see also* Pub. Util. § 7-507 (setting forth license requirement).

Maryland Establishes a Renewable Energy Portfolio Standard to Advance Its Renewable Energy Generation, Environmental, and Economic Goals

In 2004, Maryland enacted its renewable energy portfolio standard ("RPS"). The RPS promotes development of renewable sources of electricity by requiring that specified and increasing percentages of retail electricity sold by suppliers in Maryland be derived from renewable sources of electricity. Pub. Util. § 7-703(a), (b) (LexisNexis Supp. 2024). Whether electricity is generated from conventional sources (e.g., coal-powered generation) or from renewable sources (e.g., wind or solar power), however, its source cannot be determined once it is introduced into the grid.[1] *See, e.g., Direct Energy Servs., LLC v. Public Utils. Regul. Auth.*, 347 Conn. 101, 110 (2023) (noting "a fundamental reality about generation and distribution of electricity," namely, that "electrons cannot be traced from their generation source to the end user unless the source is behind the customer's electricity meter" (quotation marks omitted)).

[1] PJM is the federally designated interstate regional power grid that includes Maryland, the District of Columbia, and all or a portion of twelve other states. PJM is the marketplace in which Maryland consumers and consumers in other states in the PJM region acquire electricity. *See* PJM, *Territory Served*, https://www.pjm.com/about-pjm/who-we-are/territory-served (last visited Apr. 14, 2025).

For this reason, electricity suppliers "shall meet the [RPS] . . . by accumulating the equivalent amount of renewable energy credits that equal the percentages required under this section." Pub. Util. § 7-703(d)(1); *see also id.* § 7-709(a) (LexisNexis Supp. 2024) ("An electricity supplier may use accumulated renewable energy credits to meet the renewable energy portfolio standard."). The minimum standard under the RPS for 2025 is at least 35.5 percent from "Tier 1" renewable sources (such as wind and solar) and at least 2.5 percent from "Tier 2" renewable sources (a category that includes only hydropower). *Id.* § 7-703(b)(20); *see id.* § 7-701(s), (t) (LexisNexis Supp. 2024) (defining Tier 1 and Tier 2 renewable sources). The standard increases on an annual basis; for 2030 and beyond, the RPS will be at least 50.5 percent from Tier 1 renewable sources and at least 2.5 percent from Tier 2 renewable sources. *Id.* § 7-703(b)(25).

Owners of renewable generation within PJM receive renewable energy credits ("RECs") from the State where the generation is located and register those RECs with PJM, in whose marketplace they can be sold. Pub. Util. §§ 7-708, 7-709(b); COMAR 20.61.03.01 – 20.61.03.04. A REC is an intangible asset; for each megawatt of power, a generator of renewable electricity receives one REC. Pub. Util. § 7-701(m). As the Second Circuit has explained, "RECs are inventions of state property law whereby the renewable energy attributes are unbundled from the energy itself and sold separately." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 93 (2nd Cir.

2017) (quotation marks omitted); *see also Direct Energy*, 347 Conn. at 109. And because RECs are created by state law, they differ from state to state. *See Allco*, 861 F.3d at 93 ("[D]ifferent states define RECs differently, focusing on various attributes which they deem to be especially relevant."); Fed. Trade Comm'n, *Guides for the Use of Environmental Marketing Claims; Carbon Offsets and Renewable Energy Certificates; Public Workshop*, 72 Fed. Reg. 66,094, at 66,095 n.9 (Nov. 27, 2007) ("*Green Guides Public Workshop*") ("Currently, there is no uniform or mandatory definition of a REC."). RECs create a "financial incentive for the development of renewable energy projects by ensuring a market and steady stream of revenue for renewable generators." *Direct Energy*, 347 Conn. at 109 (brackets and quotation marks omitted); *see also* Md. Dep't of Legislative Servs., *Introduction to the Renewable Energy Portfolio Standard* 1 (Sept. 11, 2024), https://tinyurl.com/3msj5yee ("[T]he RPS incentivizes renewable energy growth and market stability as well as greenhouse gas (GHG) emissions reductions.").

In adopting the RPS, the General Assembly emphasized its desire to benefit Maryland and Marylanders. It found that "the benefits of electricity from renewable energy sources, including long-term decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources, accrue to the public at large." Pub. Util. § 7-702(b)(1). It also found that "electricity suppliers and consumers share an obligation to develop a minimum

level of [renewable energy] resources in the electricity portfolio of [Maryland]." *Id.* § 7-702(b)(2). The General Assembly further found that Maryland "needs to increase its reliance on renewable energy" in order to (1) reduce greenhouse gas emissions and meet the State's statutory greenhouse gas emission reduction goals under § 2-1205 of the Environment Article; and (2) provide economic opportunities for Marylanders and develop "a highly skilled workforce for clean energy industries in [Maryland]." *Id.* § 7-702(b)(3).[2]

Accordingly, the General Assembly expressed its intent for the RPS to (1) allow Marylanders to enjoy "the economic, environmental, fuel diversity, and security benefits of renewable energy resources;" (2) "reduce greenhouse gases and eliminate carbon-fueled generation from the State's electric grid" by using renewable energy resources; (3) establish a market for renewable energy resources in Maryland; and (4) lower the cost to Maryland consumers of electricity produced from renewable energy resources. Pub. Util. § 7-702(a) (emphasis added).

[2] Similarly, in adopting legislation that mandates reduction of greenhouse gas emissions in Maryland, the General Assembly declared that Maryland "should focus on developing and utilizing clean energies that provide greater energy efficiency and conservation" and that reducing harmful air pollutants, such as greenhouse gas emissions, is "necessary to protect the public health, economic well-being, and natural treasures of" Maryland. Md. Code Ann., Env't § 2-1201(7), (8) (LexisNexis Supp. 2024).

Thus, the RPS program's requirements reflect the General Assembly's focus on Maryland. To be eligible for compliance with Maryland's RPS, a REC "must be derived from a Tier 1 renewable source or a Tier 2 renewable source that is located" either (1) "in the PJM region"; or (2) in an area adjacent to the PJM region, "if the electricity is delivered into the PJM region." Pub. Util. §§ 7-701(m)(1), (2); *id.* § 7-703(d)(1).

Marketers of Retail Electricity Supply, Including of "Green" Electricity, Draw Complaints from the Public

The General Assembly considered S.B. 1 against this legal backdrop. And, as explained below, individual consumers, consumer groups, and other proponents of S.B. 1 provided the General Assembly with a robust record underscoring the need for the bill's reforms. Witnesses' testimony highlighted deceptive sales tactics targeting low-income communities to buy electricity priced higher than standard offer service, often with devastating financial consequences for consumers. Witnesses characterized the industry as lacking the transparency customers required to make informed purchasing decisions and underscored that "green" electricity claims should align with the environmental goals advanced by Maryland's RPS. *See generally* Md. Gen. Assembly, *Committee Testimony and Witness Signup*, https://tinyurl.com/4755xha4 (Senate bill); Md. Gen. Assembly, *Committee Testimony and Witness Signup,* https://tinyurl.com/d683f3vm (House bill).

In oral testimony, the sponsor of S.B. 1, Senator Augustine, explained that the overlying principle of the legislation is to prevent marketers from "goug[ing] our citizens." Test. of Sen. Malcolm Augustine, at 00:12:05 (Mar. 26, 2024), https://tinyurl.com/7ua734b6. In his written testimony, Senator Augustine suggested that suppliers should not be able to market electricity as "green" simply because they have fulfilled the minimum RPS requirement applicable to all suppliers, explaining that "[t]he inclusion of provisions related to green power is of priority as requiring electricity suppliers to purchase renewable energy credits in excess of the renewable energy portfolio standard demonstrates a commitment to promoting sustainable energy practices and environmental responsibility." Test. of Sen. Malcolm Augustine, at 1 (Jan. 25, 2024), https://tinyurl.com/mv357cmp.

Similarly, Baltimore City Councilman Mark Conway argued that "green" claims should not be permitted unless they are backed by RECs that support "Maryland's climate strategy," and that "S.B. 1 does this by requiring energy companies to purchase more Pennsylvania-New Jersey-Maryland Interconnection (PJM) renewable energy certificates, meaning that the certificates are local, and guarantees this by way of a disclosure." Test. of Councilman Mark Conway, https://tinyurl.com/337ye32s. This requirement would give "consumers who want to support green energy confidence that when they choose 'green power' [suppliers]—such as energy sources that are 100% renewable, 100% wind, 100%

hydro, 100% solar, or 100% emission-free—they are actually supporting Maryland's climate strategy." *Id.*; *see also id.* (describing predatory sales practices targeted at "low-income consumers in underserved neighborhoods with offers that are simply too good to be true").

The sponsor of the House version of S.B. 1, Delegate Crosby, explained that the bill "sets up guardrails for the retail energy supply segment of our energy market." Test. of Brian Crosby, at 1:53:00 (Feb. 15, 2024), https://tinyurl.com/3pa8e3fw. Delegate Crosby emphasized that "[t]his bill is about consumer protection, plain and simple." *Id.*

Witnesses, in turn, explained how ambiguous and misleading marketing had caused consumers to be confused about, and dissatisfied with, the "green" electricity supply market. For example, the Maryland Energy Advocates Coalition testified that "[e]co-buyers are wooed into retail energy with promises of clean electricity" and "assume they're paying for actual wind and clean energy." (J.A. 189 (emphasis omitted).) In fact, however, "[r]etail energy 'green power' offers are based on voluntary renewable energy certificates." (J.A. 189.) "Maryland currently has no standards or regulations regarding 'green offers,'" the Coalition continued, "and Maryland has no visibility into what types of RECs suppliers purchase on behalf of their clients." (J.A. 189.) Indeed, "[r]esearch suggests most RECs are unbundled RECs from Texas wind farms. These RECs are very low cost (after broker fees, too)

and offer no 'environmental benefits' for Maryland." (J.A. 189.) S.B. 1, the Coalition stressed, "will ensure that Maryland's eco-buyers can more readily know what they're buying." (J.A. 191.)

Individual consumers' testimony was to similar effect. One consumer testified that she agreed to pay the higher rates charged by a retail supplier that promised her electricity generated by "100% wind energy." (J.A. 196.) To her dismay, though, the consumer later discovered that she was not actually provided with electricity directly generated by wind power, but instead received the "same mix of local power grid supply as [her] neighbors who have not opted for 100% clean energy and are not paying a premium." (J.A. 196.) The consumer felt deceived by the supplier's false claims that her family would be supplied with electricity generated exclusively from renewable sources and that the premium she was paying would encourage development of renewable energy in Maryland. (J.A. 196.) Emphasizing her concern for local generation of renewable energy, the consumer urged that S.B. 1 would "press" suppliers "to make available genuine clean energy for consumers such as ourselves." (J.A. 196.)

Another consumer, self-described as a "fierce environmentalist[]," complained that she had been "duped" by REAL member CleanChoice Energy ("CleanChoice"). (J.A. 198.) Responding to marketing that falsely claimed that she would be "buying wind and solar energy" and that she would be "sourcing electricity

that comes from clean, renewable sources," the consumer switched from her local utility to CleanChoice. (J.A. 198.) After the switch, the consumer's bills increased substantially from the utility's standard offer service and, unbeknownst to her, she was converted to a variable rate contract. (J.A. 198.) Only after spending "over $10,000 for some fictional, green idea, from someone selling a credit from their wind farm," did this consumer discover that her home was not actually being supplied with electricity generated from a wind farm. (J.A. 198.)

Similarly, another consumer described the "shock and horror" he experienced upon learning that he was misled by CleanChoice into paying a premium for "standard dirty electricity" after being informed that he was making a switch to "100% clean, renewable energy." Test. of Dave Arndt, at 1 (Mar. 26, 2024), https://tinyurl.com/bde983fy.

The Maryland Office of People's Counsel, an independent state agency that advocates for Maryland's residential utility consumers, explained that "[c]onsumer complaints against retail suppliers include unfair and deceptive marking and solicitation practices such as . . . [d]eceptively marketing products as 'green energy,' 'renewable energy,' and 'carbon-free' without defining these terms." Test. of Off. of People's Counsel, at 2 (Jan. 25, 2024), https://tinyurl.com/yhspnrp4. Because all suppliers must comply with the RPS, the Office of People's Counsel also urged that "[s]uppliers should not be able to market their product as 'green' or 'clean' simply

for complying with" the minimum RPS requirement. Consumers marketed by suppliers of "green" electricity," the Office of People's Counsel suggested, "reasonably expect more than minimum statutory compliance." *Id*. at 6.

Urging that S.B. 1 would preclude marketers' continued use of "[g]reenwashing to deceptively market more expensive retail energy supply," one consumer group explained the "devastating consequences" sustained by low-income consumers due to "[i]nflated energy prices." Test. of Nat'l Consumer Law Ctr., at 3 (Mar. 26, 2024), https://tinyurl.com/y8j3te2v. Inflated energy prices may cause low-income consumers to face untenable choices, such as disconnecting from utility service or cutting back on food and healthcare. *Id*.

Environmental organizations likewise highlighted the need for S.B. 1 to create more transparency in the marketing of retail energy. One organization testified that "the whole RECs system is so opaque to the public" and that "[i]t is virtually impossible for the average person to find a third party provider whose RECs create new truly renewable energy." Test. of HoCo Climate Action, at 1 (Mar. 26, 2024), https://tinyurl.com/mr47h8vz. This organization complained about suppliers who "have swarmed to this state with poorly trained and duplicitous salespeople targeting low-income neighborhoods and the elderly with offers that are in the long term far more expensive than [standard offer service], enticing many to switch." *Id*. The witness therefore urged that S.B. 1 be adopted to stop "exploitation of Marylanders

in the name of 'CHOICE'" and improve transparency with respect to "climate benefits claimed" and the cost of "green" electricity. *Id*. at 1-2. Other witnesses similarly highlighted the lack of transparency in marketers' green energy claims. *See, e.g.,* Test. of Maryland League of Conservation Voters (Jan. 25, 2024), https://tinyurl.com/2vr46c83; Test. of SMECO, at 1 (Jan. 25, 2024), https://tinyurl.com/37bzjhbn.

All of this testimony accords with what the Federal Trade Commission has said about the marketing of "green" energy: According to the agency, "[r]esearch suggests that reasonable consumers may interpret renewable energy claims differently than marketers may intend." 16 C.F.R. § 260.15(b); *see also Green Guides Public Workshop*, 72 Fed. Reg. at 66,096 ("The nature of . . . REC claims raises particular challenges because consumers cannot easily verify that they are receiving that for which they paid."); Fed. Trade Comm'n, *Guides for the Use of Environmental Marketing Claims; Proposed Revisions to Guidelines*, 75 Fed. Reg. 63,552, 63,590 (Oct. 15, 2010) ("*Green Guides Proposed Revisions*") (highlighting comments that "consumers may believe that the renewable energy they purchase is generated in their geographic location, when . . . the utility may have purchased RECs generated in a distant location" and, to avoid consumer confusion, urging the FTC to require suppliers "to disclose that the renewable energy they sell is based on their purchase of RECs"); *id*. at 63,592 (observing that "[i]t is unclear whether

consumers interpret renewable energy claims to mean that the energy was generated in their location and, thus, yields local benefits"); Fed. Trade Comm'n, *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62,122, 62,124 (Oct. 11, 2012) ("Green Guides Revisions") (noting that consumers "*likely* interpret renewable energy claims differently than marketers may intend" (emphasis added)).

Maryland Enacts S.B. 1

Within that larger context, on May 9, 2024, Governor Wes Moore signed S.B. 1 into law. (J.A. 132.) Although S.B. 1 went into effect on July 1, 2024, the provisions at issue in this dispute applied prospectively beginning on January 1, 2025. (J.A. 131-132.) S.B. 1 creates a new two-tiered marketplace for retail electricity supply: one for electric energy comparable to standard offer service (in this brief, "regular power") and another for "green power." Pub. Util. §§ 7-510, 7-707 (LexisNexis Supp. 2024).

S.B. 1 imposes separate price caps for regular power and green power. *Id.* §§ 7-510(d)(2), 7-707(d). Where suppliers previously could charge customers whatever price their contracts permitted, retail suppliers of regular power are now prohibited from charging more than the twelve-month trailing average cost of utility standard offer service for the customer's service area. *Id.* § 7-510(d)(2). Suppliers of eligible green power may exceed the price cap applicable to regular power in

accordance with certain procedures for setting that price before the Commission. *Id.* §§ 7-510(d)(2)(iv), 7-707(d).

S.B. 1 also prescribes which products may be marketed as green power and, thus, eligible for sale at higher prices. Specifically, "[t]he 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 [must] equal[] or exceed[] 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." *Id.* § 7-707(c). This standard ensures that Maryland consumers who choose to pay rates for electricity that are higher than utilities' default standard offer service rates are purchasing energy that further advances Maryland's renewable energy goals. Electricity that does not meet this standard cannot be 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." *Id.* § 7-707(a), (c). Likewise, electricity that does not meet this standard is not eligible for sale to residential consumers at the higher rates allowed for green power. *Id*. § 7-707.

S.B. 1 also requires suppliers of green power to make certain factual disclosures designed to ensure that customers understand the product they are

deciding to purchase. For example, suppliers of green power must provide consumers with 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.

Id. § 7-707(f).

S.B. 1 also requires the Commission to adopt regulations that require suppliers of green power to include in their marketing materials a disclosure 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 renewal energy portfolio standard; and
>
> (5) the state in which the electricity was generated.

Pub. Util. § 7-707(g).

The green power rules do not apply to suppliers of electricity to commercial customers. *Id.* § 7-707(b). They also do not apply to (1) energy sales by the Maryland Department of General Services under § 7-704.4; or (2) a community

choice aggregator under § 7-510.3. *Id.* The Department of General Services, however, is not authorized to sell electricity directly to residential consumers, *id.* § 7-704.4 (LexisNexis Supp. 2024), nor is a community choice aggregator a retail supplier, *id.* § 7-510.3(g) (LexisNexis Supp. 2024).

Procedural Background

Plaintiffs filed this lawsuit challenging the constitutionality of S.B. 1 on October 1, 2024. (J.A. 6.) Their complaint sought injunctive and declaratory relief for alleged violations of the First Amendment and the dormant Commerce Clause. (J.A. 30-41.) Their motion for preliminary injunction, which advanced only a First Amendment claim, was filed the same day. (J.A. 43.) Following a hearing on November 18, 2024, the district court delivered an oral ruling denying the motion for preliminary injunction. (J.A. 241-278.) A written order followed on December 13, 2024. (J.A. 298.)

In denying preliminary injunctive relief, the district court determined that the speech at issue here "is plainly commercial pursuant to the First Amendment jurisprudence" because it promotes and explains a product or service. (J.A. 253.) In reaching this determination, the court rejected plaintiffs' argument that their speech "does more than propose a commercial transaction," observing that "[t]he speech at issue unequivocally relates to the promotion of products or services to Maryland consumers." (J.A. 254.) The court further observed that plaintiffs' position that their

speech was not commercial, if accepted, would "swallow[] [w]hole" the "framework for evaluation of commercial speech restrictions" by allowing a challenger to subject a restriction to strict scrutiny merely by contending that "the restricted speech also affects or impairs its ability to" express its views. (J.A. 254-255.) Thus, the court concluded, although "plaintiffs' ability to express their views related to the promotion of their products or services to Maryland consumers may be affected [by S.B. 1, that fact] does not transform the speech at issue [into] noncommercial speech." (J.A. 255.)

Having determined that plaintiffs' challenge to S.B. 1 involved commercial speech, the court applied the intermediate scrutiny test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). (J.A. 255.) First, the court determined that plaintiffs' speech, while not inherently or in fact misleading, "may be misleading based on the context." (J.A. 256.) Second, the court determined that the state has substantial interests in (1) protecting consumers from misleading advertising; and (2) regulating transactions, such as those at issue here, involving the sale of green power to consumers. (J.A. 256-258.) Third, after reviewing excerpts from S.B. 1's legislative history, the court found a "direct and plain" link between the legislation's marketing requirements and "the harm sought to be addressed by S.B. 1." (J.A. 263.) In this regard, the court rejected plaintiffs' assertion that S.B. 1 does not advance the state's interest because the legislation's

restrictions are inapplicable to the Department of General Services, community choice aggregators, and suppliers of electricity to commercial customers. (J.A. 264.) Finally, reasoning that S.B. 1's marketing restriction "targets particular misleading words in order to protect consumers," the court determined that the "restrictions at issue are tailored and limited to address" the identified government interests. (J.A. 267.) Expressing doubt "that a public awareness campaign would be effective," the court rejected plaintiffs' assertion that such a campaign was a less restrictive means for the state to advance its interests. (J.A. 268.)

Next, the court concluded that S.B. 1's disclosure requirements satisfy the test applicable to compelled speech under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). (J.A. 269-273.) In reaching this conclusion, the court observed that S.B.1 "does not require [plaintiffs] to make . . . nonfactual statements." (J.A. 270-271.)

Having determined that plaintiffs were unlikely to succeed on the merits, the court continued to the other preliminary injunction factors. Because plaintiffs had delayed in bringing their preliminary injunction motion and had chosen not to seek a temporary restraining order, the court observed that they had "contributed to their alleged potential harm by sitting still." (J.A. 275-276.) Thus, the court concluded that plaintiffs had failed to establish "that the balance of equities and public interest favor injunctive relief." (J.A. 274.) This appeal followed.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying plaintiffs' motion for preliminary injunction. Most significantly, plaintiffs failed to demonstrate a likelihood of success on the merits of their First Amendment challenge to S.B. 1. The speech in question here, marketing of retail electricity to consumers, is commercial. Under *Central Hudson*, it therefore is entitled to less protection than core protected speech.

Here, the first *Central Hudson* factor is dispositive because the speech in question is inherently and in fact misleading. Before the enactment of S.B. 1, retail electricity suppliers could advertise to Maryland consumers that the products they were sold were "100% wind" or "100% solar" when, in fact, the electricity was no different from less expensive electricity purchased by their neighbors at standard offer service rates. Consumers, in turn, did not understand that the electricity they purchased was "green" because it was backed by RECs, not because it was generated from a renewable source.

Even if the commercial speech is only potentially misleading, the other *Central Hudson* factors require that S.B. 1's marketing restriction be upheld. As plaintiffs concede, Maryland has a substantial interest in consumer protection, especially in the highly regulated field of retail energy. Furthermore, Maryland has a substantial interest in promoting development of renewable energy sources in

Maryland and the surrounding area. S.B. 1 advances these interests by precluding electricity suppliers from marketing power as "green" unless it is backed by regionally generated RECs in a manner that distinguishes it from regular power. Finally, S.B. 1's required disclosures are constitutional under *Zauderer* because they are factual, uncontroversial, and reasonably related to the State's interest in ensuring that consumers are not misled or deceived. *See Zauderer*, 471 U.S. at 65.

The remaining preliminary injunction factors also favor the State. Plaintiffs cannot show irreparable harm because they are unlikely to succeed on the merits of their First Amendment claim. As for the balance of the equities and the public interest, not only did plaintiffs delay in seeking extraordinary injunctive relief, but continued misleading advertising—which an injunction would allow—would significantly harm the public and the State. And even if an injunction were appropriate, the challenged provisions are severable from the remainder of S.B. 1.

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF THE PRELIMINARY INJUNCTION IS REVIEWED FOR ABUSE OF DISCRETION AND LEGAL ERROR.

"A plaintiff seeking a preliminary injunction must establish 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." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20

(2008). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. at 22.

This Court, in turn, reviews a decision denying a preliminary injunction for abuse of discretion, *Roe v. Department of Def.*, 947 F.3d 207, 219 (4th Cir. 2020), and, as part of that review, assesses the lower court's legal conclusions de novo and factual findings for clear error. *Pierce v. North Carolina State Bd. of Elections*, 97 F.4th 194, 210 (4th Cir. 2024); *Vitkus v. Blinken,* 79 F.4th 352, 361-62 (4th Cir. 2023). A district court "abuses its discretion in denying preliminary injunctive relief when it misapprehends the law with respect to underlying issues in litigation." *Vitkus*, 79 F.4th at 362 (quotation marks, brackets, and ellipsis omitted). "[M]ere disagreement with the district court," however, "does not make its findings clearly erroneous" or warrant reversal. *Pierce*, 947 F.4th at 210.

II. THIS APPEAL PRESENTS ONLY A FACIAL CHALLENGE TO S.B. 1.

Plaintiffs' complaint and motion, both filed before the effective date of S.B. 1, presented only a facial challenge. (J.A. 7, J.A. 43; *see also* ECF No. 22, at 2-4 (plaintiffs' reply memorandum).) And, at oral argument below, the parties all concurred that plaintiffs were raising only a facial challenge. (J.A. 219, J.A. 231, J.A. 239-240.) On appeal, however, plaintiffs repeatedly assert that S.B. 1 is unconstitutional as applied to them. *E.g.*, Appellants' Br. 21, 51-52, 55. Because plaintiffs made no such argument below, this Court should not consider it and,

instead, should treat this as a facial challenge.[3] *See Sines v. Hill*, 106 F.4th 341, 349 (4th Cir. 2024); *see also United States v. Stevens*, 559 U.S. 460, 473 n.3 (2010) (observing that case-specific "factual assumptions . . . can be evaluated only in the context of an as-applied challenge"); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

To prevail on a facial challenge, plaintiffs must show that "no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep." *Educational Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013) (quotation marks omitted). Alternatively, they may show that "a substantial number of [S.B. 1's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (quotation marks omitted); *see id.* (as-applied challenges turn on a developed factual record and the application of a statute to a specific person). "[F]acial challenges are disfavored" in the First Amendment context. *Moody v. NetChoice, LLC*, 603 U.S. 707, 744 (2024).

[3] In that same regard, six states have filed an amicus brief arguing that S.B. 1 should be enjoined because it violates the dormant Commerce Clause. Although the complaint includes a dormant Commerce Clause challenge, that challenge was not a basis for plaintiffs' preliminary injunction motion (J.A. 43) and thus is not before this Court.

Thus, this Court has cautioned that "[a] facial challenge to a statute's constitutionality presents a high bar, and courts must typically take care not to . . . speculate about hypothetical or imaginary cases." *Chamber of Com. v. Lierman*, 90 F.4th 679, 688-89 (4th Cir. 2024) (quotation marks omitted; ellipsis in original).

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

The district court properly applied the *Central Hudson* test to S.B. 1's restriction on marketing green power and the *Zauderer* test to the legislation's disclosure requirements. Plaintiffs are not likely to succeed on the merits of their First Amendment claim because each of the challenged provisions satisfies the applicable constitutional requirements.

A. S.B 1's Marketing Restriction Does Not Violate the First Amendment.

1. The *Central Hudson* Test Applies to S.B. 1's Regulation of Commercial Speech.

Because of its "subsidiary status," commercial speech may be "subjected to modes of regulation that might be impermissible in the realm of noncommercial expression." *Recht v. Morrissey*, 32 F.4th 398, 408 (4th Cir. 2022). Under the test the Supreme Court articulated in *Central Hudson*, "the government may freely regulate commercial speech that concerns unlawful activity or is misleading." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). Further, "[c]ommercial speech that falls into neither of those categories, . . . may be regulated

if" (1) the government asserts a substantial interest to support the regulation; (2) the government demonstrates that the restriction on commercial speech directly advances that interest; and (3) the regulation is not more extensive than necessary to serve the interest. *Id*. at 624; *see also Recht*, 32 F.4th at 408 (explaining the *Central Hudson* test and stating that "[s]trict scrutiny is . . . improper when reviewing laws that regulate commercial speech."). The *Central Hudson* test applies to all regulation of commercial speech, whether content-neutral or content-based. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) ("[C]ontent-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech."); *Recht*, 32 F.4th at 409.

By its "plain meaning," commercial speech relates to commercial transactions and includes "speech that proposes a commercial transaction." *Maryland Shall Issue, Inc. v. Anne Arundel County*, 91 F.4th 238, 248 (4th Cir. 2024). Commercial speech also encompasses speech that relates solely to the economic interests of the speaker and its audience, as well as speech connected with the sale of a good or service.[4] *Id*. In determining whether speech is commercial, courts consider whether

[4] Quoting *Maryland Shall Issue*, plaintiffs suggest that commercial speech is "solely" limited to speech that relates to the economic interests of the speaker and its audience. Appellants' Br. 27. A close reading of that decision makes clear, however, that *Maryland Shall Issue* was providing an example of what could constitute commercial speech, not narrowing the definition of commercial speech. *See* 91 F.4th at 248.

(1) the speech is an advertisement; (2) the speech refers to a product or service, and (3) the speaker had an economic motivation for the speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013). "While the combination of all these characteristics . . . provides strong support for the . . . conclusion that speech is properly characterized as commercial speech, it is not necessary that each of the characteristics be present in order for speech to be commercial." *Greater Baltimore Ctr.*, 721 F.3d at 285 (brackets, quotation marks, and citation omitted; ellipses in original); *see also Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 369 (4th Cir. 2012) ("*Bolger* recognized a broader definition of commercial speech, encompassing speech that 'cannot be characterized merely as proposals to engage in commercial transactions.'" (quoting *Bolger*, 463 U.S. at 66)).

Here, although plaintiffs ignore the *Bolger* factors altogether, the speech regulated by S.B. 1 implicates all three of them. First, by its express terms, S.B. 1 applies to electricity suppliers seeking to "market" green power to residential retail customers.[5] Pub. Util. § 7-707(a), (c). S.B. 1 does not purport to preclude suppliers

[5] The absence of a statutory definition of "market" does not, as plaintiffs suggest, render S.B. 1 a regulation of noncommercial speech. Appellants' Br. 28. The dictionary definition of "market" as "the process or technique of promoting, selling, and distributing a product or service" is sufficient to define the commercial conduct to which S.B. 1 is directed. *See Marketing*, Merriam-Webster Dictionary,

from using words such as "clean" and "green" in contexts unrelated to marketing of green power to Maryland residential consumers, including in connection with their political advocacy and their efforts to promote "'a greener lifestyle . . . through the use of clean energy.'" Appellants' Br. 28-29. Second, S.B. 1 regulates only electricity suppliers and pertains only to a specific product suppliers may seek to sell, namely, green power. *Id.* Third, S.B. 1 regulates suppliers who derive revenue from selling electricity and who thus have an economic motivation to market their products to residential consumers. Accordingly, the district court correctly determined that "[t]he speech at issue here, that is speech promoting a product or service and explaining it, is plainly commercial." (J.A. 253-254.)

The Supreme Court's decision in *Sorrell* does not suggest, as plaintiffs claim, that S.B. 1 should be subject to strict scrutiny rather than the *Central Hudson* framework. In *Sorrell*, the Supreme Court "applied the *Central Hudson* framework to a concededly content-based law." *Recht*, 32 F.4th at 409; *see also Insley*, 731 F.3d at 298 (observing that *Sorrell* applied "*Central Hudson* alone"). And in applying the *Central Hudson* test, the Court struck down the Vermont law at issue because it was not tailored to serve the state's asserted interest—not because the law

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https://www.merriam-webster.com/dictionary/marketing (last visited Apr. 14, 2025); *see also Air Line Pilots Ass'n, Int'l v. US Airways Grp., Inc.*, 609 F.3d 338, 342 (4th Cir. 2010) (in the absence of a statutory definition, statutory terms are construed to have their ordinary or natural meanings).

did not regulate commercial speech. *See Sorrell*, 564 U.S. at 576-80. Plaintiffs' citations to cases involving noncommercial, core protected speech to support an argument for strict scrutiny are unavailing because this case involves commercial speech. *See* Appellants' Br. 25-26 (citing cases such as *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which involved a sign code regulating noncommercial speech, and *Cohen v. California*, 403 U.S. 15 (1971), which involved a jacket with the words "F--- the Draft").

Plaintiffs are likewise wrong to argue that strict scrutiny must apply because their commercial and noncommercial speech are inextricably intertwined. Appellants' Br. 29-30. This Court rejected a similar argument in *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded for further consideration*, 517 U.S. 1206 (1996), *readopted*, 101 F.3d 325 (4th Cir. 1996). There, an ordinance prohibiting outdoor advertising of alcoholic beverages in certain areas of Baltimore was upheld against a First Amendment challenge. *Id.* at 1308. Like plaintiffs here, who argue that portions of their marketing materials are devoted to noncommercial speech, the plaintiff in *Anheuser-Busch* argued that the ordinance was unconstitutional because it effectively banned the portion of its billboards devoted to noncommercial public service messages about, for example, underage drinking. *Id*. at 1317.

In rejecting that argument, *Anheuser-Busch* observed that commercial speech is not so narrowly defined as to exclude speech that both publicizes a product and provides information about "important public issues." *Id*. at 1318 (citation omitted). In so reasoning, the decision relied on the Supreme Court's statement that "[w]e have made clear that advertising which links a product to a current public debate is not thereby entitled to constitutional protection afforded noncommercial speech." *Id*. (quoting *Bolger*, 463 U.S. at 68) (internal quotation marks omitted); *see also Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 441 (4th Cir. 1999) ("[I]f a communication, at bottom, proposes a commercial transaction, the fact that it contains some commentary about issues of public interest will not alter its nature." (citing *Board of Trs. v. Fox*, 492 U.S. 469, 475 (1989)).[6] Observing that Baltimore had not threatened to enforce the ordinance against any public service messages, *Anheuser-Busch* concluded that the "question of whether a

[6] To the limited extent courts have applied strict scrutiny to commercial speech intertwined with noncommercial speech, they have done so only when "it is impossible to extricate the commercial aspects of a statement from its noncommercial aspects." *Federal Trade Comm'n v. Agora Fin., LLC*, 447 F. Supp. 3d 350, 362 (D. Md. 2020) (citing *Fox*, 492 U.S. at 474). This is a "'narrow exception to the general principle that speech meeting the *Bolger* factors will be treated as commercial speech.'" *Id*. (quoting *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012)); *see also Fox*, 492 U.S. at 474-75 (holding that educational aspects of product presentations were not inextricably intertwined with regulated commercial speech).

particular billboard falls within the ordinance's proscription is . . . a hypothetical one" that was not before the court. *Id*. at 1318.

Here, Green Mountain and REAL's members are for-profit entities whose overriding mission is to earn revenues from the sale of electricity. Under *Anheuser-Busch,* any effort to clothe their marketing materials with messages promoting environmental issues would not trigger strict scrutiny.[7]

S.B. 1 regulates marketing, which, by definition, is commercial speech. As such, the district court properly determined that it must "conform its analysis . . . to the *Central Hudson* standard applicable to claims arising from commercial speech." (J.A. 255.) To the extent the State, in the future, seeks to enforce S.B.1 against

[7] Although plaintiffs cite CleanChoice Energy's 2024 Voter Guide as an example of purportedly noncommercial speech regulated by S.B. 1, *see* Appellants' Br. 28-29, the Voter Guide in fact serves the purpose of marketing to potential customers. For example, at the bottom of the Voter Guide page, a consumer may subscribe to "receive CleanChoice's email newsletter and special promotional offers." CleanChoice Energy, *Climate Voter Guide 2024*, https://cleanchoiceenergy.com/news/climate-voter-guide (last visited Apr. 14, 2025). Further, a pop-up window prompts consumers to enter an email address to "[u]nlock special offers, sun-sational content, and more." *Id*. Finally, by clicking the "Get Started" button at the top of the page, consumers can begin "switch[ing] to 100% clean, renewable energy in just a few minutes." *Id.*; CleanChoice Energy, *Ready to Sign Up?*, https://cleanchoiceenergy.com/enroll (last visited Apr. 14, 2025).

Green Mountain similarly uses its website to entice consumers to purchase electricity. *See* Green Mountain Energy Co., *Renewable Energy Plans for Your Home*, https://www.greenmountainenergy.com/en/home-energy-solutions/shop-for-electricity (last visited Apr. 14, 2025).

speech that a supplier believes is noncommercial, the supplier can bring an as-applied challenge addressing the specific speech in question.

2. The Speech Regulated by S.B. 1 Is Inherently and In Fact Misleading.

The First Amendment does not protect commercial speech that is inherently misleading or in fact misleading. *See Recht*, 32 F.4th at 410-12; *accord Florida Bar*, 515 U.S. at 623-24 ("[T]he government may freely regulate commercial speech that . . . is misleading."); *Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it . . . ."); *Anheuser-Busch*, 63 F.3d at 1313 ("[I]n order to be entitled to *any* First Amendment protection, the speech must . . . concern lawful activity and not be misleading." (emphasis in original)). That commercial speech is "inherently misleading" may be inferred from the "particular content or method of the advertising" as well as from "experience [that] has proved that in fact such advertising is subject to abuse." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

If regulated commercial speech is inherently or in fact misleading, the analysis of the regulation ends, and a reviewing court need not analyze the remaining *Central Hudson* factors. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("[T]he State may ban commercial expression that is fraudulent or deceptive without further justification

. . . ."); *Recht*, 32 F.4th at 411-12. Here, this threshold question is dispositive because S.B. 1 regulates speech that is both inherently and in fact misleading.[8]

Suppliers' representations of delivering "100% wind electricity" (for instance) are untrue unless the customer's residence is physically connected to a windmill, and their representations of delivering "100% solar electricity" are untrue unless the residence is physically connected to solar panels. And as the legislative history discussed above reflects, in response to retail electricity suppliers' claims that they were selling wind or solar power, residential consumers switched to those suppliers' more expensive electricity. Consumers have made the switch with the understanding that their residences would in fact be served by electricity generated from a renewable source, only to later learn that they were paying more for the same electricity received by their neighbors who were paying standard offer service rates. Those consumers did not understand that their suppliers' marketing claims were based upon the suppliers' purchases of RECs, that the RECs may not have been created from generation sources that contribute to the PJM grid from which

[8] Plaintiffs are incorrect to assert that the State can prevail *only* if it demonstrates that S.B. 1 regulates commercial speech that is misleading. Appellants' Br. 33, 42. As noted, if commercial speech is inherently or in fact misleading, it is not entitled to First Amendment protection at all. Otherwise, commercial speech is analyzed under the remaining *Central Hudson* factors. *See, e.g., Florida Bar*, 515 U.S. at 624 (explaining that "[c]ommercial speech [that is neither unlawful nor misleading] may be regulated if the government satisfies" the *Central Hudson* test).

Maryland consumers draw their electricity, or that sources of electricity—whether renewable or conventional—cannot be differentiated once the electricity is introduced onto the grid.

Courts, regulators, and even suppliers recognize the complexity of RECs to the average consumer. Green Mountain's own website tries to explain RECs with an analogy to Velcro. *See* Green Mountain Energy Co., *What the Heck is a REC?*, https://www.greenmountainenergy.com/en/blog/business-news/part-1-what-the-heck-is-a-rec (last visited Apr. 14, 2025). In *Direct Energy,* Connecticut adopted a marketing restriction akin to S.B. 1 "to improve consumer transparency and further [that] state's clean energy goals." 347 Conn. at 114-15, 141-42. In determining that Connecticut's marketing restriction did not violate the dormant Commerce Clause, the court explained:

> [The state regulatory authority] is well aware from its years of customer education and interactions that customers do not understand the concept of a REC. When customers are told they are purchasing renewable energy, they think they are purchasing renewable energy. They are not. They are purchasing a certificate, which purchase provides additional revenue to facilities providing renewable generation, both incentivizing more construction of renewable sources and providing financial assistance to those sources. This is a complex transaction that is being oversimplified by stating that the customer is purchasing renewable energy.

Id. at 141-42 (quoting the state regulatory authority; quotation marks and ellipses omitted). Similarly, the Federal Trade Commission has determined that consumers will likely be confused about RECs and that they are likely to interpret green energy

claims differently from how marketers intended. *See, e.g.*, 16 C.F.R. § 260.15(b); *Green Guides Public Workshop*, 72 Fed. Reg. at 66,096; *Green Guides Proposed Revisions*, 75 Fed. Reg. at 63,590, 63,592; *Green Guides Revisions*, 77 Fed. Reg. at 62,124.[9]

S.B. 1 prevents these harms. Suppliers who do not meet its requirements may not market electricity using language, such as "clean" and "green," that actual experience and common sense have shown results in consumer confusion. They may do so only if they ensure that their products are differentiated from electricity marketed as regular power.

When the inherently misleading nature of commercial speech is self-evident, courts uphold its regulation without considering the remaining prongs of the *Central Hudson* test. *See Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (upholding ban on unlicensed accountants' use of the terms "public accountant" or "PA" and ban on non-CPAs' use of certain technical terms in their reports);

[9] The Green Guides "are not agency rules or regulations"; rather, they "describe the types of environmental claims the [Federal Trade Commission] may or may not find deceptive under Section 5 of the [Federal Trade Commission] Act." Fed. Trade Comm'n, *FTC Issues Revised "Green Guides"* (Oct. 1, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/10/ftc-issues-revised-green-guides (last visited Apr. 14, 2025); *see also Direct Energy*, 347 Conn. at 138-39 (noting that these guidelines do not forbid "a state from enacting more rigorous marketing requirements"); 16 C.F.R. § 260.1(a), (b) (providing that the Green Guides do not preempt state or local laws, "do not confer any rights on any person[,] and do not operate to bind the [Federal Trade Commission] or the public").

American Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1107-08 (9th Cir. 2004) (upholding ban on physicians advertising that they are "board certified" unless the certifying entity meets certain requirements); *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 108 (2nd Cir. 2000) (misleading statements in advertising of computer software not entitled to First Amendment protection); *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754, 756-58 (5th Cir. 1994) (upholding ban of the term "invoice" in automobile advertisements). That approach is appropriate here because the terms regulated by S.B. 1 are inherently misleading when used in the marketing of electricity.

3. Maryland Has Substantial Interests in Consumer Protection and Development of Local Generation of Renewable Energy.

Even if the marketing regulated by S.B. 1 is not inherently and in fact misleading, and is therefore protected by the First Amendment, S.B. 1 is constitutional under *Central Hudson* because it directly advances two state interests.[10] First, it advances the State's interest in consumer protection. Courts have recognized that States hold a substantial "interest in protecting consumers and regulating commercial transactions." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447,

[10] That S.B. 1 exempts certain entities does not undermine the government's interests, *see* Appellants' Br. 38-39, because those entities are not similarly situated to for-profit suppliers of electricity to residential consumers. *See* discussion at pages 18-19 above.

460 (1978); *see also In re R.M.J.*, 455 U.S. 191, 202 (1982) (explaining that the "public's comparative lack of knowledge" about professional services, among other factors, "renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling"); *Recht*, 32 F.4th at 413. The State's interest is particularly strong here because S.B. 1 involves a heavily regulated industry, State-licensed suppliers, and a State-created intangible asset. *See Ohralik*, 436 U.S. at 460 (stressing that the State's interest in protecting consumers was "particularly strong" with respect to regulation of advertising by licensed professionals). Not only that, but as the legislative record of S.B. 1 reveals, the "green" electricity industry has shown itself to be especially susceptible to abuse.

Plaintiffs do not challenge the validity of the State's interest in protecting consumers. Instead, they assert that the consumer protection justifications for S.B. 1 were "invented *post hoc* in response to litigation." Appellants' Br. 33 (quotation marks omitted). That assertion ignores the testimony of S.B. 1's sponsors, consumers, advocacy groups, and others about the need for the legislation. *See* discussion at pages 9-16 above. It also ignores that the subject matters of electricity supply, RECs, and the RPS are arcane and confusing to the average consumer, leaving them at a disadvantage when communicating with marketers of "green" electricity.

Second, by requiring marketers of green power to surpass the minimum RPS, *see* Pub. Util. § 7-707(c), and therefore offer a higher percentage of electricity backed by RECs that count toward Maryland's RPS, S.B. 1 furthers the substantial state interest in promoting development of renewable energy sources in Maryland and the PJM region. (J.A. 221-222); *see* Pub. Util. § 7-701(m) (defining RECs).[11] Development of renewable energy sources outside of the PJM region would not advance these legislative goals. *Cf. Direct Energy*, 347 Conn. at 113-14, 128-35 (explaining that displacement of fossil fuel resources and RECs generated in distant states such as Texas and California has "little to no effect on [Connecticut's] environment"). S.B. 1 thereby helps to achieve the goals the General Assembly articulated in adopting the RPS, including diversifying energy sources available to Marylanders, reducing greenhouse gas emissions, promoting a healthier environment, and providing economic opportunities for Marylanders. *See id.* § 7-702; Env't § 2-1201(7), (8).

That conclusion is consistent with the Second Circuit's treatment of Connecticut's RPS. As with Maryland's RPS, only state law-defined RECs count towards the requirements of Connecticut's RPS. *Allco*, 861 F.3d at 93. Like

[11] Plaintiffs cite to an interpretation of S.B. 1 by the Commission's technical staff. Appellants' Br. 14. The Commission's technical staff appears as a party before the Commission, however, and has its own legal counsel. Pub. Util. § 2-108(d) (LexisNexis Supp. 2024). Unless adopted by the Commission, staff interpretations have no legal authority.

Maryland RECs, Connecticut RECs are generated by renewable energy sources located within the grid from which that State draws electricity. *Id*. And, like Maryland's statutory scheme, the purpose of Connecticut's geographic limitation on RECs is to encourage local development of new sources of renewable energy and, among other things, to improve air quality for the State's citizens. *Id*. In upholding Connecticut's statutory scheme against a dormant Commerce Clause challenge, the Second Circuit "recognize[d] the importance of Connecticut's interest in protecting the market for RECs produced within [the grid that serves Connecticut] or in adjacent areas." *Id*. at 106. "Connecticut's RPS program," the court continued, "serves its legitimate interest in promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power." *Id*.; *accord Direct Energy*, 347 Conn. at 128-30; *cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (recognizing the government's interest in maintaining parks); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (recognizing the government's interest in combatting visual blight); *Recht*, 32 F.4th at 412-13 (recognizing the state's substantial interest in protecting public health). Maryland's interest in promoting the development of regional renewable energy sources through its RPS is no less substantial here, in the context of plaintiffs' First Amendment challenge to S.B. 1.

4. S.B. 1 Directly Advances Maryland's Substantial Interests.

To demonstrate that S.B. 1 directly advances Maryland's substantial interests, the State "'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Recht*, 32 F. 4th at 413 (quoting *Edenfield*, 507 U.S. at 770-71). The State's burden is modest, though. It need not present empirical data "accompanied by a surfeit of background information." *Id*. (quotation marks omitted). Instead, commercial speech restrictions may be justified "by reference to studies and anecdotes pertaining to different locales altogether—or even based solely on history, consensus, and simple common sense." *Id*. at 413-14 (quotation marks omitted); *see also Anheuser-Busch,* 63 F.3d at 1311 ("If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met."). The inquiry "does not involve as strict a nexus as that inherent in the traditional tort concept of causation"; rather, the question is only "whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." *Anheuser-Busch*, 63 F.3d at 1313; *see id.* at 1314 (explaining that the State need not "prove conclusively that [a] correlation in fact exists" between the legislative objective and the means selected to achieve it "or that the steps undertaken will solve the problem").

S.B. 1 easily meets this standard. First, as to consumer confusion, the legislative record is replete with testimony that consumers have been misled to their financial detriment by suppliers who sold them "green" electricity that was not what they understood it to be. Indeed, the district court observed that the commercial speech at issue "may be misleading based on the context." (J.A. 256.) Even plaintiffs' counsel acknowledged below that consumers mistakenly "thought a wind farm was connected to [their] house" because "[t]hey didn't understand the concept of a REC."[12] (J.A. 235-236.)

Because they cannot credibly assert that RECs and the transactions by which they are created are not inherently confusing, plaintiffs suggest that S.B. 1 focuses only on alleviating consumer confusion about the geographic source of RECs. *E.g.,* Appellants' Br. 35-36. Although the legislation does ensure that consumers are informed of where REC-backed electricity is generated, *see* Pub. Util. § 7-707(g)(5), plaintiffs' focus is misdirected. If, as is apparent, consumers do not first understand that the "green" electricity they buy is backed by RECs, they certainly will not grapple with the question of where the REC-backed electricity was generated. And

[12] Consumers' strong interest in having their homes directly receive electricity generated by renewable sources, and their dismay upon learning that they had merely bought electricity backed by RECs, undermines plaintiffs' suggestion that the consumers were principally motivated by global environmental issues. *See* Appellants' Br. 35.

the Federal Trade Commission has warned of consumer confusion regarding RECs, including whether they will yield local environmental benefits. *See* discussion at pages 15-16 above.

Thus, S.B. 1's marketing restriction works together with its disclosure requirement to ensure that Maryland consumers know that the "green" power they buy is backed by RECs, know what RECs are, know where the renewable electricity that created the RECs was generated, and know what percentage of the RECs meet Maryland's RPS requirements. The restriction also protects consumers from marketers who might make "green" and "clean" energy claims with respect to electricity that is indistinguishable from regular power, which merely meets the minimum RPS requirement set forth in § 7-703.

Second, the 51% REC requirement to market green power directly furthers Maryland's interest in promoting development of renewable electricity sources within Maryland and PJM, the area from which Marylanders obtain electricity. *See Allco*, 861 F.3d at 107 (observing that the geographic distinctions in Connecticut's RPS "piggyback[ed]" on geographic lines drawn by FERC in instituting "a sort of regionalization of the national electricity market"). Development of local renewable electricity sources, in turn, helps Maryland meet its goals of reducing local greenhouse gas emissions, improving local air quality and public health, and providing Marylanders with economic opportunities. *See* Pub. Util. § 7-702; Env't

§ 2-1201(7), (8).[13] And Maryland consumers can buy green power secure in the knowledge that more than half the electricity that yielded the RECs directly benefits Marylanders. Generation of renewable electricity in distant states outside PJM, like Texas, does not further these interests.

5. S.B. 1's Restrictions Are Not More Extensive Than Necessary.

To satisfy the last prong of the *Central Hudson* test, Maryland need not "employ the least restrictive means conceivable" to advance the State's interests. *Recht*, 32 F.4th at 398 (quotation marks omitted). Rather, "there needs to be a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quotation marks omitted). Because "it is difficult to 'establish with precision the point at which restrictions become more extensive than their objective requires,

[13] *See also Allco*, 861 F.3d at 93, 105-07 (explaining that Connecticut's need for a diversified renewable energy supply would not be served by RECs produced by a facility that does not contribute to Connecticut's grid and, thus, that "Connecticut's RPS program serves its legitimate interest in promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power"); *Direct Energy*, 347 Conn. at 113-14, 128-35 (in determining that the geographic restriction in Connecticut's RPS furthers the State's environmental goals, explaining that locally sourced RECs help to create demand for renewable electricity and displace fossil fuel resources within a region that "will provide environmental benefits to Connecticut," but that displacement of fossil fuel resources and generation of RECs in distant states has "little to no effect on [Connecticut's] environment").

this standard gives the State needed leeway in a field (commercial speech) traditionally subject to governmental regulation." *Id.* (quotation marks and brackets omitted). Thus, "only when a regulation is 'substantially excessive, disregarding far less restrictive and more precise means[,]' will the regulation be invalidated under this prong of *Central Hudson*." *Anheuser-Busch,* 63 F.3d at 1315 (quoting *Fox*, 492 U.S. at 479).[14] This standard permits States to regulate commercial speech before any harm occurs. *See, e.g., Ohralik*, 436 U.S. at 466-67 (observing that the "efficacy of the State's effort to prevent" harm to consumers "would be substantially diminished if . . . the State were required . . . to prove actual injury" and holding that it was "not unreasonable, or violative of the Constitution" for the State to adopt a prophylactic rule to protect consumers).

This Court's decision in *Recht* illustrates the required fit between the regulation and the State's interests. *Recht* upheld a West Virginia law regulating lawyers' advertisements targeting clients in litigation involving medications or medical devices. 32 F.4th at 416. In so ruling, the Court explained that the State's

[14] Although plaintiffs assert that *Central Hudson* requires the government to attempt less intrusive measures before regulating commercial speech, the case they cite does not involve commercial speech or the application of *Central Hudson*. *See* Appellants' Br. 43, 46 (citing *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020)). Here, citing *Recht*, the district properly observed that "the state need not pursue . . . an alternative where it is doubtful that it would prove more effective." (J.A. 265.)

prohibition of advertisements styled as consumer medical alerts was sufficiently tailored, and noted that "each prohibition targets particular misleading words or images in order to protect public health and prevent citizens from taking misguided medical actions based on attorney advice." *Id.* at 414. The West Virginia law in question did "not strip attorneys of the ability to advertise." *Id.*

S.B. 1 similarly passes the test. It advances Maryland's interests in protecting consumers and promoting the development of local sources of renewable energy by (1) defining what electricity can be marketed as "green" and sold at higher rates; and (2) requiring certain disclosures to consumers. Suppliers are not prohibited from advertising their electricity or from selling it at regular power rates. And they may market electricity as green power at higher rates, as long as the electricity meets Maryland's requirements for green power. Nor are suppliers barred from purchasing RECs created outside the PJM region, even though such RECs do not count toward the definition of "green power." *See Allco*, 861 F.3d at 93 (noting that there was no bar on purchasing out of network RECs).

Plaintiffs' suggestion that Maryland might undertake an online educational campaign for consumers does not warrant a conclusion that S.B. 1 is unconstitutional. Appellants' Br. 44-45. *Recht* rejected a similar suggestion, observing that a public awareness campaign would not be more effective than the West Virginia law's prohibition and that misleading speech would "wipe out the

potential benefits of such a campaign." 32 F.4th at 415. Here, the benefits of an online campaign could easily be eradicated by contrary messages directed to consumers from suppliers not bound by marketing restrictions. The district court rightly rejected this approach, noting that it would be unlikely to be effective, let alone more effective than S.B. 1. (J.A. 268.)

Plaintiffs' assertion that the protections of S.B. 1 are unnecessary due to existing consumer protection laws and disclosure requirements also does not support their challenge. Appellants' Br. 44-45. In *Recht*, this Court rejected a similar assertion based on an existing West Virginia law, reasoning that the challenged law must "stand or fall on its own merits independent of whether it overlaps" with other laws. 32 F.4th at 415 (quotation marks omitted). In addition, in focusing on whether S.B. 1 is tailored to protect consumers, plaintiffs ignore that the 51% REC requirement furthers Maryland's interest in *also* promoting local development of renewable electricity sources.

In sum, S.B. 1's reasonable restriction on misleading commercial speech, coupled with its mandatory factual disclosures, helps to ensure that Maryland electricity consumers will understand the products they purchase. Likewise, S.B. 1's definition of green power, in concert with the well-established Maryland RPS program, is reasonable and narrowly tailored to achieve Maryland's energy interests. By no means does S.B. 1 use "substantially excessive" means to advance Maryland's

interests. *See Anheuser-Busch,* 63 F.3d at 1315. Accordingly, under the *Central Hudson* test, the marketing restrictions in S.B. 1 are constitutional.

B. S.B 1's Disclosure Requirements Do Not Violate the First Amendment.

While prohibitions on commercial speech must pass the *Central Hudson* test, under *Zauderer*, "laws requiring advertisers to disclose 'purely factual and uncontroversial information' are permissible as long as the disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers.'" *Recht*, 32 F.4th at 416 (quoting *Zauderer*, 471 U.S. at 651); *accord Maryland Shall Issue*, 91 F.4th at 247. When, as here, "'the possibility of deception'" is "'self-evident,'" the government need not show that the regulated advertisements are misleading. *Spirit Airlines, Inc. v. United States Dep't of Transp.*, 687 F.3d 403 (D.C. Cir. 2012) (quoting *Zauderer*, 471 U.S. at 652-53); *see also R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1212 (D.C. Cir. 2012) (explaining that the *Zauderer* test is "akin to rational-basis review").

S.B. 1 requires a factual disclosure that a REC is an intangible asset, equal to one megawatt-hour of renewable energy generation, that can be sold separately from electricity. Pub. Util. § 7-707(f). Green Mountain's website provides essentially the same factual information:

> Renewable energy certificates (aka renewable energy credits, or RECs) represent the environmental and other non-power attributes of renewable electricity generation and are part of most renewable

> electricity products. RECs are measured in 1 megawatt-hour (MWh) increments of power generated from renewable sources . . . and can be traded separately from the actual electricity produced by renewable facilities.

Green Mountain Energy Co., *What Is Clean Energy?*, https://www.greenmountainenergy.com/en/why-renewable-energy/benefits-of-clean-electricity (last visited Apr. 14, 2025). REAL also provides the same information on its website. *See* REAL, *Answering the Customer Call for Clean Energy*, https://www.retailenergychoice.org/answering-the-customer-call-for-clean-energy/ (last visited Apr. 14, 2025).[15]

The other disclosures required by S.B. 1 are also purely factual and thus unproblematic. Suppliers must disclose (1) what the customer will actually be paying; (2) how the electricity underlying REC-backed electricity was generated; (3) how the green power will benefit the environment; (4) the percentage of electricity provided by the supplier that counts towards Maryland's RPS; and (5) the State in which the electricity was generated. Pub. Util. § 7-707(g).

Plaintiffs are wrong to contend that S.B 1 compels them to express an opinion by requiring them to state that a REC represents a "social good." Appellants' Br. 30-31. As the district court explained (J.A. 271-272), plaintiffs isolate these words from their context, as the full required sentence is: "A REC represents the social

[15] These disclosures by Green Mountain and REAL predate the effective date of S.B. 1. (ECF No. 14, at 24.)

good that accompanies 1 megawatt-hour of renewable electricity generation." Pub. Util. § 7-707(f). Plaintiffs' argument is "not about factual accuracy [but] about wordsmithing." (J.A. 272.) And to the extent a supplier objects to specific words in the statutorily required disclosure, it may submit a proposed alternative disclosure for the Commission's approval. Pub. Util. § 7-707(f)(2).

National Institute of Family & Life Advocates v. Becerra, 585 U.S. 755 (2018) ("*NIFLA*") does not support plaintiffs' contentions. They rely on *NIFLA* to argue that S.B. 1's required disclosures are unconstitutional because they are purportedly controversial. Appellants' Br. 31. This case, though, is nothing like *NIFLA*. There, the Court struck down, as requiring "controversial" disclosures, a California law that required clinics serving pregnant women to disclose that California provides free or low-cost abortion services and a phone number to obtain such services. 585 U.S. at 761. Both *Recht* and *Maryland Shall Issue* declined to apply *NIFLA* to the factual disclosures at issue in those decisions, deeming them uncontroversial. *See Maryland Shall Issue*, 91 F.4th at 249 (upholding ordinance requiring gun sellers to distribute a pamphlet, prepared by county health department, with information about gun safety, gun training, suicide prevention, mental health, and conflict resolution); *Recht*, 32 F.4th at 416-17 (upholding statute mandating that attorney advertisements soliciting clients in medication or medical device litigation include a warning to not stop taking medication and a disclosure that medication remains approved by the

Food and Drug Administration). Likewise, the disclosures mandated by S.B. 1 are not comparable to the politically charged subject of abortion.

The disclosures, moreover, are "'reasonably related to the State's interest in preventing deception of consumers.'" *Recht*, 32 F.4th at 416 (quoting *Zauderer*, 471 U.S. at 651). Notwithstanding plaintiffs' assertion that S.B. 1 addresses "hypothetical" harms, Appellants' Br. 47-49, the legislative record is replete with instances of consumers not understanding that the "green" electricity they agreed to purchase was not actually generated from renewable sources. *See* discussion at pages 9-16 above. More generally, the concept of a REC, and how it is distinct from electricity itself, is inherently confusing. To address the risk of confusion, Maryland has adopted factual disclosures that will help consumers decide whether they want to pay more for electricity marketed as "green." *See* Pub. Util. § 7-707(f), (g).

Recht is again on point. There, in determining that a disclosure was reasonably related to the government's interest in preventing consumer deception, this Court explained that it is not a court's role to independently assess information relied upon by the State or to judge "whether mandatory disclosures are the most appropriate remedy"; rather, "[t]hese are questions quintessentially reserved to the political branches, an assignment of responsibility that *Zauderer*'s deferential standard emphatically reinforces." 32 F.4th at 419. Here, the disclosures required

by S.B. 1 must be upheld because they are factual and not controversial, and are reasonably related to the State's interest in preventing deception of consumers.[16]

IV. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM FROM ENFORCEMENT OF S.B. 1.

In a First Amendment challenge, the "plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quotation marks omitted). Because plaintiffs are not likely to succeed on the merits of their First Amendment claim, they cannot show irreparable harm from any alleged First Amendment violation.

V. A PRELIMINARY INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST AND IS UNSUPPORTED BY THE BALANCE OF THE EQUITIES.

When the government opposes a preliminary injunction, the traditional factors of assessing harm to the opposing party—the balance of the equities—and weighing the public interest merge. *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022). The district court was correct to find that this factor favored the State because of plaintiffs' six-month delay in bringing this lawsuit and seeking preliminary

[16] Plaintiffs' argument that S.B. 1's required disclosures are inadequately tailored, *see* Appellants' Br. 49-50, implicates a prong of the *Central Hudson* test not applicable to *Zauderer*'s more lenient test.

In addition, plaintiffs cite to an alternative disclosure approved by the Commission in accordance with its authority under § 7-707(f) to approve a "similar disclosure." *See* Appellants' Br. 15. Because plaintiffs' challenge to S.B. 1 is a facial one, the alternative disclosure is outside its scope.

injunctive relief. (J.A. 274-276.) Plaintiffs, the court properly concluded, "contributed to their potential harm by sitting still." (J.A. 276); *see Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (reasoning that, because a preliminary injunction motion "is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required").

On the other side of the balance, the district court did not abuse its discretion in concluding that harms to the public and to the State weighed against injunctive relief. As the district court observed, without S.B. 1, Maryland consumers risk being further deceived and financially harmed. (J.A. 276-277.) "That continued risk of harm," the court emphasized, "is not insignificant as Plaintiffs appear to suggest." (J.A. 277.) Further, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). Courts thus should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The district court appropriately heeded that guidance here.

Finally, in the event this Court were to find that the equities favored injunctive relief, any injunction would have to be limited because each challenged provision is

severable. Severability is a question of state law. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 627 (4th Cir. 2002). Under Maryland law, unless stated otherwise, "the provisions of all statutes . . . are severable." Md. Code Ann., Gen. Prov. § 1-210(a) (LexisNexis 2019); *see also Montrose Christian Sch. Corp. v. Walsh*, 363 Md. 565, 596 (2001) ("[T]here is a strong presumption that if a portion of an enactment is found to be invalid, the intent of the legislative body is that such portion be severed.").

Here, apart from the challenged marketing restriction and disclosure requirements, S.B. 1 made a host of changes to the Maryland marketplace for retail electricity supply. For example, it restricted gas and electricity suppliers from offering variable rate contracts, Pub. Util. §§ 7-510(d)(2)(v), 7-604.2(b)(2)(iii) (LexisNexis Supp. 2024); created new licensing requirements for energy salespersons and vendors; *see id*. §§ 1-101(l-1), 7-317 (LexisNexis Supp. 2024); and created new training and educational programs for electricity suppliers, gas suppliers, energy salespersons, and energy vendors, *id*. §§ 7-310(c)(3), (g)(3); 7-311 (LexisNexis Supp. 2024). These and other provisions stand independent of the challenged ones and should be left intact. And the challenged disclosure requirements are independent of the challenged marketing restriction. Thus, each is severable from the other.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully submitted,

ANTHONY G. BROWN
Attorney General of Maryland

/s/ Colin Glynn
MILES H. MITCHELL
General Counsel
COLIN GLYNN
Associate General Counsel
Maryland Public Service Commission
6 Saint Paul Street, 16th Floor
Baltimore, Maryland 21202
colin.glynn@maryland.gov
(410) 576-8039
(410) 333-1270 (facsimile)

Attorneys for Appellees Frederick H. Hoover, Michael T. Richard, Kumar P. Barve, and Bonnie A. Suchman

/s/ James D. Handley
HOWARD R. FELDMAN
JAMES D. HANDLEY
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
jhandley@oag.state.md.us
(410) 576-6993
(410) 576-6995 (facsimile)

Attorneys for Appellee Anthony G. Brown

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument because this case involves a constitutional challenge to a state law enacted against a complex regulatory backdrop.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,381 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

/s/ James D. Handley
_____
James D. Handley

TEXT OF PERTINENT PROVISIONS

Md. Code Ann., Environment Article (LexisNexis Supp. 2024)
§ 2-1201 Legislative findings

The General Assembly finds that:

* * *

(7) While reductions of harmful greenhouse gas emissions are one part of the solution, the State should focus on developing and utilizing clean energies that provide greater energy efficiency and conservation, such as renewable energy from wind, solar, geothermal, and bioenergy sources;

(8) It is necessary to protect the public health, economic well-being, and natural treasures of the State by reducing harmful air pollutants such as greenhouse gas emissions by using practical solutions that are already at the State's disposal;

* * *

Md. Code Ann., Public Utilities Article (LexisNexis Supp. 2024)
§ 7-701 Definitions

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 administrated 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.

Renewable energy portfolio standard or standard

(n) "Renewable energy portfolio standard" or "standard" means the percentage of electricity sales at retail in the State that is to be derived from Tier 1 renewable sources and Tier 2 renewable sources in accordance with § 7-703(b) of this subtitle.

* * *

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 exchange from or thermal energy avoided by, ground water 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 Ann., Public Utilities Article (LexisNexis 2020)
§ 7-702 Legislative intent and findings

(a) It is the intent of the General Assembly to:

(1) Recognize the economic, environmental, fuel diversity, and security benefits of renewable energy resources;

(2) Reduce greenhouse gas emissions and eliminate carbon-fueled generation from the State's electric grid by using these resources;

(3) Establish a market for electricity from these resources in Maryland; and

(4) Lower the cost to consumers of electricity produced from these resources.

(b) The General Assembly finds that:

(1) The benefits of electricity from renewable energy resources, including long-term decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources, accrue to the public at large;

(2) Electricity suppliers and consumers share an obligation to develop a minimum level of these resources in the electric supply portfolio of the State: and

(3) The State needs to increase its reliance on renewable energy in order to:

(i) Reduce greenhouse gas emissions and meet the State's greenhouse gas emissions reduction goals under § 2-1205 of the Environment Article; and

(ii) Provide opportunities for small, minority, women-owned, and veteran-owned businesses to participate in and develop a highly skilled workforce for clean energy industries in the State.

Md. Code Ann., Public Utilities Article (LexisNexis Supp. 2024)
§ 7-703 Renewable energy portfolio standards

* * *

Calculating renewable energy credits

(b) Except as provided in subsections (e) and (f) of this section, the renewable energy portfolio standard shall be as follows:

* * *

(19) in 2024:

(i) 33.7% from Tier 1 renewable sources, including:

1. at least 6.5% derived from solar energy;

2. an amount set by the Commission under § 7-704.2(a) of this subtitle derived from offshore wind energy; and

3. at least 0.15% derived from post-2022 geothermal systems;

(ii) 2.5% from Tier 2 renewable sources

(20) in 2025:

(i) 35.5% from Tier 1 renewable sources, including:

1. at least 7% derived from solar energy;

2. an amount set by the Commission under § 7-704.2(a) of this subtitle, not to exceed 10%, derived from offshore wind energy; and

3. at least 0.25% derived from post-2022 geothermal systems;

(ii) 2.5% from Tier 2 renewable sources

(21) in 2026:

(i) 38% from Tier 1 renewable sources, including:

1. at least 8% derived from solar energy;

2. an amount set by the Commission under § 7-704.2(a) of this subtitle derived from offshore wind energy, including at least 400 megawatts of Round 2 offshore wind projects; and

3. at least 0.5% derived from post-2022 geothermal systems;

(ii) 2.5% from Tier 2 renewable sources

* * *

(25) in 2030 and later:

(i) 50% from Tier 1 renewable sources, including:

1. at least 14.5% derived from solar energy;

2. an amount set by the Commission under § 7-704.2(a) of this subtitle derived from offshore wind energy, including at least 1,200 megawatts of Round 2 offshore wind projects; and

3. at least 1% derived from post-2022 geothermal systems;

(ii) 2.5% from Tier 2 renewable sources

Md. Code Ann., Public Utilities Article (LexisNexis Supp. 2024)
§ 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 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

(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 material

(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 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.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

	*	
RETAIL ENERGY ADVANCEMENT LEAGUE, *et al*.,	*	
Plaintiffs-Appellants,	*	No. 25-1012
v.		
	*	
ANTHONY G. BROWN, *et al.*	*	
Defendants-Appellees.		

* * * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I certify that, on this 15th day of April, 2025, the Brief of Appellee was filed electronically and served on counsel of record who are registered CM/ECF users.

/s/ James D. Handley
_____
James D. Handley

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, et al. v. Anthony G. Brown, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Anthony G. Brown, in his official capacity as Attorney General of Maryland
(name of party/amicus)

---

who is an Appellee, 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:

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/ Howard R. Feldman Date: 01/10/2025

Counsel for: Appellee, Anthony G. Brown

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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.)
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No. 25-1012 Caption: Retail Energy Advancement League, et al. v. Anthony G. Brown, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Frederick Hoover, Michael Richard, Kumar Barve, and Bonnie Suchman (in their official capacities
(name of party/amicus)

as members of the Maryland Public Service Commission)

who is appellees, 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
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Signature: /s/ Colin Glynn Date: 1/10/25

Counsel for: Appellees Hoover et al.

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