No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The dormant Commerce Clause is meant to prevent economic isolation among the States. But just how far does that go?

The Sixth Circuit held that a Kentucky law likely violates the doctrine. The law directs a state agency not to consider any jurisdiction's coal-severance tax in assessing the reasonableness of a utility company's fuel costs (which the agency does to help ensure customers pay a fair price). In the lower court's view, the law discriminates against interstate commerce at least in its practical effect and purpose. The court did not say whether it thought the law also discriminates on its face. So the case presents the overarching question: does the law discriminate against interstate commerce in violation of the dormant Commerce Clause? But the lower court's holdings also present three subsidiary, more specific questions on the scope of the dormant Commerce Clause.

First, does a law discriminate against interstate commerce in practical effect when there has been no showing of any burden on interstate commerce beyond a de minimis one?

Second, can a law so discriminate when it only offsets a state-imposed disadvantage, does so equally for all States imposing that disadvantage, and does not affect any out-of-state business's earned or natural advantage?

And third, does discriminatory purpose matter in determining whether a law violates the dormant Commerce Clause and, if so, does the law here have such a purpose?

PARTIES TO THE PROCEEDING

The petitioners are Kent Chandler, in his official capacity as Chairman and Commissioner of the Kentucky Public Service Commission; Angela Hatton, in her official capacity as Vice Chair and Commissioner of the Kentucky Public Service Commission; Mary Pat Regan, in her official capacity as Commissioner of the Kentucky Public Service Commission; and Linda Bridwell in her official capacity as Executive Director of the Kentucky Public Service Commission. They (or their predecessors in office) were defendants in the district court and appellees in the court of appeals.

The respondent is Foresight Coal Sales, LLC. It was the plaintiff in the district court and the appellant in the court of appeals.

DIRECTLY RELATED PROCEEDINGS

Foresight Coal Sales, LLC v. Chandler, No. 3:21-cv-16, U.S. District Court for the Eastern District of Kentucky (order denying motion for a preliminary injunction issued on November 3, 2021; order granting motion for a preliminary injunction following remand issued on April 13, 2023; order amending preliminary injunction issued on May 2, 2023).

Foresight Coal Sales, LLC v. Chandler, No. 21-6069, U.S. Court of Appeals for the Sixth Circuit (judgment entered on February 3, 2023).

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INTRODUCTION

There is a serious question whether the dormant Commerce Clause is legitimate. It appears nowhere in the text of the Constitution and parts of it make little sense. *See Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting). Now, perhaps some of its reach can be justified by different constitutional provisions rightly interpreted—say, the Import-Export Clause or Article IV's Privileges and Immunities Clause. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring). Or perhaps the doctrine has developed staying force under stare decisis. All of that may be true. But given its shaky footing, there is no doubt that the doctrine should not be extended. At the very least, courts "should not be in the business" of extending the "judge-made 'dormant Commerce Clause' limitations on state powers." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2478 (2019) (Gorsuch, J., dissenting).

Yet that is just what the lower court did here. It held that Kentucky's 2021 Senate Bill 257 likely discriminates against interstate commerce in its practical effect and purpose. But those holdings "broaden the doctrine" far "beyond its existing scope." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 360 (2008) (Scalia, J., concurring in part) (citation omitted). Consider three aspects of the holdings.

First, the lower court determined that there is no need to wait and see how SB 257 operates to determine whether it discriminates in practical effect. Even

if its only effect on interstate commerce is the Kentucky agency's treating coal from certain States as relatively more expensive in its reasonableness assessments, that de minimis burden is enough for discrimination in practical effect. But that is not what the doctrine says. The holding conflicts with this Court's precedent, does away with any distinction between practical-effect discrimination and *Pike* balancing, and creates a circuit split.

Second, according to the court, it made no difference for its practical-effect holding that the law here just offsets severance taxes that States impose on their own businesses, without stripping away any out-of-state business's earned or natural advantage. Again, that expands the doctrine's reach. Plus, it ignores the purpose of the dormant Commerce Clause, raises an important question that this Court should answer, and takes sides in another circuit split.

And third, while the court was skeptical about whether a discriminatory purpose matters, it found such a purpose based on the law's text (despite not finding the law facially discriminatory). That too could expand the doctrine by allowing only a perceived discriminatory purpose to invalidate a state law. And it raises another question that this Court should answer, highlights a potential third circuit split, and is just wrong in the end.

In short, the decision below significantly broadens the judge-made dormant Commerce Clause doctrine, "limiting the lawful prerogatives of" Kentucky. *Wayfair*, 138 S. Ct. at 2097. And that means it checks practically all the boxes guiding the Court's discretion in granting review—several more than once. *See* Sup. Ct. R. 10; *Camreta v. Greene*, 563 U.S. 692, 709 (2011). No

doubt, the scope of the dormant Commerce Clause is an important question of federal law. It affects "the interests of this nation in its internal . . . relations," *Forsyth v. City of Hammond*, 166 U.S. 506, 515 (1897), and goes directly to the States' power as dual sovereigns. On top of that, the decision below creates a circuit split, adds to a second, and highlights a potential third. And it both conflicts with this Court's cases and raises questions the Court should answer. No matter what else can be said of the dormant Commerce Clause, at a minimum its reach should not be extended. The Court should step in and ensure that it isn't.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a–27a) is reported at 60 F.4th 288. The district court's decision (App. 28a–51a) is unreported but available at 2021 WL 5139491.

JURISDICTION

The lower court entered judgment on February 3, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Kentucky's 2021 Senate Bill 257 states:

> (1) In any review by the commission of any fuel adjustment clause, for any contracts entered

> into on or after July 1, 2021, the commission shall, in determining the reasonableness of fuel costs in procurement contracts and fuel procurement practices, 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.
>
> (2) As used in this section, "fuel adjustment clause" means any clause or provision in any tariff or contract by which an electric utility may immediately recover increases in fuel costs subject to later scrutiny or review by the commission.

Ky. Rev. Stat. § 278.277.

STATEMENT OF THE CASE

1. Despite the Commerce Clause containing only an affirmative grant of power to Congress, the Court has long held that it has a negative side too. *Tenn. Wine & Spirits*, 139 S. Ct. at 2459. That side is intended to prevent the States from enacting protectionist laws that limit the national market. *Id.* It aims to ensure that in- and out-of-state businesses compete on equal footing. *See Wayfair*, 138 S. Ct. at 2094. And it does so in two ways: by preventing laws from discriminating against interstate commerce and from unduly burdening that commerce. *Id.* at 2091. A law falls on the former side if it discriminates on its face or in its practical effect (and some would say in its purpose). And it falls on the latter if it does not discriminate but still adversely affects interstate commerce. Such a law must pass *Pike* balancing to be valid (the burden on interstate commerce cannot be clearly excessive to the

local benefits). *Id.*; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

2. Foresight Coal Sales, an Illinois coal producer, thinks that Kentucky's SB 257 violates that negative side of the Commerce Clause. Kentucky's General Assembly passed, and its Governor signed, the bill into law in 2021. App. 5a. SB 257 regulates how a Kentucky agency, the Public Service Commission, reviews Kentucky utility companies' fuel purchases. The PSC makes sure that the utilities charge their customers reasonable rates. Ky. Rev. Stat. §§ 278.030(1), 278.040. But because such rates can vary depending on short-term fluctuations in fuel prices, a utility may have trouble ensuring that. So the PSC has a regulatory mechanism that allows utilities to adjust their customers' rates in real time to respond to the fluctuating prices: the fuel-adjustment clause. *See* 807 Ky. Admin. Reg. 5:056. Under that clause, utilities can adjust customers' rates without getting pre-approval from the PSC.

The PSC, however, still has to make sure that customers are paying a reasonable price. So it reviews how utilities employ the fuel-adjustment clause on the back end. Those reviews are holistic, considering various factors to ensure the reasonableness of a utility's costs—not just whether the company bought the cheapest fuel. They occur at interim six-month and then final two-year intervals. *Id.* And that's where SB 257 comes in.

It specifies that the PSC is not to consider "any coal severance tax imposed by any jurisdiction" when "determining the reasonableness of fuel costs." Ky. Rev. Stat. § 278.277(1). Many States impose such coal-severance taxes. Kentucky imposes one of 4.5% on the

gross value of coal severed or processed in Kentucky. *Id.* § 143.020. Other States do similarly—at various rates. Some States do so at a lower rate than Kentucky, some at a higher rate, and some at a bit of both. For example, Wyoming imposes a 6.5% severance tax on surface coal and a 3.75% one on underground coal. Wyo. Stat. Ann. § 39-14-104. West Virginia imposes a general 5% severance tax but allows for a reduced rate for certain coal. W. Va. Code § 11-13A-3. Illinois, however, does not impose a coal-severance tax. And that caused Foresight, an Illinois company, to think that SB 257 disadvantaged it.

3. So Foresight sued. Less than two weeks after Kentucky passed SB 257 and well before the PSC had conducted any reviews applying the law, it filed its complaint. And shortly after, it moved for a preliminary injunction in the district court.

There, Foresight argued that SB 257 discriminates against and unduly burdens interstate commerce. App. 43a. The district court disagreed. It rejected each of Foresight's arguments that SB 257 discriminates against interstate commerce. The law does not discriminate on its face, in its practical effect, or in its purpose. App. 45a–50a.

On its practical-effect holding, the court explained that there was not enough evidence in the record to show a discriminatory effect. App. 48a–49a. Nothing showed how the PSC would apply SB 257 or what impact the law would have on its reasonableness determinations given that cost is only one factor in its review. *Id.* As the court saw it: "the principles of federalism instruct that a federal court should be reticent to enjoin a state law before the effects of that law have

been borne out, except in the most extreme circumstances." App. 49a. And on its purpose holding, the court determined that SB 257's language "is neutral, applies equally to all states, and does not particularly single out Kentucky." App. 47a–48a. So that language did not evidence any discriminatory purpose, and there was no circumstantial evidence showing such a purpose. App. 46a–47a.

Likewise, the district court held that Foresight had not shown that SB 257 failed *Pike* balancing. App. 51a. In its two-paragraph argument on the point, Foresight's speculation could not show that the law's burden on interstate commerce was clearly excessive to its local benefits. *Id.* The court therefore denied the motion for a preliminary injunction.

4. Foresight then appealed to the Sixth Circuit under 28 U.S.C. § 1292(a)(1). There, it raised only its discrimination claims, electing not to challenge the *Pike* holding. *See* Appellant Br. 23 n.5, 60 F.4th 288 (No. 21-6069). The Sixth Circuit reversed. In its view, Foresight was likely to succeed on the merits. App. 26a. Although the court flirted with finding facial discrimination, it never did. App. 12a. Instead, its primary holding rested on SB 257's practical effect.

As the court saw it—and despite the district court's factual findings—there was no need to wait to see SB 257's effect. App. 14a–16a. That was because the court determined that any burden on Illinois coal was enough for such discrimination: "any economic disadvantage will do." App. 15a. And it saw such a disadvantage because SB 257 "discounts" coal from severance-tax States in the PSC's reasonableness determinations but not from other States like Illinois. *Id.* Whether that actually causes Illinois coal companies

to lose Kentucky utility contracts did not matter. Those companies were, in the abstract, at least a little bit worse off.

On top of that, the court rejected the argument that SB 257 does not discriminate because it merely offsets a state-imposed disadvantage without stripping away any earned advantage of out-of-state businesses. App. 18a–26a. The court determined that the principle of offsetting such disadvantages negating a discrimination claim is limited to compensatory taxes. App. 21a–22a. Of course, SB 257 does not fit that bill. The court also rejected any distinction between affecting earned and unearned advantages of other States. App. 24a–26a. So the court held that SB 257 likely discriminates against interstate commerce in its practical effect.

And the lower court held the same for its purpose. The court did not answer whether a discriminatory purpose matters at all and was skeptical that such a purpose alone could invalidate a law. App. 9a & n.1. Yet it found a discriminatory purpose. And it did so based solely on SB 257's text—which it never held was facially discriminatory. App. 17a.

The court then remanded the case for the district court to reconsider whether to grant a preliminary injunction given its holding that SB 257 is likely unconstitutional. App. 27a. On remand, because the likelihood of success on the merits is usually determinative for constitutional claims, the district court granted a preliminary injunction against enforcing SB 257 against Foresight. App. 56a. It then amended the preliminary injunction to prohibit enforcement of the law at all. App. 59a.

And that brings us to this petition.

REASONS TO GRANT THE PETITION

The dormant Commerce Clause "is a limit on state power. Defining that limit has been the continuing task of this Court." *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). In fact, one of the Court's main functions in this area "has been to adjudicate disputes that require interpretation of the Commerce Clause in order to determine its meaning, its reach, and the extent to which it limits state regulations of commerce." *Wayfair*, 138 S. Ct. at 2090. Over the years, the Court has not shied away from fulfilling that function—and rightly so.

If the dormant Commerce Clause is misinterpreted, then that "prohibit[s] the States from exercising their lawful sovereign powers in our federal system." *Id.* at 2096. So the Court "should be vigilant in correcting the error." *Id.* And all the more so because such errors extend a judge-made doctrine.

This petition asks the Court to do just that: step in and correct an error significantly extending the dormant Commerce Clause. That extension conflicts with this Court's cases and presents questions the Court should address. It creates one circuit split, deepens another, and highlights a potential third. And of course, it raises important questions affecting the sovereignty of the States. Finally, there is no good reason to wait to review the case. The Court should grant review.[1]

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[1] The focus here is on the three specific questions presented by the lower court's holdings. Those holdings are what extend the doctrine and warrant this Court's review. But the Court could just grant review of the overarching question presented: whether SB 257 discriminates against interstate commerce in violation of

I. The decision below conflicts with those of this Court and creates a circuit split.

The first specific question raised by the lower court's opinion is whether a law discriminates in practical effect when it imposes only a de minimis burden on interstate commerce. The lower court said yes. It declined to wait and see how the PSC applies SB 257 and what practical effect the law has on interstate commerce—if any. App. 14a–16a. Instead, the court found discrimination in practical effect only because the law requires the PSC to subtract coal-severance taxes from its reasonableness determinations, which makes States without such a tax relatively worse off in the abstract. *Id.* But that conflicts with this Court's cases and creates a circuit split.

1. Start with the Court's cases—the decision below conflicts with several. First, it conflicts with *American Trucking Ass'ns v. Michigan Public Service Commission*, 545 U.S. 429 (2005). There, the Court considered whether Michigan's flat $100 fee charged on trucks making intrastate hauls had a discriminatory effect on interstate commerce. *Id.* at 431, 434. Although the fee applied only to intrastate hauls, interstate ones were affected because some trucks made both interstate

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the dormant Commerce Clause. Doing so would include the three specific questions plus whether the law discriminates on its face. In other words, because of what the lower court held, the Petitioners do not focus on whether SB 257 facially discriminates. But they would not shy away from arguing on the merits that it doesn't if the Court wants to decide that issue. In fact, they would welcome it. The law applies evenhandedly to all jurisdictions. It does not single out Kentucky or any other State. It is not facially discriminatory.

and intrastate hauls at the same time. And the argument went, because those trucks did less intrastate hauls than trucks that only traveled in Michigan, the flat fee discriminated in practical effect. *Id.* at 432. Trucks doing interstate hauls were relatively worse off than trucks doing only intrastate ones.

But the Court rejected that argument. Just because the fee imposed a proportionately greater burden on trucks doing both interstate and intrastate hauls that did not mean the law discriminated in practical effect. The plaintiffs did not show how "the $100 fee impose[d] any significant practical burden upon interstate trade." *Id.* at 434. There were no facts in the record that "empirically could show that the $100 fee significantly deters interstate trade." *Id.* at 435. Plus, given the costs the fee was intended to offset, it was not unfair for it to apply per truck rather than per mile. *Id.*

American Trucking conflicts with the lower court's decision here in two ways. First, as the Court saw it, the practical-effect burden had to be significant. By implication, a de minimis burden would not be enough. Yet it was for the lower court. App. 15a. Second, the Court required the facts in the record to show that significant burden. Mere speculation was not enough; the record had to bear out that the discrimination was actually occurring. Yet the lower court declined to wait and see what the actual effects of SB 257 are. App. 14a–16a.

Indeed, the law could end up having no practical effect on interstate commerce. On this record, we

simply do not know. Foresight might well lose no utility contracts because of it. And Kentucky coal producers might gain none. That is all the more true because SB 257 has the PSC subtract the amount of *any* jurisdiction's severance tax and some jurisdictions have a higher one than Kentucky. *See, e.g.*, Wyo. Stat. Ann. § 39-14-104; W. Va. Code § 11-13A-3. So Kentucky companies could end up losing business as a result of it. In short, as of now, it's unclear what real practical effect—if any—SB 257 will have on interstate commerce. The lower court's disregard for that, and its reliance on only a perceived de minimis burden on coal producers in Illinois, conflicts with *American Trucking*.

Second, the decision below conflicts with *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). There, the Court held that Minnesota's law prohibiting selling milk in plastic, nonreturnable containers neither discriminated against interstate commerce nor failed *Pike* balancing. *Id.* at 471–72. It did not even seriously consider that the law discriminated in practical effect, easily holding that there was no discrimination. *Id.* Then the Court held that the law passed *Pike* balancing: its burden on interstate commerce was not excessive. *Id.* at 472. In part, that was because the burden was relatively minor. True, certain Minnesota producers would likely benefit at the expense of out-of-state producers because the raw material used for making the plastic milk containers was produced exclusively out of state and the likely replacement, pulpwood, was a major in-state product. *Id.* at 473. But that did not mean the law failed *Pike* balancing. As the

Court explained, "[e]ven granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry," that was not clearly excessive in relation to the local interests advanced. *Id.*

Yet here's the kicker: under the decision below, such an effect would mean the law discriminates in practical effect. It is at least a de minimis burden on interstate commerce—out-of-state businesses are relatively worse off and in-state ones better off. But remember, the Court was clear that the law was not discriminatory. *Id.* at 471–72. So it cannot be right that a de minimis burden can show discrimination in practical effect. More is needed. If that more is lacking, then a court analyzes the law under *Pike* balancing just as in *Clover Leaf Creamery*. And that brings us to the next conflict.

Third, the decision below conflicts with *Pike*. There, the effect of Arizona's law required almost all cantaloupes grown for profit to be packaged in-state. *Pike*, 397 U.S. at 138. No doubt, that had at least a de minimis burden on interstate commerce. There was a clear burden on the interstate plaintiff: the law would require it to expend an additional $200,000. *Id.* at 144. Yet the Court did not hold that the law discriminated in practical effect. Instead, it viewed the effect on interstate commerce as "only incidental." *Id.* at 142. And so the Court analyzed the law under a different framework than practical-effect discrimination.

To be sure, the Court has noted that there is "no clear line between these two strands of analysis." *Gen.*

Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997). But there is still a distinction—a distinction that the decision below does away with. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 38–39 (1st Cir. 2007) ("Were we to require no showing beyond the de minimis level, no distinction would exist between the discriminatory effect test and the incidental burden test employed by the Supreme Court in *Pike*."); *Nat'l Paint & Coating Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995). Doing so of course conflicts with *Pike*, treating a de minimis burden as showing discrimination in practical effect instead of just having to pass *Pike* balancing.

2. So how did the court below misstep? It conflated what this Court has said about facial discrimination with practical effects. The Court has explained that "the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994). And the lower court relied on that to find practical-effect discrimination. App. 16a. But that statement speaks to only facial discrimination.

Lohman was about "patent discrimination"—that is, facial discrimination. *Id.* at 649. *Maryland v. Louisiana*, the other case the lower court cited, also had clear facial discrimination. 451 U.S. 725, 756–57 (1981) ("On its face, this credit favors those who both own OCS gas and engage in Louisiana production."). And the same goes for the other times the Court has noted that the amount of discrimination is not determinative. *See, e.g.*, *Camps Newfound/Owatonna*, 520

U.S. at 581; *Wyoming v. Oklahoma*, 502 U.S. 437, 455–56 (1992); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988).

The Court has never held that a de minimis burden alone results in practical-effect discrimination. And that makes sense. Naturally, the degree of discrimination does not matter for facial discrimination. For that, discrimination has already been determined, so it makes no difference how much there is. But the same is not true for determining practical-effect discrimination. In that context, a court is looking to whether discrimination exists in the first place so the extent of the practical effects matter. As the First Circuit has noted: "The de minimis standard, when used in cases involving facially discriminatory laws, speaks to the *degree* of discrimination. It cannot sensibly be used to answer the different question of whether discriminatory effect exists." *Cherry Hill Vineyard*, 505 F.3d at 38. And that must be true if there is any distinction between practical-effect discrimination and *Pike* balancing—which, under this Court's cases, there is. *See id.*

3. Now, consider the circuit split. The decision below creates a split with at least the First, Seventh, and Ninth circuits.

The First Circuit holds that proving discrimination in practical effect requires a substantial showing. *See id.* at 36. There "must be substantial evidence of an actual discriminatory effect." *Id.* at 37. And that effect must be more than a de minimis burden on interstate commerce. *Id.* at 38–39.

That's why in *Cherry Hill Vineyard* the First Circuit held that the plaintiffs did not show that a Maine law discriminated in practical effect. *Id.* at 39. The law exempted small wineries from restrictions on selling to consumers face to face. *Id.* at 31. The plaintiffs argued that the practical effect was to discriminate against out-of-state wineries. *Id.* at 33–34. But the problem was they did not show that. The record contained "no evidence" supporting their argument. *Id.* at 36. And they could not rely on there being at least a de minimis burden. *Id.* at 38–39.

That is not to say, however, that the plaintiffs could not have met their burden. They just failed to do so. Indeed, in another case, the First Circuit held that plaintiffs challenging a Massachusetts law allowing only small wineries to obtain a favorable shipping license showed a discriminatory impact. *Fam. Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 11 (1st Cir. 2010). The record evidence there showed that the law's effect was to "significantly alter the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries." *Id.* In other words, there was more than a de minimis burden, and it was adequately shown.

Likewise, the Seventh Circuit holds that discrimination in practical effect requires a "powerful" effect. *Nat'l Paint & Coatings*, 45 F.3d at 1131; *see also Regan v. City of Hammond*, 934 F.3d 700, 703 (7th Cir. 2019). But "weak" effects (de minimis ones) are subject only to *Pike* balancing. *Nat'l Paint & Coatings*, 45 F.3d at 1131. And the Seventh Circuit too does not infer effects.

Because of that, in *National Paint & Coatings*, the Seventh Circuit did not even entertain that a Chicago ordinance banning the sale of spray paint was discriminatory in practical effect. *Id.* at 1132. Assuming that the ordinance would lower the amount of spray paint moving into Illinois, the effect on interstate commerce at most would be weak. *Id.* So only *Pike* balancing could apply. But the plaintiffs did not offer any evidence that spray-paint replacements would "come from inside Illinois to any greater degree than the spray paint itself" did. *Id.* And so they came up short on *Pike* balancing too.

And finally, the Ninth Circuit agrees with the First and Seventh that a de minimis burden is insufficient and that substantial evidence is needed to show practical-effect discrimination. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232, 1235 (9th Cir. 2010). In *Black Star Farms*, the Ninth Circuit held that an Arizona law allowing wineries to bypass the normal wine distribution system when certain conditions were met did not discriminate in practical effect. *Id.* at 1227. That was because the record lacked "substantial evidence of an *actual* adverse effect created" by the law. *Id.* at 1231. And the Ninth Circuit would not infer that the law had a discriminatory effect. It explained: "Courts examining a 'practical effect' challenge must be reluctant to invalidate a state statutory scheme . . . simply because it might turn out down the road to be at odds with our constitutional prohibition against state laws that discriminate against Interstate Commerce." *Id.* at 1232. And the court was clear

that neither the potential for discrimination in practical effect nor a "de minimis benefit to in-state wineries" was enough. *Id.* at 1235.

The Sixth Circuit's decision conflicts with the views of each of those circuits. It held that practical-effect discrimination was shown by a mere de minimis burden: that coal from companies in non-severance-tax States would be treated as relatively more expensive than coal from those in severance-tax States in the PSC's reasonableness reviews. It held no other evidence was needed—let alone substantial—that SB 257 discriminates in practical effect. And worse still, it did so in the context of a preliminary injunction before there is any evidence about how the PSC will apply SB 257.

Unlike the district court, which under federalism principles was "reticent to enjoin a state law before the effects of that law have been borne out," the Sixth Circuit saw no need to wait. App. 49a. That cannot square with the holdings of the First, Seventh, and Ninth circuits, which require more than a de minimis burden shown by significant evidence.

II. The decision below raises another question that the Court should review and deepens another circuit split.

The case presents a second specific question worth reviewing: whether SB 257 can discriminate in its practical effects at all. Can a law that simply offsets a state-imposed disadvantage for all States without limiting any out-of-state business's earned or natural advantage discriminate in practical effect? That is a

question this Court should answer. And it is one on which the decision below deepens a circuit split.

1. For the former, recall that the dormant Commerce Clause is intended to stop the States from retreating into economic isolation. It is meant to ensure that out-of-state businesses can compete on equal footing with in-state businesses. *See, e.g.*, *Wayfair*, 138 S. Ct. at 2094 (suggesting the doctrine "was intended to put businesses on an even playing field" (citation omitted)). That's why a State can neither prop up in-state businesses over out-of-state ones nor put down out-of-state businesses under in-state ones. Both tilt the playing field toward in-state businesses.

But a law that just offsets a state-imposed disadvantage is different. It only evens the playing field for in-state businesses. Now, perhaps that could be problematic if the law offsets only its own state-imposed disadvantage and not also those of other States. But if the law evenhandedly offsets the self-imposed disadvantages for all States, then it does truly even the playing field for the disadvantaged businesses.

The only argument otherwise is that businesses in States without the self-imposed disadvantage are worse off because of the law. But that makes little sense. Such businesses are no worse off than if the other States were to do away with their self-imposed disadvantage—which of course they could do. For example, if Kentucky had simply repealed its coal-severance tax rather than passed SB 257, Foresight agrees that such a law would not discriminate in effect. That shows that a law like SB 257 takes nothing away from

out-of-state businesses like Foresight (at least nothing they have any right to). Such businesses have no natural or earned advantage over businesses in States with the self-imposed disadvantage. They lose nothing other than an unearned advantage flowing from States' self-imposed disadvantage.

All that to say: a law that only offsets a State's self-imposed disadvantage, does so for all States imposing that disadvantage, and does not do away with any earned or natural advantage of out-of-state businesses cannot discriminate against interstate commerce. The law just levels the playing field. That follows from the very purpose of the dormant Commerce Clause.

Yet the lower court disagreed. It rejected the argument that SB 257 cannot discriminate because it merely offsets the self-imposed disadvantage of all States with a coal-severance tax and does not affect any natural or earned advantage of out-of-state businesses. App. 18a–26a. And that raises a question that goes both to the very purpose of the dormant Commerce Clause and its reach. It is a question that this Court should answer.

2. And it's not as though the Court's cases say nothing on the question. They say a lot. On the one hand are the Court's compensatory-tax cases, which show the principle that States can in fact offset a self-imposed disadvantage. And on the other hand are the Court's cases about discriminatory effects, which focus on whether a law takes away an earned advantage. Consider a case from both sides: *Henneford v. Silas*

Mason Co., 300 U.S. 577 (1937), and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

In *Henneford*, the Court upheld a Washington law that imposed a two-percent use tax on goods bought out of state but used in-state. 300 U.S. at 579–80. The tax offset a two-percent sales tax imposed on equivalent goods sold in-state. *Id.* And it helped retail sellers in Washington "to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden." *Id.* at 581. It achieved "equality and not preference." *Id.* at 586.

The takeaway is that States can act to offset self-imposed disadvantages to help level a playing field. Now, there are important limitations on that. The Court has made clear that compensatory taxes must meet specific criteria. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 332–33 (1996). Those criteria ensure that the tax actually offsets a state-imposed disadvantage. And that makes sense: a tax on out-of-state businesses imposes a direct burden on them, so there is a real danger of burdening interstate commerce if the tax is not truly compensatory. But contrast that with a law that only offsets a state-imposed disadvantage without imposing a direct burden—a law like SB 257. Then the law fits neatly into the principle underlying *Henneford*. The State is just helping businesses compete on equal footing.

That's why the lower court's rejection of this argument comes up short. Of course, SB 257 is not a compensatory tax. It is not a tax at all. But the law still cannot discriminate in practical effect because it just offsets a self-imposed disadvantage. And it does so without directly burdening out-of-state businesses. That means the lower court's statement that "a policy that benefits out-of-state interests doesn't justify another that burdens them" misses what's going on. App. 19a. SB 257 "burdens" out-of-state businesses like Foresight only by offsetting the artificial benefit they received from some States' self-imposed disadvantages. It imposes no direct burden on such businesses. That is all too clear because any effect on those businesses is no different than if Kentucky were to repeal its coal-severance tax—which no one suggests it could not do. So whatever "burden" SB 257 imposes on Foresight here cannot take away an advantage that it has any right to.

It would be a different story if Foresight had some natural or earned advantage that SB 257 took away. And that's where *Hunt* comes in. There, Washington apple sellers (and the State itself) had put significant work into using its state grading system to make Washington apples more marketable. *Hunt*, 432 U.S. at 351. As a result, its grading system had "gained nationwide acceptance in the apple trade" and was preferred over the federal grade because of its "greater consistency, its emphasis on color, and its supporting mandatory inspections." *Id.* In other words, Washington had earned a competitive advantage over other States.

That's why the Court struck down North Carolina's law requiring apples sold or shipped into the State to have only the federal grade. The practical effect was to strip "away from the Washington apple industry the competitive and economic advantages it ha[d] *earned for itself* through its expensive inspection and grading system." *Id.* at 351 (emphasis added). So the law had a "leveling effect which insidiously operate[d] to the advantage of local apple producers." *Id.* In other words, it brought Washington apple sellers down by doing away with an earned advantage; it did not bring in-state sellers up by only doing away with a self-imposed disadvantage.

So between them, *Henneford* and *Hunt* (along with other cases like them) stand on both sides of allowing a law that just offsets a self-imposed disadvantage without affecting any earned advantage of another State. But even with those cases, the question remains whether such a law can discriminate—as shown by the lower court's holding. This Court should answer it.

3. On top of that, there is also a circuit split on this question—one that the decision below adds to. The Sixth Circuit's decision aligns with the Third Circuit's in *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board*, 462 F.3d 249 (3d Cir. 2006). There, the Third Circuit considered whether a Pennsylvania law regulating milk sales discriminated in practical effect. The law imposed an over-order premium on raw milk that Pennsylvania sellers had to pay when selling raw milk to in-state milk producers but not when selling to out-of-state ones. *Id.* at 256. And it imposed a minimum wholesale price that all

producers selling milk to retailers had to pay. *Id.* The Third Circuit ultimately held that the out-of-state business that sued had not met its burden to show practical-effect discrimination. *Id.* at 269–70. But the court noted that the business could have done so if it gained a competitive advantage from not having to pay the over-order premium on raw milk and lost that advantage by the minimum wholesale price. *Id.* at 265, 270.

Put another way, if the out-of-state business's competitive advantage gained by one part of the law was neutralized by another part of it, in the Third Circuit's view, that would amount to discrimination in practical effect. That maps onto what the Sixth Circuit held here that even a law only offsetting a self-imposed disadvantage without affecting an earned advantage of another State can discriminate in practical effect. So there are now two circuits on this side.

On the other is the Ninth Circuit, which follows *Hunt* in focusing on whether an earned advantage of out-of-state businesses is taken away. The key case is *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). There, the Ninth Circuit rejected the argument that a California law regulating ethanol and crude oil stripped away out-of-state businesses' earned competitive advantage. *Id.* at 1092. One of the businesses' arguments was that they had gained an advantage by building ethanol production facilities near places where they could access "cheap, coal-generated electricity." *Id.* But while the court recognized that was an advantage, it explained that lessening it did not mean the law discriminated in practical effect.

As the court saw it: "Access to cheap electricity is an advantage, but it was not 'earned' in the sense meant by *Hunt* simply because ethanol producers built their plants near coal-fired power plants." *Id.*; *see also Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 915 (9th Cir. 2018).

So for the Ninth Circuit, it matters what type of advantage is taken away. If an earned advantage is taken away, then there is a problem—not so for an unearned one. Of course, an advantage flowing only from other States' self-imposed disadvantage is not earned. And that means, in the Ninth Circuit, a law that only offsets such a disadvantage without affecting an earned advantage of out-of-state businesses would not discriminate in practical effect. That is the opposite of how the Third and now Sixth circuits view it. And so the decision below presents a second circuit split.

III. The decision below raises a third question the Court should review and highlights a potential third circuit split.

This case presents one more specific question worth reviewing: whether purpose matters in determining if a law discriminates against interstate commerce. That question is raised squarely by this Court's cases—a few of which suggest purpose has a role to play, while others (and the most recent) suggest the opposite. And lower courts, including the court below, have repeatedly noted the question. It is therefore one that this Court should answer. And it contains a potential third circuit split. Finally, wrapped up in the question is the lower court's treatment of it. Assuming discriminatory purpose matters, the decision below got it wrong that SB 257 has such a purpose.

1. Early on, this Court was clear that "motives alone will seldom, if ever, invalidate a [statute] that apart from its motives would be recognized as lawful." *Henneford*, 300 U.S. at 586. Yet the Court has also stated that a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted). And that suggests the opposite. So how do we square those statements—is *Henneford* or *Bacchus* right?

Well, just a few years ago, the Court in *Wynne* seemed to side with *Henneford*. It explained: "The Commerce Clause regulates effects, not motives, and it does not require courts to inquire into voters' or legislators' reasons for enacting a law that has a discriminatory effect." *Wynne*, 575 U.S. at 561 n.4. And that makes sense—for two reasons. First, a law that has a discriminatory purpose but neither discriminates on its face nor in its effects does not actually discriminate. Interstate commerce is no worse off because of it. There is no danger of economic isolation. And second, determining whether a law has a discriminatory purpose often requires the ever-elusive inquiry into collective legislative intent. *See, e.g.*, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906–07 (2019). The only time it doesn't is when the law shows that discriminatory purpose on its face. But then there is facial discrimination, seemingly making the purpose inquiry redundant. So there is no reason for it, and the Court should clarify that it was serious in *Wynne*: the dormant Commerce Clause regulates effects, not motives. A law's purpose has no place in the analysis.

2. That the question is worth reviewing is confirmed by lower courts' puzzlement on how a law could be discriminatory just because of its purpose. The court below was "skeptical" that purpose alone could suffice to show a dormant Commerce Clause violation and doubted that such a case would be problematic. App. 9a n.1. Other courts agree. *See, e.g.*, *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 89–90 (1st Cir. 2021) ("[I]t is difficult to conceive of a case in which a [statute] that does not discriminate in effect could be struck down based on discriminatory purpose."); *Wynne v. Comptroller of Md.*, 228 A.3d 1129, 1144 n.28 (Md. 2020).

And yet, most circuit courts still list discriminatory purpose as a stand-alone category. *See, e.g.*, *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1026 (8th Cir. 2020). But not all: for example, the Seventh Circuit does not. *See Regan*, 934 F.3d at 703; *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1058 (7th Cir. 2018). Its test makes no mention of a discriminatory purpose. Neither do the Tenth or Eleventh circuits' tests. *See, e.g.*, *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040–41 (10th Cir. 2009); *Fla. Transp. Servs., Inc. v. Miami-Dade County*, 703 F.3d 1230, 1243–44 (11th Cir. 2012). And that suggests a potential third circuit split raised by the decision below. Under some circuits' articulation of the test, the dormant Commerce Clause is seemingly not violated by a mere discriminatory purpose. But under other circuits' articulation, it could be. All told, this question is also worth the Court's review.

3. Finally, wrapped up in the question—depending on how the Court answers it—is another. Assuming

purpose does matter, did the court below get it right that SB 257 has a discriminatory purpose?

The lower court held that SB 257 has a discriminatory purpose based on its text alone—even though the court never held that the law was facially discriminatory. That makes no sense. Nothing in the text of SB 257—exempting *any* coal-severance tax from *any* jurisdiction from the PSC's reasonableness reviews—suggests anything discriminatory. And the court's reliance on its determination that leveling the playing field by offsetting a self-imposed disadvantage amounts to practical-effect discrimination comes up short. Doing so cannot discriminate in violation of the dormant Commerce Clause, as discussed above. So that cannot show a discriminatory purpose. Even if purpose matters, the lower court got it wrong.

IV. The questions presented are important, and the Court should review them now.

Each of the three specific questions presented warrants review. They do so standing alone—and especially together. No doubt, they are important, going to the scope of the judge-made dormant Commerce Clause and its limitation on state sovereignty. But focus a moment on just how important they are. The result of the decision below is that the PSC cannot enforce SB 257. A state agency cannot enforce a state law.

The Constitution split sovereignty between the federal government and the States. It did not "abolish the sovereign powers of the States." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022) (citation omitted). It only limited them. So beyond those limits, the States retain their sovereign

powers. And chief among them is "the power to enact and enforce any laws that do not conflict with federal law." *Id.* It is therefore a big deal any time a court enjoins a State from enforcing its law because it conflicts with federal law.

In fact, if a court gets that wrong and there is no conflict with federal law, then the State necessarily "suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). That injury is only more pronounced when a court incorrectly enjoins enforcement of a law because of a perceived conflict with the judge-made dormant Commerce Clause. Then the error flows not from a misinterpretation of the written Constitution or a federal statute but from extending a judge-made doctrine.

That is exactly what has happened here. The decision below misinterpreted the doctrine in multiple ways, extending its reach well beyond what this Court has allowed. In doing so, it stops Kentucky from being able to enforce its law—causing irreparable injury all the while. And that's why the Court should step in now. It should stop Kentucky's irreparable injury and the extension of the doctrine.

Plus, the precedent is already set for future cases. When the next case comes around from a State in the Sixth Circuit, the expanded view of the dormant Commerce Clause will apply. And who knows what that case will be about. It could be about something relatively small, like a law letting certain wineries sell their wares to customers face to face. *See Cherry Hill Vineyard*, 505 F.3d at 31. Or it could be about something bigger, like a law banning businesses from requiring customers to show proof of vaccination against

COVID-19. *See Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen., Fla. Dep't of Health*, 50 F.4th 1126, 1130 (11th Cir. 2022). Either way, under the precedent set by the decision, as long as there is a de minimis burden on interstate commerce then there is a dormant Commerce Clause violation. And that remains true even if that burden does not affect any out-of-state business's earned or natural advantage.

Besides, no matter what the next case is about, the infringement on state sovereignty is real. And that is always a serious thing. In other words, the decision below not only causes Kentucky irreparable harm by stopping it from enforcing SB 257 and infringing on its sovereignty, but it also sets precedent that could further encroach on state sovereignty. There is no good reason to wait: the Court should step in now.

* * *

To be clear, this case does not ask the Court to put the dormant Commerce Clause to bed. The ask here is more modest. But it is no less important: don't let the doctrine be extended. The Court should review the Sixth Circuit's decision limiting Kentucky's sovereignty, presenting multiple circuit splits, and extending the reach of a judge-made doctrine.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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