No. 25-1012

In the United States Court of Appeals for the Fourth Circuit

RETAIL ENERGY ADVANCEMENT LEAGUE, et al.,

Plaintiff-Appellants,

v.

ANTHONY G. BROWN, in his official capacity as Attorney General of Maryland, et al.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
No. 1:24-cv-2820-JRR

Brief of States of North Dakota and Six Other States As Amici Curae in Support of Appellants

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Imagine that the State of North Dakota were to pass a labeling law that said beef products sold in North Dakota could only be described as "beef" if they came from cattle that were raised in North Dakota or neighboring States. And then when asked to defend that restriction on commercial speech, North Dakota asserted an interest in defending or growing its in-state or in-region cattle industry. The markets are different, but that is essentially what Maryland has asserted here.

Under dormant Commerce Clause jurisprudence, the states may not use their regulatory authorities to discriminate against out-of-state (or out-of-region) commerce for the purpose of bolstering their own in-state (or in-region) commerce. And if states cannot engage in that kind of geographic discrimination directly, they cannot cite such a parochial interest when attempting to justify commercial speech restrictions.

The States of North Dakota, Alabama, Idaho, Iowa, Louisiana, Montana, and Nebraska are sovereign states of the Union. Maintaining a nationally open market free from individual states imposing geographic restraints was a key reason for the Constitutional Convention, and it remains an important aspect of our federalist system today.

Amici States do not dispute that Maryland has a valid state interest to impose labeling restrictions for protecting consumers from inaccurate information, and it has substantial discretion to do so. Amici States impose many labeling requirements of their own. But what Maryland does not have a valid state interest to do is impose labeling restrictions for the purpose of growing in-state commerce at the expense of out-of-state commerce.[1] Nonetheless, such an interest was asserted below, and does not appear to have been rejected by the district court.

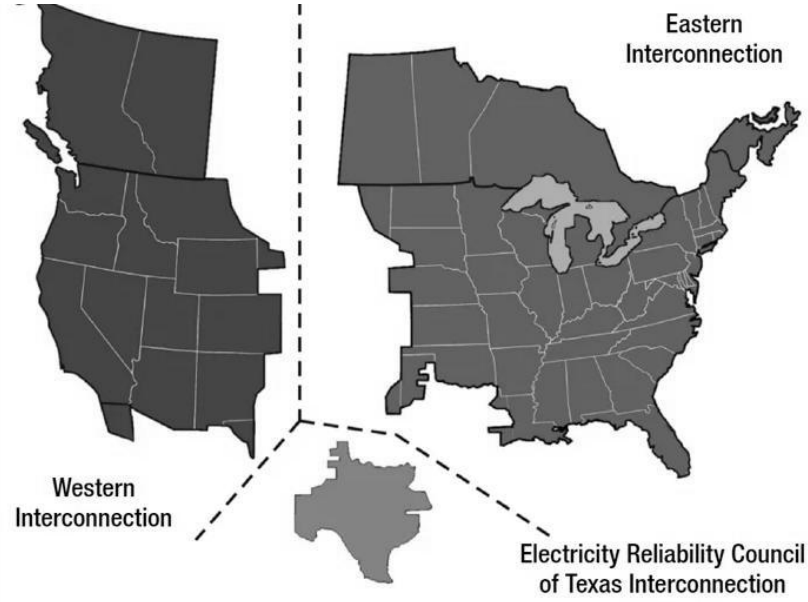
Amici States therefore submit this brief on a very narrow point: whatever reasons that Maryland may legitimately be able to invoke to defend the labeling requirements that are challenged in this lawsuit, a parochial interest in growing its own in-state (or in-region) renewable energy industry can't be among them. Amici States are authorized to file this brief pursuant to Fed. R. App. Proc. 29(a)(2).

[1] Importantly, the challenged restriction is not a truth-in-origin type of restriction—i.e., to say "made in Maryland" the product must actually be made in Maryland. Instead, it restricts the ability to describe the marketable features of a product if it is not made in Maryland.

BACKGROUND

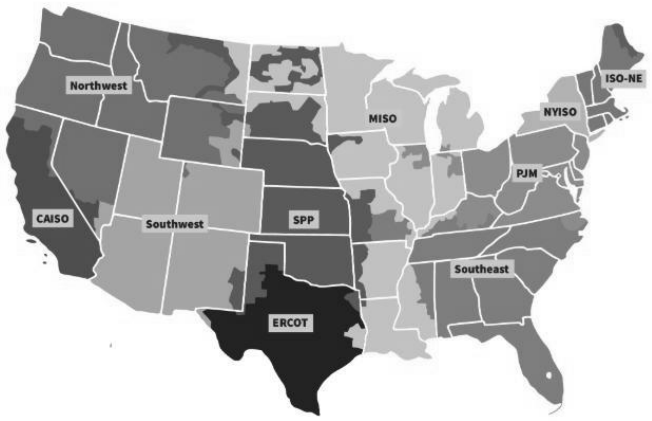
I. Our National Power Grids.

The continental United States contains three primary electric grids: the Eastern Interconnection, the Western Interconnection, and the Electricity Reliability Council of Texas Interconnection.



https://www.energycap.com/resource/power-grid-fundamentals-and-electricity-pricing/.

Within those grids, the transmission, control, and management of the electricity markets are performed by several Regional Transmission Organizations and Independent System Operators.



https://www.ferc.gov/power-sales-and-markets/rtos-and-isos.

Power generated in one grid can be transmitted to other grids, but "energy flowing onto [the] power network or grid *energizes the entire grid*, and consumers then draw undifferentiated energy from that grid." *New York v. FERC*, 535 U.S. 1, 7 n.5 (2002) (quoting Brief for Electrical Engineers et al). Reinforcing the idea that consumers generally draw undifferentiated energy to power their homes and businesses, transformers physically separate energy transmission along the grid at multiple points, such that it would be extremely unusual for *any* residential consumer to receive a single electron originating at *any* generating facility, let alone a specific generating facility. *See, e.g., S.C. Power Co. v. S.C. Tax Comm'n*, 52 F.2d 515, 524 (D.S.C. 1931) (describing operation of transformers and explaining "the current going out is not the current coming in, but a new and different current").

Accordingly, "[o]nce electricity generated from a renewable-energy resource is delivered to the power grid, it becomes indistinguishable from electricity generated from traditional resources, such as coal or natural gas." *In re Alternative Energy Rider*, 106 N.E. 3d 1, 4 (Ohio 2018).

II. The Challenged Statute.

Some consumers value electric power that is generated in ways they deem to be environmentally friendly, and they are willing to pay a premium for such electricity. But individual consumers generally aren't connected to specific generating facilities; rather, as noted *supra*, the power supplied at any point on a grid is generally indistinguishable from power supplied at any other point on that grid. There is no practical way to trace power consumed to any specific generating source.

To accommodate consumers who value power generated by wind, solar, or other renewable sources, some electricity suppliers market "renewable energy credits" ("RECs"). RECs are a derivative financial abstraction that represent a quantum of renewable power generation. A customer can direct their buying power towards the purchasing of electricity generated from renewable sources by purchasing a REC that is paired with undifferentiated electric power supplied from the grid.

In 2024, Maryland enacted S.B. 1 to regulate the marketing of what it termed "green power." Among other things, S.B. 1 prohibits suppliers of residential electricity from marketing their products in Maryland using terms like "clean," "green," "eco-friendly," "environmentally friendly or responsible," "carbon-free," "renewable," "100% wind," "100% hydro," "100% solar," or "100% emission-free" unless the supplier complies with various requirements. *See* Md. Code, Pub. Util. § 7-707(a).

One of those requirements—the only one that Amici States take issue with here—is that the electricity must be generated in Maryland or certain nearby states. That requirement derives from S.B. 1's requirement that—to be labeled as "green" power—at least 51% of the paired RECs must satisfy Maryland's renewable energy portfolio standard. *See* Md. Code, Pub. Util. §§ 7-707(c)(1); 7-703(b). And to satisfy Maryland's renewable energy portfolio standard, the electricity must be generated "in the PJM region," "outside the [PJM region] but in a control area that is adjacent to the PJM region," or "in an area that … is between 10 and 80 miles off the coast of [Maryland]." *Id.* § 7-701(m).

PJM is a Regional Transmission Organization that manages the power grid in parts of thirteen states and the District of Columbia:

https://www.ferc.gov/electric-power-markets.

Maryland's decision to tie its labeling requirement to electricity generated in "the PJM region" therefore means it only encompasses Maryland and a limited set of states and areas close to Maryland.[2]

Renewably sourced power that meets Maryland's standards and is generated in Maryland's favored region can be marketed as "green" power and potentially sold at a premium. Md. Code, Pub. Util. § 7-707. In contrast, renewably sourced power that otherwise meets Maryland's standards but is generated outside of Maryland's favored region can't be marketed as "green" power. *Id.* § 13-201.

[2] Those areas are notably distant from the Great Plains, where much of the nation's wind power is currently generated. https://www.chooseenergy.com/data-center/wind-generation-by-state/.

III. These Proceedings.

The Retail Energy Advancement League and Green Mountain Energy Company filed this lawsuit in the District of Maryland alleging that S.B. 1 is unconstitutional based on the First Amendment and the dormant Commerce Clause. Dkt. 1. The Plaintiffs moved for a preliminary injunction, contending S.B. 1 restricts speech they contend is truthful. The parties contested whether strict or intermediate scrutiny applies. Regardless, at minimum, Maryland acknowledged it was required to show at least a substantial government interest for S.B.1's restrictions on commercial speech. Dkt. 14 at 17.

To establish that substantial state interest, Maryland pointed to consumer protection and preventing deception, but hinted at something more: "No longer will Maryland customers pay higher monthly rates only to find out that the 'green' electricity they were promised is derived from non-renewable *or out-of-state sources*." *Id.* at 19 (emphasis added).

And then, at the preliminary injunction hearing, Maryland was more direct: "[i]n addition to the State's general interest in protecting consumers related to commercial transactions, there are additional government interests here … and that's expanding renewable energy in

Maryland and the PJM region." Tr. 22:17-21. As Maryland stated, through S.B. 1, "[t]he State seeks to incentivize the creation of further renewable energy in the PJM and Maryland." Tr. 23:5-6.

The district court denied the preliminary injunction from the bench. Applying intermediate scrutiny and the factors set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980), the court held that Plaintiffs failed to establish they "are likely to succeed on the merits of their First Amendment claims based on SB1 speech restrictions or its compelled disclosures at issue." Tr. 56:12-14, 74:20-24. The district court appears to have accepted, without critical analysis, Maryland's asserted state interest in "encourag[ing] the development of new … renewable electricity generation within the PJM region." Tr. 46:12-14. Plaintiffs appeal from that denial.

ARGUMENT

I. The Dormant Commerce Clause Prohibits Regulatory Discrimination Based on Geographic Source.

One of the key reasons for the Constitutional convention "was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons* v. *Ogden,* 22 U.S. 1, 224

(1824) (Johnson, J., concurring in the judgment)). The Constitution accordingly grants Congress the power to "regulate Commerce … among the several states." U.S. Const. art. I, § 8, cl. 3. And the Supreme Court has long read that clause as mandating an open national market:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall … have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525, 539 (1949).

The "very core" of this so-called dormant Commerce Clause jurisprudence is a prohibition on state laws "driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (cleaned up).

"Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down … unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988); *see also C&A*

Carbone v. Town of Clarkston, 511 U.S. 383, 390 (1994) ("We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State."); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) ("the police power may [not] be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state").

II. Economic Protectionism Violating the Dormant Commerce Clause Cannot Support Speech Restrictions.

The dormant Commerce Clause ties into the speech restrictions at issue in this appeal because, in order to pass First Amendment scrutiny, Maryland acknowledged that S.B. 1 must, at minimum, be able satisfy the test set forth in *Central Hudson*, 447 U.S. at 566. *See* Dkt. 14 at 17-19. That test requires establishing a "governmental interest [that] is substantial," that the challenged speech restriction "directly advances the governmental interest asserted," and that the challenged speech restriction "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

The last two factors "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those

ends." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 487 (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 770-71 (1993)). As the Supreme Court has explained, those requirements are "critical." *Id.* "[O]therwise, a State could with ease *restrict commercial speech in the service of other objectives* that could not themselves justify a burden on commercial expression." *Id.* (emphasis added) (quoting *Edenfield*, 507 U.S. at 771).

Dormant Commerce Clause jurisprudence makes clear that Maryland cannot claim a legitimate state interest in using its regulatory power to incentivize *where* renewably sourced electric power will be generated. Nonetheless, Maryland asserted below that S.B. 1 could be defended based on a purported state interest in "incentiviz[ing] the creation of further renewable energy in the PJM and Maryland." Tr. 23:5-6*; cf. Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes economic protectionism may be made on the basis of either discriminatory purpose, or discriminatory effect.").

In short: Maryland's desire to incentivize the development of renewable energy in-state (or in-region) can't justify labeling requirements that discriminate against renewable energy generated in other states (or regions). *Baldwin*, 294 U.S. at 511. Amici States take no position here on whether Maryland's geographically discriminatory labeling requirements can be justified on other grounds; but Supreme Court precedent is clear that economic protectionism doesn't suffice. *E.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) ("[W]hatever [Maryland's] ultimate purpose, it may not be accomplished by discriminating against [renewable power] coming from outside [the PJM region] unless there is some reason, apart from their origin, to treat them differently.").

CONCLUSION

This is not the first time Maryland has sought to incentivize local power generation via an unlawful regulatory scheme. *See Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150 (2016). But whatever state interests Maryland may assert to defend the labeling requirements at issue here, a parochial interest in growing in-state (or in-region) renewable energy capacity should not be counted amongst them.

Dated: March 10, 2025

Respectfully submitted,

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/s/ Philip Axt