No. 22-1083

In the
Supreme Court of the United States

KENT CHANDLER, IN HIS OFFICIAL CAPACITY AS CHAIRMAN AND COMMISSIONER OF KENTUCKY PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FORESIGHT COAL SALES, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

This case concerns Kentucky Senate Bill 257 ("SB 257"). That law requires Kentucky's Public Service Commission to evaluate the reasonableness of electric utilities' coal purchases "based on the cost of the fuel less any coal severance tax imposed by any jurisdiction." Ky. Rev. Stat. § 278.277(1). Under SB 257, bids from coal producers in non-severance-tax states must be evaluated based on their actual price. Meanwhile, bids from coal producers in severance-tax states must be evaluated based on their price *minus* the amount of severance tax imposed on the bidder. In either case, the utility will pay the full price. The principal question presented is whether, at the preliminary-injunction stage, Foresight has demonstrated a likelihood that SB 257 violates the Commerce Clause. This question includes three others:

First, does SB 257 unconstitutionally discriminate against interstate commerce on its face by offering preferential treatment to producers operating in severance-tax states?

Second, does SB 257 unconstitutionally discriminate against interstate commerce in effect by requiring an agency—and, correspondingly, utilities—to evaluate competitive coal bids only after artificially reducing bids from producers in severance-tax states?

Third, does SB 257 unconstitutionally discriminate against interstate commerce when its admitted aim is to reshape the market and artificially equalize competition among producers in severance-tax and non-severance-tax states?

CORPORATE DISCLOSURE

Foresight Coal Sales, LLC, is 100% owned by Foresight Energy, LLC. Foresight Energy, LLC, is 100% owned by Foresight Energy Resources LLC. No entity that owns more than 10% of the membership interests in Foresight Energy Resources LLC is publicly traded.

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INTRODUCTION

Near the beginning of the satirical novella *Animal Farm*, barn animals overthrow Mr. Jones, take control of Manor Farm, and establish "The Seven Commandments of Animalism." The commandments apply equally to all animals, and the seventh leaves no doubt about the rules' overarching intent: "All animals are equal." Throughout the rest of the tale, however, the pigs change the rules to justify their increasingly preferential treatment. Near the end, and as most relevant here, they replace those initial seven rules with a single proclamation: "All animals are equal but some animals are more equal than others." This case concerns Kentucky's brazen attempt to steal a page from George Orwell's classic.

Kentucky levies a 4.5% coal severance tax (*i.e.*, a tax in-state producers pay for the privilege of extracting coal). While a handful of states impose this same tax, many others have enacted different tax schemes. At the same time, Kentucky deploys its Public Service Commission ("PSC") to make sure utilities' coal purchases are "reasonable." Utilities can pass "reasonable" fuel costs along to consumers via higher rates. Not so for "unreasonable" ones. The PSC's reasonableness review generally encouraged utilities to buy the cheapest coal. But, in recent years, in-state producers often lost to cheaper out-of-state competitors. To reverse that trend, Kentucky enacted SB 257. This law requires the PSC to evaluate competitive bids differently based on state of origin.

Bids from producers in severance-tax states, like Kentucky, must be evaluated only after deducting amounts attributable to coal severance taxes. For example, under the law, the PSC—and,

correspondingly, utilities—must evaluate in-state producers' bids after subtracting 4.5% from the price to account for Kentucky's coal severance tax. This price reduction is "phantom" because utilities must always pay the fully loaded price. SB 257 affects only how competitive bids are evaluated. Given the phantom price reduction, SB 257 guarantees bids from producers in severance-tax states will *never* be evaluated based on actual price.

Bids from producers in non-severance-tax states, like Illinois, receive no phantom price reduction. Accordingly, SB 257 guarantees these producers' bids will *always* be evaluated based on actual price. This unequal comparison ensures bids from producers in severance-tax states will be evaluated—by the PSC and utilities—more favorably. SB 257 puts a new spin on Orwell's famous refrain: All coal purchases must be reasonable, but some must be more reasonable than others.

The fundamental question here is whether SB 257 likely violates the Commerce Clause, which prohibits state laws that discriminate against interstate commerce. As the Sixth Circuit held, the answer is "yes." Indeed, SB 257 does everything the Commerce Clause forbids—it discriminates on its face, in its practical effect, and as to its purpose.

First, SB 257's language creates two rules for evaluating the reasonableness of competitive coal bids—one for producers in severance-tax states and another for producers in non-severance-tax states. Given the phantom price reduction, the former will be evaluated on an amount below the actual price utilities pay. The latter will be evaluated on actual price. Put simply, SB 257 facially discriminates by

treating producers differently based on where they mine coal. The analysis can—and should—end there.

Second, SB 257 has the effects its language mandates. It causes bids from producers in severance-tax states to be evaluated differently—and more favorably—than bids from producers in non-severance-tax states. Contrary to Petitioners' assertions, there is no doubt about this effect. The statute is written in mandatory terms. It cannot be applied any other way.

And its effects are in no way "de minimis." Indeed, one of its primary supporters—Representative Jim Gooch—repeatedly gave an example where SB 257 would require a utility to purchase more expensive in-state coal instead of less expensive out-of-state coal. The PSC itself agreed SB 257 will sometimes require utilities to do so. Of course, Petitioners' entire "de minimis" argument is beside the point. The Constitution prohibits all discrimination, big and small.

Third, the only problem Kentucky sought to solve with SB 257 was that its coal producers were losing market share to cheaper out-of-state competitors. Because in-state producers could not compete in fact, Kentucky gave them a leg up by requiring that they be evaluated on fiction. This Court has repeatedly held that laws that aim to reshape the interstate market violate the Commerce Clause. And it confirmed just this year that a law's purpose remains a necessary consideration when assessing its constitutionality.

This case does not present a close question. Readers have long understood that the pigs in *Animal Farm* were treated better than the other animals. The

revised rule proclaiming "some animals are more equal than others" meant the animals were not equal at all. Differential treatment is the inevitable consequence of having one rule for a preferred group and a different rule for others.

The same logic applies to SB 257. Kentucky's two tests for reasonableness discriminate in favor of producers in states with a preferred tax structure and against all others. The pigs pulled it off in *Animal Farm* because they could rewrite the rules to suit their purposes. But the Constitution guards against Kentucky's efforts to remake the rules to create a preferred bloc of states for coal procurement. There is no need for this Court's intervention. SB 257 violates the Commerce Clause. The petition should be denied.

STATEMENT OF THE CASE

The Commerce Clause stands as a bulwark against states' inclination "to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). Petitioners concede it has long been understood to contain this "negative" or "dormant" aspect. Pet. 4–5, 9, 30. This understanding is the lasting consequence of an important historical reality. The Commerce Clause "reflected a central concern" among the Framers that, "to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (citation omitted).

The Commerce Clause, like the entire Constitution, "was framed upon the theory that the peoples of the several states must sink or swim together." *Baldwin v. G.A.F Seelig, Inc.*, 294 U.S. 511,

523 (1935). In other words, Commerce Clause jurisprudence echoes the Framers' sound judgment that, among the states, "the prosperity of the one is the prosperity of the others."[1] It rests on the simple principle that "our economic unit is the Nation, which alone has the gamut of powers necessary to control . . . the economy." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949) (explaining that, under the Commerce Clause, "the states are not separable economic units"). In this way, the Commerce Clause, including its dormant aspect, quells the urge to engage in "commercial warfare." *Id.* at 533. And it brings a peaceful end to "the quarreling and biting and jealousy which had been normal features of life in the old days."[2]

Somewhat surprisingly, Petitioners agree. In their own words, the Commerce Clause "is intended to stop the States from retreating into economic isolation" and "to ensure that out-of-state businesses can compete on equal footing with in-state businesses." Pet. 19. This reality is not the result of some free-standing, judge-made Dormant Commerce Clause. *See, e.g.*, Pet. 1–2 (questioning the legitimacy of a doctrine that "appears nowhere in the text of the Constitution").

It is instead the natural consequence of the Constitution's explicit and exclusive grant of power over "Commerce . . . among the several States" to Congress. U.S. CONST. art. I, § 8, cl. 3. Indeed, this Court recently "reiterate[d] that the Commerce Clause *by its own force* restricts state protectionism."

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[1] George Orwell, *Animal Farm* 7 (Harcourt Brace Modern Classic ed. 1990).

[2] Orwell, *supra* note 1, at 25.

Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) (emphasis added). Because "removing state trade barriers was a principal reason for the adoption of the Constitution," any interpretation of the Commerce Clause that omits its "dormant" aspect would leave "a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Id.* at 2460.

With these "deeply rooted" principles established, *id.*, Respondent turns to the challenged law. To understand how SB 257 violates the Commerce Clause, however, one must first understand the regulatory scheme Kentucky has established for utilities' fuel purchases.

A. Kentucky's Fuel Adjustment Clause: "All Animals Are Equal."[3]

Kentucky's PSC is responsible for regulating utilities. Ky. Rev. Stat. § 278.040. By statute, the agency has broad authority to ensure utilities' rates are "reasonable." *Id.* § 278.030. To begin, it sets a baseline fuel rate. 807 Ky. Admin. Regs. 5:056(1)(1); PUB. SERV. COMM'N, THE FUEL ADJUSTMENT CLAUSE: FREQUENTLY ASKED QUESTIONS, https://psc.ky.gov/agencies/psc/consumer/FAC%20QandA.pdf (last visited August 3, 2023) [hereinafter "FAC FAQs"]. If a utility's ever-shifting fuel costs exceed the baseline rate, it may pass those additional costs on to ratepayers. *Id.* But it may do so only if the PSC deems those costs "reasonable." 807 Ky. Admin. Regs. 5:056(3)(1); FAC FAQs.

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[3] Orwell, *supra* note 1, at 21.

Unreasonable fuel expenses, on the other hand, "shall be disallowed and may result in the suspension of the fuel adjustment clause based on the severity of the utility's unreasonable fuel charges and any history of unreasonable fuel charges." 807 Ky. Admin. Regs. 5:056(3)(1). Every six months, the PSC conducts "a formal review" of "a utility's past fuel adjustments." *Id.* at 5:056(3)(3)(a). There, the PSC "shall order a utility to charge off and amortize, by means of a temporary decrease of rates, any adjustments the [PSC] finds unjustified due to . . . improper fuel procurement practices." *Id.* at 5:056(3)(3)(b).

A final review occurs at two-year intervals, at which point the PSC must "disallow improper expenses." *Id.* at 5:056(3)(4)(a). In both periodic reviews, the PSC seeks to determine whether "a utility has done everything it reasonably can do to keep fuel costs as low as possible, while maintaining a reliable fuel supply." FAC FAQs.

Under this longstanding regime, Kentucky requires all coal purchases—from whatever source—to be "reasonable." And everyone agrees cost is one of the most substantial factors in the PSC's reasonableness analysis. App. 16a; Supp. App. 91sa–92sa.

B. House Resolution 144: "A Most Terrible Thing Has Been Discovered."[4]

On March 14, 2019, the Kentucky House of Representatives adopted House Resolution 144 ("HR 144"). Supp. App. 1sa–2sa. This resolution lamented that "the amount of coal produced in Kentucky ha[d] decreased from 109,018,240 tons in 2011 to

[4] Orwell, *supra* note 1, at 71.

39,587,320 tons in 2018" and that "approximately 54 percent of coal consumed in Kentucky by electric-generating units was imported from Illinois, Indiana, Ohio, Pennsylvania, West Virginia, and Wyoming." Supp. App. 1sa. The resolution left no doubt about what the House believed caused the decline in Kentucky coal production and the rise of coal importation: "[D]ifferences in severance tax policies of other states have impacted the competitiveness of Kentucky coal." *Id.*

Kentucky imposes a 4.5% coal severance tax. Ky. Rev. Stat. § 143.020. As Petitioners note, several other states impose coal severance taxes, too. Pet. 5. They do so at varying rates, some higher and some lower than Kentucky's. Pet. 6. Other states, like Illinois, do not impose coal severance taxes at all. But all states impose *some* taxes on coal producers (*e.g.*, sales taxes, property taxes, corporate taxes, inventory taxes, etc.), as well as other costs generated by states' differing policy choices (*e.g.*, labor costs governed by minimum-wage laws, regulatory compliance costs related to health and safety laws, environmental requirements, etc.). As with coal severance taxes, each state charts its own course, choosing both the type and magnitude of taxes and other costs to impose on domestic businesses.

All coal producers must account for the panoply of benefits and burdens imposed by their states to compete in the interstate market. Supp. App. 94sa–98sa. But HR 144 did not concern itself with the full range of taxes and costs imposed, to varying degrees, by all fifty states. Instead, it zeroed in on coal severance taxes, instructing the PSC to "amend its administrative regulations to consider all costs, including fossil fuel-related economic impacts within

Kentucky, when analyzing coal purchases." Supp. App. 2sa. Here, Kentucky's "mighty cry for vengeance went up."[5]

About two weeks after HR 144's adoption, Charles Snavely, then-Secretary of then-Governor Matthew Bevin's Energy and Environment Cabinet, contacted members of the PSC about the resolution. Supp. App. 3sa–5sa. He noted the Kentucky coal industry's recent 50% decline. Supp. App. 3sa. He continued: "[A]lthough Kentucky power plants burn approximately 25 million tons of coal annually, 13 million tons, or 54%, is imported from other states." Supp. App. 4sa. He explained the "primary reason" utilities purchase coal from other states is that "the [PSC's] requirements . . . cause utilities to purchase imported coals if they cost less than Kentucky coals." *Id.* He then crystallized the desire to incentivize purchases of in-state coal:

> The fallacy in that regulatory compliance analysis is that Kentucky imposes a severance tax of 4.5% of the gross value of the sale of coals mined in Kentucky, while several other states do not impose that tax on their sales. Illinois and Indiana do not impose a severance tax at all, and Ohio's tax rate is less than 15 cents per ton. These three states alone account for half of the 13 million tons of coal imported into Kentucky each year. The discrepancy in excise tax rates often *creates a perverse incentive for our own utilities to purchase coals from other states* and create further economic distress in Kentucky.

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[5] Orwell, *supra* note 1, at 90.

Id. (emphasis added). He requested that the PSC "give [HR 144] serious consideration" and determine whether "to amend its regulations to address the tax discrepancy issue." Supp. App. 4sa–5sa.

C. The Precursor-Regulation: "Some Animals Are More Equal than Others."[6]

Within a month of HR 144's adoption, on April 15, 2019, the PSC issued a draft regulation requiring the PSC to "evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any tax collected under [Kentucky's coal severance tax statute]." Supp. App. 14sa. The next day, the PSC's then-Chairman confirmed this proposal was meant "to . . . incentivize Kentucky utilities to purchase Kentucky coal." Supp. App. 8sa. Likewise, the PSC admitted the initial draft's purpose was to incentivize the purchase of Kentucky coal and to make Kentucky coal more competitive in the interstate market. Supp. App. 96sa–97sa, 103sa–104sa.

After a notice-and-comment period, however, the PSC tweaked its initial proposal, requiring the PSC to "evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any coal severance tax imposed by any jurisdiction." Supp. App. 66sa. Because everyone agrees this language is "materially" identical to SB 257's language, Supp. App. 90sa, Respondent refers to this law as the "precursor-regulation."

The precursor-regulation was Kentucky's first attempt to grant producers in severance-tax states a phantom price reduction. In its Statement of Consideration, the PSC acknowledged the obvious:

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[6] Orwell, *supra* note 1, at 118.

"There are occasions when [the precursor-regulation] will require utilities to select a fuel source that is slightly more expensive than the alternative based on the proposed language." Supp. App. 18sa.

On January 8, 2020, after Respondent threatened a lawsuit, the PSC asked Kentucky's Attorney General Daniel Cameron to weigh in on the precursor-regulation's constitutionality. Supp. App. 57sa–61sa. Almost two months later, Attorney General Cameron issued the requested opinion, concluding that the precursor-regulation did not violate the Commerce Clause. Supp. App. 64sa–69sa.

Specifically, he found it "would cause Kentucky coal to be priced more competitively in comparison to some states and less competitively with respect to other states, depending on which states have chosen to enact severance taxes and at what rate." Supp. App. 68sa. The PSC agrees this statement is true. Supp. App. 106sa. It further testified that the precursor-regulation "would make Kentucky coal more competitive as compared to Illinois and Indiana" coal. Supp. App. 106sa–107sa. Nonetheless, Attorney General Cameron blessed the precursor-regulation because removing coal severance taxes from the calculus would not "favor Kentucky coal producers to the detriment of *all* out-of-state interests." Supp. App. 68sa–69sa (emphasis added).

Upon receipt of this opinion letter, Respondent filed suit and sought a preliminary injunction. The district court denied that motion. Respondent timely appealed. The precursor-regulation remained in effect pending Respondent's appeal. During that time, at least some utilities evaluated the price of competitive bids only after deducting producers' coal severance

taxes. Supp. App. 99sa–100sa, 102sa; *see also* Supp. App. 49sa (explaining to prospective bidders that the PSC "is now requiring utilities to evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any coal severance tax imposed by any jurisdiction"). These phantom price reductions sometimes elevated more expensive bids from producers in severance-tax states above less expensive ones from producers in non-severance tax states. Supp. App. 100sa–102sa.

On November 30, 2020, just days before the Sixth Circuit was scheduled to hear oral argument, the parties settled. Supp. App. 70sa–73sa. Petitioners (or their predecessors) agreed to withdraw the precursor-regulation. Supp. App. 70sa. Kentucky returned to its previous regime, under which the PSC evaluated all coal purchases—from whatever source—the same way.

D. SB 257: Kentucky "Never Gave up Hope."[7]

When the previous case settled, Respondent thought Kentucky's efforts to tilt the coal market in favor of in-state producers had come to an end. "[A]s it turned out," however, the precursor-regulation's replacement "was achieved much earlier and more easily than anyone had expected."[8] On February 22, 2021, Senator Robby Mills and Senator Phillip Wheeler co-sponsored a bill to amend Chapter 278—Kentucky's statutes related to the PSC—to add a section virtually identical the precursor-regulation the PSC had just agreed to remove.

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[7] Orwell, *supra* note 1, at 115.
[8] *Id.* at 15.

SB 257 requires the PSC to "evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any coal severance tax imposed by any jurisdiction." Ky. Rev. Stat. § 278.277(1). This language reinstitutes the precursor-regulation's disparate rules, requiring the PSC and utilities to grant producers in severance-tax states a phantom price reduction.

The law passed the Kentucky Senate by a 36-0 vote on March 4, 2021. Before the vote, Senator Mills explained SB 257

> allows the coal severance tax that is added to coal in the State of Kentucky to be considered reasonable when compared with coal contracts that do not have a severance tax on there. And the reason that it is reasonable is because we all know what coal severance tax does for our community and what it returns back to the state, and those are benefits above and beyond just the price for the consumers.

Supp. App. 75sa–76sa. In later proceedings, Representative Jim Gooch—a co-sponsor of HR 144—shared a story about the kind of problem this new law would solve:

> I know I was taking testimony one time in a committee when I first got here, and I can remember, of course, the PSC . . . wanted to make sure you had the lowest cost or whatever, and there was one utility that testified that they were buying some compliant . . . coal that was eight cents a ton cheaper than what the same compliant coal in Kentucky was. . . . [A]nd when you looked at, you know, . . . the employment, the economic development, the

> way the dollars turned over, the coal severance, and all of that, that certainly was not something that really made any sense to this . . . state[.]

Supp. App. 79sa–80sa. Representative Gooch shared the same story before the House's 93-1 vote for SB 257. Supp. App. 86sa–88sa (concluding Kentucky "would have been much better off" if the utility had bought more expensive in-state coal). He and Senator Mills also repeatedly linked SB 257 to HR 144 and the precursor-regulation. Supp. App. 80sa–81sa, 87sa–88sa.

On March 25, 2021, Governor Beshear signed SB 257 into law. On April 5, 2021, Respondent brought a lawsuit challenging SB 257. After limited pre-answer discovery, Respondent again filed a motion for preliminary injunction, which the district court again denied. App. 51a. Respondent timely appealed a second time.

E. The Sixth Circuit Reverses: "Sooner or Later Justice Will Be Done."[9]

There was no eve-of-argument settlement this time. The parties briefed and argued the case to the Sixth Circuit. At argument, Judge Larsen asked whether Illinois could create a similar phantom price reduction for in-state coal producers to offset Illinois's higher minimum wage. Supp. App. 111sa. Kentucky's Solicitor General responded: "Of course." *Id.* On February 3, 2023, the Sixth Circuit issued a published opinion. Whereas the district court had twice bought the argument that Kentucky "was only leveling the

[9] Orwell, *supra* note 1, at 7.

playing field tilted against Kentucky coal by its own severance tax," the Sixth Circuit did not. App. 3a.

It held: "Here, the law discriminates, if not on its face, then in effect." App. 9a. As to facial discrimination, the court mentioned several critical facts. It explained that, because "SB 257's text requires the [PSC] to discount coal that has paid severance taxes, . . . the statute demands that coal from non-severance taxing states (e.g., Illinois) be treated one way, and coal from severance-taxing states (e.g., Kentucky) another." App. 11a. Because "[t]he fact of the severance tax is . . . a near perfect proxy for the coal's state of origin," "applying SB 257 starts *and* ends with the state." *Id.* Whether to call the law "facially" discriminatory was an "interesting but ultimately unimportant" question because its effects were so clear. App. 11a–12a.

In particular, "SB 257 requires the [PSC] to treat coal that has paid severance taxes (to Kentucky or the handful of other states that impose them) better than it treats coal that has not paid such a tax." App. 12a. For evaluation purposes, the former is "artificially discounted," while the latter "is not discounted at all." *Id.* And producers of the latter coal, which will be made to seem relatively more expensive, are "worse off as a matter of basic economics and Supreme Court precedent." App. 15a. Indeed, the law could have no other effect, as SB 257 uses mandatory language that grants the PSC no discretion. App. 16a.

As to purpose, the Sixth Circuit again focused on the law's language, explaining "[t]he immediate goal of [SB 257's] text is to make severance-tax-state coal cheaper" for evaluation purposes, "which will, in turn, encourage Kentucky utilities to buy more coal from

severance-tax jurisdictions, like Kentucky, and less from other states." App. 17a. Indeed, Kentucky *admitted* its goal was to reshape the market this way. *Id.* And, if the Constitution countenanced such attempts, "[a] state with a high minimum wage, like Illinois, . . . might . . . manipulate its sales tax to 'level out' its higher labor costs relative to states like Kentucky." App. 20a. Indeed, the "process could play out in every state," as to a host of divergent policies with various economic effects each state could seek to "even out." *Id.* In other words, Kentucky's argument invited the very "commercial warfare" the Commerce Clause was meant to avoid. *Id.*

Because Respondent was "likely to be able to show that SB 257 discriminates against interstate commerce," the Sixth Circuit reversed and remanded for further proceedings. App. 25a–26a. On April 13, 2023, the district court entered a preliminary injunction preventing the PSC from enforcing SB 257 against Respondent. App. 56a–57a. On May 1, 2023, it amended the injunction to prohibit enforcement against utilities. App. 59a–60a. By then, the law had been in effect for nearly two years.

REASONS TO DENY CERTIORARI

The Sixth Circuit's decision aligns with this Court's longstanding precedents. Indeed, it is compelled by them. There is no need for this Court to "step in and correct an error," Pet. 9, precisely because there is no error here. Nor does the Sixth Circuit's decision "create," "deepen," or "highlight" any circuit splits. *Id.* Petitioners' arguments to the contrary miss the mark.

Indeed, Petitioners overlook a fundamental feature of this Court's Commerce Clause

jurisprudence. The "first step" in the analysis is to determine whether the challenged law (1) "discriminates against interstate commerce," or (2) "regulates evenhandedly with only incidental effects on interstate commerce." *Or. Waste Sys., Inc. v. Dep't of Env. Quality of State of Or.*, 511 U.S. 93, 99 (1994) (citations omitted).

Proper classification comes with consequences. Discriminatory laws "are virtually *per se* invalid." *Id.* (citation omitted). They can be sustained only if "demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988). Evenhanded laws with "only incidental effects on interstate commerce," on the other hand, "are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Or. Waste*, 511 U.S. at 99 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Laws fall on the "discriminatory" side of the line if they are "designed to benefit in-state economic interests by burdening out-of-state competitors." *Limbach*, 486 U.S. at 273; *see also Or. Waste*, 511 U.S. at 99 (defining discrimination as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). Discrimination persists even if the benefits extended to in-state interests flow to *some* out-of-state ones as well. *See, e.g.*, *Limbach*, 486 U.S. at 274–75 (holding a law facially discriminated despite extending benefits to some out-of-state producers); *Maryland v. Louisiana*, 451 U.S. 725, 731–34, 756–58 (1981) (holding a first-use tax "unquestionably discriminate[d]" even though it also exempted out-of-state gas that had been subjected to a severance tax).

While such laws may not discriminate against all out-of-state competitors, they create "preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland*, 451 U.S. at 754.

I. This Court's precedents show that SB 257 is facially discriminatory.

The questions presented in the petition "comprise every subsidiary question fairly included therein." SUP. CT. R. 14(1)(a). Petitioners concede their broad question about SB 257's constitutionality includes "whether the law discriminates on its face." Pet. 9–10 n.1. Resolving that question alone is enough to conclude the petition should be denied.

A law discriminates "facially" based on its language. The question here is whether the statutory text compels differential treatment that benefits in-state competitors and burdens at least some out-of-state ones. *See, e.g.*, *Limbach*, 486 U.S. at 273. As one example, a law is facially discriminatory when it "explicitly deprives" certain producers of "generally available beneficial . . . treatment" because they operate "in certain other States." *Id.* at 274–75.

SB 257 does exactly that. It grants coal producers operating in severance-tax states, like Kentucky, a phantom price reduction that ensures they are never evaluated on their actual price. Those operating in non-severance-tax states, like Illinois, must be evaluated on actual price. This approach is by no means neutral or "evenhanded" concerning state of origin. The statute's plain language sorts producers into two groups based on their states' severance-tax policies and compels the PSC to evaluate one group on fact and the other on fiction.

While the Sixth Circuit did not technically decide the case on this basis, it did a bit more than "flirt[] with finding facial discrimination." Pet. 7. Indeed, the Sixth Circuit focused almost exclusively on SB 257's text. It explained, for example, that "SB 257's text . . . demands that coal from non-severance taxing states (e.g., Illinois) be treated one way, and coal from severance-taxing states (e.g., Kentucky) another." App. 11a. Lest there be any confusion, the Sixth Circuit said it twice: "SB 257 requires the [PSC] to treat coal that has paid severance taxes (to Kentucky or the handful of other states that impose them) better than it treats coal that has not paid such a tax." App. 12a.

But the Sixth Circuit did not stop there. It then inserted SB 257 directly into *Limbach*'s central holding, explaining "the Kentucky provision at issue here explicitly deprives certain products of generally available beneficial regulatory treatment because they are made in certain other States." *Id.* (citation and alterations omitted). As this Court unanimously proclaimed thirty-five years ago, such a law facially discriminates against interstate commerce. *See Limbach*, 486 U.S. at 274 (holding, on that precise basis, that Ohio's law "on its face appears to violate the cardinal requirement of nondiscrimination").[10]

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[10] In her concurring opinion, Judge Batchelder opined SB 257 is not facially discriminatory because, if Kentucky repealed its coal severance tax, "SB 257 would not favor Kentucky." App. 27a. Even in that hypothetical scenario, however, the law would extend phantom price reductions to producers from some states and deny them to producers from other states. It would remain facially discriminatory by fashioning a preferential trade area. Petitioners' misguided argument that SB 257 operates the same way as a repeal of Kentucky's coal severance tax, Pet. 22, ignores

Likewise, the district court held SB 257 "applies to any jurisdiction that imposes a coal severance tax." App. 44a. But a law that extends preferential treatment to producers in only a handful of states discriminates against those in other states. That SB 257 does not "apply" to producers in states with other tax structures means it is not evenhanded. The district court's analysis thus confirms that SB 257 is facially discriminatory and creates a preferential trade area of states that impose Kentucky's preferred tax scheme.[11]

If any doubt remained, the PSC's testimony removed it. The following exchanges make clear that SB 257's language mandates differential treatment based on state of origin:

> Q. . . . [L]et's look at [SB] 257 again, and again I'll ask you that this language instructs the PSC to treat coal differently depending on where it was produced, correct?
>
> * * *
>
> A. Yes.
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this point. That said, the hypothetical is irrelevant. Kentucky has not repealed its coal severance tax.

[11] The district court later held SB 257 "applies equally to all states." App. 47a. But SB 257 applies "equally" to all states the same way the Ohio law in *Limbach* and the Louisiana law in *Maryland* applied "equally" to all states—namely, by offering a benefit to producers from any state willing to adopt Kentucky's tax preferences. Producers in states unwilling to adopt Kentucky's preferences are denied the benefit. This treatment is not "equal" at all, as *Limbach*, *Maryland*, and *Animal Farm* explain.

> Q. . . . Under SB 257 the only characteristic that leads to differential treatment is the coal's state of origin, correct?
>
> A. . . . [U]nder Senate Bill 257 I would agree, yes.

Supp. App. 90sa–91sa. There is no mystery here. This law's text is not evenhanded. In zeroing in on the payment of a coal severance tax, Kentucky selected "a near perfect proxy for the coal's state of origin." App. 11a. Administering the law's phantom price reductions "starts *and* ends with the state." *Id.*

In fact, even the petition admits this state-of-origin-based differential treatment. Petitioners repeatedly argue SB 257 "levels" the playing field between producers operating in severance-tax states and those operating in non-severance-tax states by artificially "offsetting" that tax's competitive effects. *See, e.g.*, Pet. i, 20–21, 28. The law could not possibly do so by treating producers in all states the same way. Instead, SB 257 reshapes the market by treating producers in severance-tax states better than producers in non-severance-tax states. App. 12a.

In this way, SB 257 does not stray far from the lessons of *Animal Farm*. There, the revised rule proclaiming "some animals are more equal than others" meant animals were not treated equally at all. Here, Kentucky's "some coal purchases must be more reasonable than others" regime similarly ensures producers in certain states get preferential treatment. The statutory language permits no other possibility. Accordingly, SB 257 facially discriminates

against interstate commerce. Any argument to the contrary attempts to "turn black into white."[12]

Because it discriminates, SB 257 is "virtually *per se* invalid." *Or. Waste*, 511 U.S. at 99. It can survive only if "demonstrably justified by a valid factor unrelated to economic protectionism." *Limbach*, 486 U.S. at 274. As Petitioners readily admit, however, the only thing justifying SB 257 *is* economic protectionism. Kentucky's desire to "level" the competitive landscape by forcing the PSC to pretend coal from producers in severance-tax states costs less than its actual price, Pet. i, 20–21, 28, cannot be described any other way. *See Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (holding "a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory").

SB 257 facially violates the Commerce Clause. The analysis need not proceed any further. The petition can be denied on this basis alone.

II. The decision below aligns with this Court's "practical effects" jurisprudence and creates no circuit split.

The petition's discussion of SB 257's effects gets off to a curious start. Petitioners claim the Sixth Circuit held SB 257 discriminates in practical effect even though "it imposes only a de minimis burden on interstate commerce." Pet. 10. But the Sixth Circuit said no such thing. Indeed, this Court will search in vain for any mention of "de minimis" effects in the opinions below. The absence is easy to explain. Before the petition, neither party ever raised any argument

[12] Orwell, *supra* note 1, at 13.

about de minimis effects. Petitioners' newfound argument attacks a holding that simply does not exist.

But the argument underscores a bigger problem for Petitioners. Under this Court's precedents, when a law discriminates against interstate commerce, the size and scope of the discrimination is irrelevant. *See, e.g.*, *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) (holding "the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred"). Instead, "actual discrimination, wherever it is found, is impermissible." *Id.*

This Court has expressly rejected attempts to fashion a de minimis defense to discriminatory laws. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 n.15 (1997) (noting "there is no 'de minimis' defense" for discriminatory laws (citations omitted)); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996) ("[W]e have never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause."); *Wyoming*, 502 U.S. at 455 ("The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." (citations omitted)); *Maryland*, 451 U.S. at 760 ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."). Indeed, this Court has "rejected reliance on any calculus that requires a quantification of discrimination as a preliminary step to determining whether the discrimination is valid." *Lohman*, 511 U.S. at 649.

Petitioners claim this rule applies only to facially discriminatory laws, not to those with discriminatory effects. Pet. 14–15. Their argument suffers at least two fatal flaws. *First*, this Court has applied the same logic in both contexts. *See, e.g.*, *Wyoming*, 502 U.S. at 455–56 (declining to measure the extent of discrimination for a law that "discriminate[d] both on its face and in practical effect"); *Maryland*, 451 U.S. at 757–61 (refusing to determine "how unequal" the law was because its "obvious economic effect" was "to favor local interests"). This Court has never limited the rule to facially discriminatory laws.

Second, facially discriminatory laws inevitably come with discriminatory practical effects. Indeed, their language compels them. A de minimis exception applicable to laws that discriminate only in practical effect would mean, by virtue of being less forthright, sufficiently clever states could discriminate against interstate commerce after all—at least a little. But this Court's precedents foreclose that possibility as well. *See, e.g.*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) ("Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce."); *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("The Commerce Clause forbids discrimination, whether forthright or ingenious.").

Thus, even if Petitioners could somehow establish the relevant factual predicate—namely, that SB 257 discriminates against interstate commerce only to a "de minimis" extent—the law would still violate the Commerce Clause. Such is the almost-inevitable fate of laws that fall on the "discrimination" side of the line. *See, e.g.*, *Or. Waste*, 511 U.S. at 99. And, as the Sixth Circuit explained, SB 257 falls on the

"discrimination" side, not the "evenhanded" one. *See, e.g.*, App. 11a–12a (explaining SB 257 "demands" producers in severance-tax states be treated one way and those in non-severance-tax states another).

The Sixth Circuit's decision presents no conflict with the precedents Petitioners cite because those cases concerned "evenhanded" laws. *See, e.g.*, *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005) ("The statute applies evenhandedly to all carriers that make domestic journeys."); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981) ("Minnesota's statute . . . 'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State."); *Pike*, 397 U.S. at 142 (establishing the test for laws that "regulate[] even-handedly to effectuate a legitimate local public interest," with "effects on interstate commerce [that] are only incidental")[13]; *Regan v. City of Hammond, Ind.*, 934 F.3d 700, 705 (7th Cir. 2019) ("As we have said, the ordinance treats all landlords the same, regardless of whether they are domiciled in Hammond."); *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230–31 (9th Cir. 2010) (confronting a law plaintiffs "conceded . . . [was] not discriminatory on its face" where there was "no

[13] There was at least a hint in *Pike* that the challenged order discriminated in effect. *See, e.g.*, *Pike*, 397 U.S. at 145 (holding a law requiring a producer to "build and operate an unneeded $200,000 packing plant" posed a burden whose "nature . . . is, constitutionally, more significant than its extent" because such burdens "ha[ve] been declared to be virtually per se illegal"); *id.* at 146 (explaining the law imposed a "straitjacket" on an in-state company's "allocation of its interstate resources").

evidence" the law had discriminatory effects); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007) ("Farm winery licenses are available on equal terms to in-state and out-of-state vineyards alike, and Maine's ban on the direct shipping of wine applies evenhandedly across the board."); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (confronting a law with "[n]o disparate treatment" and "no disparate impact" on interstate commerce).

For "evenhanded" laws, "incidental" burdens on interstate commerce must be compared to "local benefits." *Or. Waste*, 511 U.S. at 99. In that context, the burdens' relative size matters. But SB 257 does not apply evenhandedly, and its effects on interstate commerce are not "incidental." Indeed, it has no effects except the ones reshaping the interstate market. SB 257 discriminates, and the magnitude of that discrimination is constitutionally irrelevant. Petitioners' attempt to manufacture a circuit split on the point fails.

The notion that SB 257 "could end up having no practical effect on interstate commerce," Pet. 11–12, fares no better. SB 257's practical effects are well known. They were admitted by Kentucky's Attorney General. Supp. App. 68sa (explaining the materially identical precursor-regulation "would cause Kentucky coal to be priced more competitively in comparison to some states and less competitively with respect to others, depending on which states have chosen to enact severance taxes and at what rate"). They were admitted by the PSC. Supp. App. 106sa–107sa (testifying materially identical language "would make Kentucky coal more competitive as compared to Illinois and Indiana"). They were confirmed by the

law's sponsors. Supp. App. 87sa (recommending SB 257 because Kentucky is better off if utilities purchase more expensive in-state coal instead of less expensive out-of-state coal). And they were confirmed by utilities' evaluations of competitive bids. Supp. App. 100sa–102sa (testifying the materially identical precursor-regulation sometimes caused utilities to rank more expensive bids from producers in severance-tax states above less expensive ones from producers in non-severance-tax states).[14]

To the extent Petitioners' citations speak to the requisite quantum of evidence, then, there is no doubt this case exceeds it. *See, e.g.*, *Cherry Hill*, 505 F.3d at 36–38 (requiring "substantial evidence" instead of "no evidence"); *Black Star*, 600 F.3d at 1231–33 (similar). And Respondent's evidence sets aside the fact that SB 257's language itself requires these effects. *See supra* at 21–22.

Finally, although it makes no difference, SB 257's practical effects are not "de minimis." A simple example should suffice. Imagine a utility requests a contract only two producers can satisfy—one from Kentucky and another from Illinois. The law requires the utility to purchase from the Kentucky producer unless the Illinois producer can beat its price by more than 4.5%. Any other outcome risks cost amortization and loss of the Fuel Adjustment Clause. *See* 807 Ky. Admin. Regs. 5:056(3)(1). Meanwhile, the Illinois

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[14] While decidedly untrue, Petitioners' argument that—two years after its effective date—"we simply do not know" SB 257's practical effects, Pet. 11–12, severely undercuts the argument that the preliminary injunction causes Kentucky "irreparable harm," Pet. 29–30. Unless SB 257 affects interstate commerce, Pet. 12, it accomplishes nothing. Enjoining enforcement of a law that does nothing harms no one.

producer has a dilemma—lose the sale or drop the price to compete with the fictitious amount on which Kentucky coal must be evaluated.

A 4.5% swing is hardly "de minimis." Indeed, Representative Gooch himself confirmed competitive bids are sometimes separated by just a few cents per ton. Supp. App. 79sa, 87sa. And this Court's precedents confirm discrimination of even that size remains unconstitutional. *See, e.g.*, *Limbach*, 486 U.S. at 272 (invalidating "a credit of so many cents per gallon"); *Maryland*, 451 U.S. at 732, 756 (invalidating a first-use tax of "seven cents per thousand cubic feet").

SB 257's known discriminatory effects are another reason to deny the petition.

III. There is no Commerce Clause carveout for "state-imposed" disadvantages or "unearned" out-of-state advantages.

Petitioners next argue that, although it reshapes the interstate market, SB 257's effects are not discriminatory because it only "offsets a state-imposed disadvantage" (*i.e.*, the competitive effects of certain states' severance-tax policies) "without limiting any out-of-state business's earned or natural advantage." Pet. 18. They liken SB 257 to a "compensatory" scheme for sales and use taxes. *See* Pet 20–22. Petitioners believe their argument poses "a question that this Court should answer." Pet. 20. There is just one problem: The Court answered this exact question more than forty years ago.

In *Maryland v. Louisiana*, Louisiana "enacted a tax of seven cents per thousand cubic feet of natural gas on the 'first use' of any gas imported into

Louisiana which was not previously subjected to taxation by another State or the United States." 451 U.S. at 731. Like SB 257, the first-use tax was "designed to equalize competition between gas produced in Louisiana and subject to the state severance tax of seven cents per thousand cubic feet, and gas produced elsewhere not subject to a severance tax." *Id.* at 732. Like Petitioners, Louisiana argued the tax "compensate[d] for the effect of the State's severance tax on local production of natural gas." *Id.* at 758–59.

This Court held Louisiana's first-use tax "unquestionably discriminates against interstate commerce in favor of local interests." *Id.* at 756. As to the compensatory-tax comparison, the Court held that "Louisiana has no sovereign interest in being compensated for the severance of resources" from lands outside its borders. *Id.* at 759. Moreover, in the compensatory-tax context, a state "impose[s] a tax on a substantially equivalent event to assure uniform treatment of goods . . . consumed in the State." *Id.* Severance and use, however, "are not comparable" in the same way "a use tax complements a sales tax." *Id.*

This Court need not repeat itself. It long ago explained that efforts to "equalize competition" between severance-tax and non-severance-tax states violate the Commerce Clause. That Louisiana's severance tax involved "state imposed" competitive disadvantages did not alter the analysis. Nor did it matter that out-of-state producers did not "earn" the "right" not to bear the kind of tax Louisiana chose to levy on in-state producers. The law discriminated, so it was invalid. Kentucky's effort to achieve the same end with phantom price reductions might be

"manifestly cleverer,"[15] but it must suffer the same fate. *See Best*, 311 U.S. at 455 (noting the Commerce Clause forbids even "ingenious" discrimination).

And *Maryland* is no outlier. This Court has broadly explained that laws "artificially encouraging in-state production even when the same goods [can] be produced at lower cost in other States" and laws "neutralizing the advantage possessed by lower cost out-of-state producers" are "clearly unconstitutional." *W. Lynn Creamery*, 512 U.S. at 193–94. SB 257 does exactly what *West Lynn Creamery* forbids.

Indeed, the very case Petitioners rely on for their argument about "unearned" competitive benefits forecloses it. In *Hunt v. Washington State Apple Advertising Commission*, this Court confronted a North Carolina law forbidding apples sold in the state to bear anything other than the applicable federal grade. 432 U.S. 333, 335 (1977). Washington apples went through "a stringent, mandatory inspection program, administered by the State's Department of Agriculture," that resulted in Washington-issued apple grades. *Id.* at 336. Washington's scheme imposed "approximately $1 million" in annual compliance costs on in-state growers. *Id.* Six other states had their own grading schemes, too. *See id.* at 349. North Carolina's law prohibited growers from those states from displaying their state-issued grades. *See id.* at 337.

This Court invalidated the law based on its discriminatory effects. *See id.* at 352–53. It explained: "This discrimination takes various forms." *Id.* at 350. For example, it raised the cost of doing business in

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[15] Orwell, *supra* note 1, at 43.

North Carolina. *See id.* at 350–51. In addition, "by prohibiting Washington growers . . . from marketing apples under their State's grades, the statute ha[d] a leveling effect which insidiously operate[d] to the advantage of local apple producers." *Id.* at 351. And it "stripp[ed] away from the Washington apple industry the competitive and economic advantage it ha[d] earned for itself through its expensive inspection and grading system." *Id.*

Petitioners ignore that SB 257 has a "leveling effect" that "insidiously operates" to the advantage of in-state coal producers. Instead, they seize upon *Hunt*'s "earned for itself" language to argue the door is open to all efforts to eliminate so-called "unearned" competitive advantages. Pet. 23. But Washington apple growers did not have a "natural" advantage over growers in other states. Pet 18, 20, 22, 30. They "earned" their competitive advantage by enduring their state's mandatory grading system and its associated costs. Put simply, *Hunt* involved the exact kind of out-of-state policy decision whose effects Petitioners now argue can be neutralized with impunity.

In general, "States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes." *W. Lynn Creamery*, 512 U.S. at 199 n.15. If Petitioners' argument were accepted, however, those undertakings would be for naught. Such state efforts would create only "unearned" competitive advantages, which—according to Petitioners—other states could freely neutralize. The same tariff-adjacent barriers could be raised to offset states' various policies concerning the minimum wage, environmental issues, and health-and-safety

requirements. Supp. App. 111sa (Kentucky's Solicitor General arguing Illinois should be permitted to offset in-state producers' higher labor costs). "What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!" *H. P. Hood & Sons*, 336 U.S. at 539.[16]

Petitioners' argument encourages the very Balkanization the Commerce Clause guards against. *See Hughes*, 441 U.S. at 325–26. The petition should be denied.

IV. This Court has made clear that purpose remains a necessary consideration, and Kentucky's sole purpose was economic protectionism.

This Court's precedents require eventual examination of a law's purpose. A discriminatory law can survive only if "demonstrably justified by a valid factor unrelated to economic protectionism." *Limbach*, 486 U.S. at 274. But a court cannot know whether a law is "unrelated to economic protectionism" without knowing what it aims to

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[16] The Ninth Circuit decisions Petitioners cite, Pet. 24–25, are in no way inconsistent with these principles. Indeed, those cases confronted laws untethered to state of origin. *See Am. Fuel & Petrochemical Mfrs. v. O'Keefe*, 903 F.3d 903, 911 (9th Cir. 2018) (addressing a law that "discriminate[d] against fuels based on lifecycle greenhouse gas emissions, not state of origin"); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013) (involving a standard that did "not base its treatment on a fuel's origin but on its carbon intensity"). As this Court has explained, a law can treat in-state and out-of-state products differently when "there is some reason, *apart from their origin*, to treat them differently." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978) (emphasis added). Unlike the laws in those Ninth Circuit cases, SB 257 treats products and producers differently based on state of origin.

accomplish. An evenhanded law survives if its "putative local benefits" exceed its "incidental effects" on interstate commerce. *Or. Waste*, 511 U.S. at 99. To know whether its effects are "incidental" and where to look for putative local benefits, though, a court must examine what the law seeks to do. Either way, purpose remains a necessary component of the analysis.

When the law's only purpose is economic protectionism, it cannot pass either test. It must fail because that purpose cannot sustain a law in a constitutional manner. It makes sense, then, to acknowledge that a law with such a purpose begins out of bounds. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (noting that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose" and that laws justified by "simple economic protectionism" are virtually per se invalid (citations omitted)).

Assuming there was confusion about these points among the circuits, Pet. 27, this Court resolved it one week after the petition was filed. *See Nat'l Pork Prods. Council v. Ross*, 143 S. Ct. 1142, 1154 (2023) (summarizing Commerce Clause cases as typifying "the familiar concern with preventing purposeful discrimination against out-of-state economic interests"); *id.* at 1157 (confirming even "the *Pike* line [of precedent] serves as an important reminder that a law's practical effects may . . . disclose the presence of a discriminatory purpose").

Kentucky's purpose here is clear. It did not invoke its police powers to protect consumers from "confusion and deception," *Hunt*, 432 U.S at 353, or to save an at-risk species, *Taylor*, 477 U.S. at 148–52, or to

encourage environmentally responsible recycling efforts, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346–47 (2007) (plurality). SB 257's sole purpose is to reshape the interstate market in a manner favorable to Kentucky's producers and unfavorable to out-of-state producers whose states impose tax regimes unlike Kentucky's. Pet. 20–23, 28. This purpose is clear from the text alone. App. 16a–17a. But it is confirmed by HR 144, the Snavely letter, legislative history (*i.e.*, the draft regulation, the precursor-regulation, and then SB 257's enactment), and sponsoring legislators' descriptions.

The effort to preserve an in-state industry may have some Orwellian appeal. But it falls outside the Constitution and undermines the uniform national market. Indeed, to permit Kentucky to pursue that end would "make a virtue of the vice that the rule against discrimination condemns." *W. Lynn Creamery*, 512 U.S. at 205 ("Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (explaining that, if supporting local industry justified discriminatory laws, "we would have little occasion ever to find a statute unconstitutionally discriminatory").

Because SB 257 seeks to protect in-state producers (and those from a handful of other states that impose Kentucky's preferred tax scheme) from the rigors of interstate competition, it is constitutionally doomed. The petition should be denied for this reason as well.

CONCLUSION

The petition presents no question warranting this Court's review. It should be denied.

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