APPENDIX

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APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FORESIGHT COAL SALES, LLC., *Plaintiff-Appellant* *v.* KENT CHANDLER, in his official capacity as Chairman and Commissioner of Kentucky Public Service Commission, et al., *Defendants-Appellees.*	No. 21-6069

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.
No. 3:21-cv-00016—Gregory F. Van Tatenhove, District Judge.

Argued: June 7, 2022

Decided and Filed: February 3, 2023

Before: BATCHELDER, CLAY, and LARSEN, Circuit Judges.

COUNSEL

ARGUED: Joshua I. Hammack, BAILEY & GLASSER, LLP, Washington, D.C., for Appellant. Matthew F. Kuhn, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Joshua I. Hammack, Nicholas S. Johnson, BAILEY & GLASSER, LLP, Washington, D.C., Christopher D. Smith, BAILEY & GLASSER, LLP, Charleston, West Virginia, for Appellant. Matthew F. Kuhn, Brett R. Nolan, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

LARSEN, J., delivered the opinion of the court in which CLAY, J., joined in full. BATCHELDER, J. (pg. 19), delivered a separate opinion concurring in the judgment.

OPINION

LARSEN, Circuit Judge. Kentucky imposes a severance tax on coal extracted within its borders. At the same time, Kentucky directs its utilities to buy the most competitive coal, with cost being one of the most important factors. Predictably, this combination of measures, along with the fact that many coal-producing states don't impose a severance tax, makes Kentucky utilities less likely to buy Kentucky coal. Recognizing the problem, the Kentucky legislature decided

to have its cake and eat it, too. The legislature directed the agency that regulates Kentucky utilities to evaluate the reasonableness of coal prices after subtracting any severance tax paid from the actual bid price. In practice, the policy makes coal from states with severance taxes, like Kentucky, cheaper for the utilities by the amount of the severance tax.

A coal producer from Illinois, where there is no severance tax, challenged the policy as a violation of the Commerce Clause. The Commission responded that it wasn't discriminating against interstate commerce because it was only leveling the playing field tilted against Kentucky coal by its own severance tax. Twice the district court bought this argument. We do not.

I.

The Public Service Commission, a state agency, regulates utilities in Kentucky. The Commission is tasked with ensuring that energy rates remain "reasonable" for consumers. Ky. Rev. Stat. Ann. § 278.030; *see id.* § 278.040. One of the Commission's regulations, the fuel adjustment clause, allows utilities to adjust the base rates they charge customers to account for fluctuating fuel costs. *See* 807 Ky. Admin. Regs. § 5:056(1)(1). If the rate charged to customers is unreasonable, the charges are disallowed, the utility eats the cost, and the utility may be suspended from using the fuel adjustment clause. *Id.* § 5:056(3)(1). To determine what charges are reasonable, the Commission conducts six-month and two-year reviews of each utility. *Id.* § 5:056(3)(3)–(4). And one of the most substantial factors during review is the price the utility paid for raw materials, like coal. Basically, Kentucky utilities are encouraged to buy cheaper coal.

This setup is a problem for Kentucky coal producers, who must pay a severance tax equal to 4.5% of the gross value of the coal upon extraction. Ky. Rev. Stat. Ann. § 143.020. Compared to states with no severance tax, Kentucky coal is relatively expensive. So, because of the fuel adjustment clause and its reasonableness requirement, Kentucky utilities are discouraged, on the margin, from buying Kentucky coal.

Kentucky has tried several times to solve this problem. In 2019, the Kentucky House of Representatives adopted House Resolution 144, which encouraged the Commission "to amend its administrative regulations to consider all costs, including fossil fuel-related economic impacts within Kentucky, when analyzing coal purchases under the fuel adjustment clause." H.R. 144, 2019 Reg. Sess. (Ky. 2019). Weeks later, the Commission issued a draft regulation stating that, in determining the reasonableness of fuel costs, the Commission would consider the cost of the fuel less the Kentucky severance tax. Simply put, the Commission would artificially discount the price of Kentucky coal by 4.5%. However, the Commission never adopted the drafted language out of concern that the regulation might violate the dormant Commerce Clause. Instead, the final regulation stated that the Commission would artificially discount a utility's fuel costs by the amount of the severance tax paid to any jurisdiction.

In late 2019, Foresight Coal Sales, LLC, an Illinois coal producer, sent a letter to the Commission arguing that the amended regulation was still unconstitutional under the Commerce Clause. In response, the Commission briefly suspended enforcement. But the Kentucky Attorney General issued an opinion saying that the regulation was legal because, while it might

benefit Kentucky coal relative to producers in some states, it might hurt Kentucky coal relative to others. So the Commission resumed its enforcement.

Foresight Coal sued in the Eastern District of Kentucky and sought a preliminary injunction. The district court denied the motion, and Foresight Coal appealed to this court. The parties fully briefed the appeal, and oral argument was scheduled for December 4, 2020. Then, right before argument, the Commission agreed to rescind the regulation, and Foresight Coal dropped the case.

Kentucky wasn't done, though. On March 25, 2021, the Kentucky Governor signed Senate Bill 257 into law. The new law requires the Commission 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. Ann. § 278.277(1). In form and function, the new law is the same as the old regulation. The new law went into effect on July 1, 2021.

Foresight Coal again sued the Commission members in their official capacities and, again, sought a preliminary injunction. With "a distinct sense of déjà vu," the district court again denied the preliminary injunction. *Foresight Coal Sales, LLC v. Chandler*, No. 3:21-cv-00016- GFVT, 2021 WL 5139491, at *1 (E.D. Ky. Nov. 3, 2021). Foresight Coal appeals.

II.

A court must balance four factors when considering a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of

the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 365– 66 (6th Cir. 2022) (quoting *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). We review the district court's ultimate determination of whether these factors favor an injunction for an abuse of discretion. *Id.* at 366. But the likelihood of success on the merits is often the determinative factor. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 735 (6th Cir. 2021) (per curiam). And that factor we review de novo. *Union Home Mortg. Corp.*, 31 F.4th at 366.

Congress has the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "[T]he Commerce Clause is written as an affirmative grant of authority to Congress." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018). And some have argued that, under the plain text of the Constitution, its reach ends there. *E.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). Nonetheless, the Supreme Court has long held that the Commerce Clause goes further and imposes limitations on the states even when Congress hasn't acted. *Wayfair*, 138 S. Ct. at 2089. This negative, or dormant, Commerce Clause requires courts to preserve the "free flow of interstate commerce," *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945), with the aim of preventing the "economic Balkanization" that plagued the early colonies, *Wayfair*, 138 S. Ct. at 2089 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

The Supreme Court has articulated two principles for applying the dormant Commerce Clause. "First, state regulations may not discriminate against interstate commerce." *Id.* at 2091. Once a regulation is found to be discriminatory, it is "virtually *per se*" invalid. *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Second, if the regulation isn't discriminatory, the doctrine still asks whether the state has imposed an "undue burden[] on interstate commerce." *Wayfair*, 138 S. Ct. at 2091. Specifically, state policies effectuating "a legitimate local public interest . . . will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A theme throughout is that courts should inquire whether the policy "is basically a protectionist measure." *City of Philadelphia*, 437 U.S. at 624; *see also Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) ("The key point of today's dormant Commerce Clause jurisprudence is to prevent States from discriminating against out-of-state entities in favor of in-state ones."); Donald H. Regan, *The Supreme Court & State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1092 (1986) (arguing that the Supreme Court has been "concerned exclusively with preventing states from engaging in purposeful economic protectionism").

A.

Dormant Commerce Clause jurisprudence is famously complex. *See* Saikrishna Prakash, *Our Three Commerce Clauses & the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1169 (2003) (calling

the doctrine "complicated and byzantine"). The Supreme Court itself has recognized the doctrine's "very considerable judicial oscillation." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 420 (1946); *see also Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring) ("The 'negative' Commerce Clause is inherently unpredictable[.]"); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (calling the doctrine "hopelessly confused"). As a lower court, we must chart a course through the doctrine's "cloudy waters." *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 17 (1986) (Burger, C.J., concurring in part and concurring in the judgment).

The parties agree that "discrimination" in the Commerce Clause context "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994). They also agree that both laws that discriminate on their face and those that discriminate in effect run afoul of the doctrine. They debate the role of purpose, however. Foresight Coal points to statements from this court and the Supreme Court that could be read to suggest that a discriminatory purpose, standing alone, can serve to invalidate a state's regulation of commerce. *E. Ky. Res. v. Fiscal Ct. of Magoffin Cnty.*, 127 F.3d 532, 540 (6th Cir.1997) ("A [state regulation] can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect."); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (noting that a regulation may be unlawful because of a "discriminatory purpose or discriminatory effect" (citation

omitted)). The Commission responds with *Comptroller of the Treasury v. Wynne*, which stated that "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." 575 U.S. 542, 561 n.4 (2015) (emphasis added). The Commission reads *Wynne* to say both that motive without effect can never be enough, and that a discriminatory effect suffices to invalidate a law, even absent discriminatory purpose. Thoughtful scholarship has offered a third approach, noting that in a string of cases before *Wynne* (and unrepudiated by it), the Court had upheld even discriminatory laws "in cases without evidence of a subjective intention to distort competition." Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 Denv. L. Rev. 255, 292 (2017) (collecting cases); *see also* Regan, *supra*, at 1092. On this theory, discriminatory purpose is necessary, though perhaps never sufficient; and *Wynne* might be confined to the special realm of tax cases. Francis, *supra*, at 292.

Happily, we need not settle the place of protectionist purpose in the "quagmire" of Commerce Clause jurisprudence. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring). Here, the law discriminates, if not on its face, then in effect, and so we have no occasion to consider whether discriminatory purpose alone could ever suffice.[1] And, to the

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[1] Still, we are skeptical. It's hard to "imagine a case in which a state legislature intended to discriminate against interstate commerce but did not make that purpose clear in the statute (and thereby did not facially discriminate) and also failed to achieve that purpose (and thereby did not discriminate in effect)." *Wynne v. Comptroller of Md.*, 228 A.3d 1129, 1142 n.28 (Md. 2020); *see also Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th

extent that a protectionist purpose is necessary, we find that too.

B.

The parties spend considerable energy debating whether SB 257, which does not mention any state by name, nonetheless discriminates on its face. Foresight Coal says that it does because it "extend[s] beneficial treatment to producers from severance-tax states" and denies them to others. Appellant Br. at 28. But in the Commission's view, that "is an argument that a facially neutral statute discriminates in effect." *Id.* at 24. Which party is right turns on how close a proxy must be before we may find facial discrimination. But, in this case, not much turns on the answer. Whether labeled as "facial" or "in effect" discrimination, SB 257 discriminates against out-of-state coal.

SB 257 requires the Commission 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. Ann. § 278.277(1) (emphasis added). A severance tax is a tax imposed by a state (or political subdivision) upon natural resources extracted or "severed" from the land within its borders.[2] *See Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). Only the state from

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76, 89 (1st Cir. 2021). Nor would such a case seem practically problematic. *See Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 654 (1994) ("[T]he flow of commerce is measured in dollars and cents, not legal abstractions.").

[2] That a municipality could, in theory, impose a severance tax makes no difference for Commerce Clause purposes. *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 357, 361 (1992) (rejecting the state's argument that policies did "not discriminate against interstate commerce on

which a natural resource was extracted may impose a severance tax on it. *Id.* (noting that "Louisiana ha[d] no sovereign interest in being compensated for the severance of resources" outside of its borders). So "any coal" that has paid a severance tax to "any jurisdiction" necessarily originated in that jurisdiction, and SB 257's text requires the Commission to discount coal that has paid severance taxes. Quite plainly then, 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. Even coal from the various severance-taxing states is given further disparate treatment, depending on the amount of each state's tax. Thus, applying SB 257 starts *and* ends with the state. The fact of the severance tax is, therefore, a near perfect proxy for the coal's state of origin.

Acknowledging the proxy problem, the Commission argues that SB 257 doesn't differentiate based on state because coal from the same state may be treated differently. For example, "Montana imposes a different severance tax based on how the coal is severed . . . and the coal's heating quality." Appellee Br. at 23. But regardless of whether all Montana coal is treated the same, Montana coal is treated differently from coal in other states by virtue of its being Montana coal. Applying SB 257 to Montana coal still starts and ends with the state, even if that state's law is more complex.

Does this tight correlation mean that we should call SB 257's severance-tax-based discrimination "facial" state-of-origin discrimination? The question is

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their face or in effect because they" differentiated based on "county").

interesting but ultimately unimportant. Whether a law discriminates in explicit terms against out-of-state goods, or does so merely "in effect," the result is the same. As is true of other constitutional doctrines, "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell,* 311 U.S. 454, 455 (1940); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). So a law discriminatory in effect must be justified as if it discriminated on its face. *See Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) ("When a state statute clearly discriminates against interstate commerce, it will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." (citation omitted)).

C.

The real question then is not whether SB 257 *differentiates* between in-state and out-of- state coal but whether it impermissibly *discriminates*, as that term is used in the Commerce Clause. That is, does the law benefit in-staters and burden outsiders? *Or. Waste Sys.*, 511 U.S. at 99. We conclude it does. SB 257 requires the Commission 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: Coal from severance tax states is artificially discounted by the amount of the tax; other coal is not discounted at all. So, "[t]he [Kentucky] provision at issue here explicitly deprives certain products of generally available beneficial [regulatory] treatment because they are made in certain other States . . . ." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).

The Commission points out that some out-of-state coal could *benefit* from SB 257—if that state had a higher severance tax than Kentucky. But that can't save the statute. In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held that a North Carolina statute forbidding nonfederal grading of apples violated the Commerce Clause because it stripped Washington of the competitive and economic advantages of its superior grading system, while giving a boost to North Carolina's apples. 432 U.S. 333, 351 (1977). The North Carolina statute also benefitted apple producers from nearly half of the other states competing in the North Carolina apple market, which had no state grading systems of their own. *See id.* at 349. But that made no difference to the Court. *Id.*; *see also Lohman*, 511 U.S. at 645, 649–50 (rejecting the contention that the "overall effect of the use tax scheme across the State was to place a lighter aggregate tax burden on interstate commerce than on intrastate commerce"). Nor could it. "The facial unconstitutionality of [a state regulation] cannot be alleviated by examining the effect of legislation enacted by its sister States." *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 242 (1987); *see also Freeman v. Hewit*, 329 U.S. 249, 256 (1946) ("The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."). And, to violate the dormant Commerce Clause, a regulation needn't discriminate against every state or industry. *Limbach*, 486 U.S. at 276 ("[N]either a widespread advantage to in-state interests nor a widespread disadvantage to out-of- state competitors need be shown."); *Lohman*, 511 U.S. at 650 ("[D]iscrimination is appropriately assessed with

reference to the specific subdivision in which applicable laws reveal differential treatment.").

The Commission raises several arguments in response. First, it points us to the standard of review. The district court declined "to find at this time that S.B. 257 discriminates in effect," concluding that there was "not enough evidence in the record to properly ascertain whether S.B. 257 will disadvantage states that do not impose severance taxes." *Foresight Coal Sales*, 2021 WL 5139491, at *9. The Commission says this is a finding of fact that we may set aside only if "clearly erroneous." *City of Pontiac Retired Emps. Ass'n*, 751 F.3d at 430. But, as we will show, the district court didn't err by finding a wrong fact; it erred by asking the wrong question. So the district court's determination that SB 257 likely doesn't have a discriminatory effect (i.e., that it does not treat out-of-staters worse than in-staters) is a legal error that we review de novo. *Id.*

As for findings of fact, the district court found it "obvious that cost is an important factor in the reasonableness analysis" but that it is "only one factor that the Commission analyzes when conducting its reasonableness inquiry." *Foresight Coal Sales*, 2021 WL 5139491, at *9. The Commission's review is "holistic." *Id.* And, at least once, a utility purchased more expensive coal based on "other considerations." *Id.* From these facts, the district court essentially concluded that, even with SB 257 in effect, Kentucky utilities might still buy Illinois coal, based on factors besides cost, and still qualify for the fuel-adjustment clause. *Id.* Even if each of these findings is correct, they don't lead to a legal conclusion that SB 257 isn't discriminatory.

The question the Commerce Clause cases ask is whether SB 257 burdens Illinois coal—not whether that burden is so insurmountable that no Illinois coal will ever again be sold to a Kentucky utility. *See Or. Waste Sys.*, 511 U.S. at 99. The question isn't even whether Foresight will necessarily lose market share. Instead, any economic disadvantage will do—whether measured in loss of market share or in lost profits due to decreased prices. *W. Lynn Creamery*, 512 U.S. at 195 n.11 (forcing out-of-state industry "to cut its profits by reducing its sales price below the market price sufficiently to compensate" for an imposed disadvantage is "an economic barrier against competition"). We can see that in *Hunt*. There, the Court concluded that North Carolina's forced "downgrading" of Washington apples would "[a]t worst, . . . have the effect of an embargo against those Washington apples in the superior grades," and "[a]t best . . . will deprive Washington sellers of the market premium that such apples would otherwise command." *Hunt*, 432 U.S. at 352. Either effect constituted impermissible "discrimination against commerce." *Id.* at 353.

Here, Kentucky artificially discounts its own coal, and coal from other severance-tax states, by the amount of the tax. Because non-severance-tax state coal gets no such discount, the effect is to make Illinois coal relatively more expensive. That, in turn, will cause Illinois coal either to lose market share or to lower its price. *See, e.g.*, *W. Lynn Creamery*, 512 U.S. at 195 n.11. Either way, Illinois coal is worse off as a matter of basic economics and Supreme Court precedent. And either result is sufficient to find discrimination. *Id.*; *Hunt*, 432 U.S. at 352–53.

In this litigation, everyone agrees that cost is one of the most substantial factors for the utilities. This is also common sense. When Kentucky utilities incur high energy costs, they want to be able to pass them on to customers; the fuel adjustment clause lets them do that. *See* 807 Ky. Admin. Regs. § 5:056(1)(1). But, to keep this ability, the utilities must pay "[]reasonable" prices for coal. *Id.* § 5:056(3)(3)–(4). Under SB 257, the Commission must discount severance taxes from the reasonableness calculation; the law gives it no discretion. Ky. Rev. Stat. Ann. § 278.277. And we assume that the Commission will follow the law. *Cf. U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies." (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926))). So coal from severance tax states will be treated as cheaper for the utilities (though not for their customers) by the amount of that severance tax. The district court may well be right that the *amount* of loss is still unknown. But "the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Lohman*, 511 U.S. at 650; *see also Maryland*, 451 U.S. at 759–60 ("It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination . . . but this is an insufficient reason for not now declaring the Tax unconstitutional.").

D.

SB 257 is also purposefully discriminatory. To determine the purpose of a statute, we start with the text. *Am. Bev. Ass'n*, 735 F.3d at 371. Usually, the text is sufficient to determine purpose. *E. Ky. Res.*, 127 F.3d at 542. Such is the case here.

The text of SB 257 is plain: In calculating the reasonableness of fuel costs for Kentucky's utilities, the Commission must consider the "cost of the fuel less any coal severance tax imposed by any jurisdiction." The immediate goal of this text is to make severance-tax-state coal cheaper, which will, in turn, encourage Kentucky utilities to buy more coal from severance-tax jurisdictions, like Kentucky, and less from other states. And, as we have explained above, that purpose is discriminatory.

The parties debate the importance of the prior regulation and of various floor statements—some suggesting that the aim of the bill was to prop up the Kentucky coal industry, others suggesting that the legislators had no intent to "run afoul of interstate commerce." But none of that matters, at least not when the purpose is plain from the text. *See Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 648 (6th Cir. 2010). We note, moreover, that the Commission itself has offered only one purpose for SB 257: to "even out the playing field" between Kentucky coal and competing coal from non-severance tax states. And, as we explain next, that purpose is itself discriminatory.

III.

A.

The Commission's primary defense of SB 257 is that the law does not impermissibly discriminate within the meaning of the Commerce Clause because Kentucky coal isn't really advantaged by the policy; it's just no longer *dis*advantaged by Kentucky's own severance tax. Similarly, Illinois coal isn't really burdened by the policy, it's just no longer unfairly propped

up by its state's *lack* of a severance tax. As the Commission puts it, SB 257 at most "evens a playing field" that the severance-tax states have tilted against themselves. Appellee Br. at 13. The Commission believes that such a law cannot be discriminatory. But a discriminatory policy is no less discriminatory because it has a "leveling" effect. In fact, the "leveling" effect may be precisely what is discriminatory.[3] *See Hunt*, 432 U.S. at 351 (holding that a state statute which had "a leveling effect" violated the Commerce Clause).

This conclusion follows naturally from three principles in the Supreme Court's dormant Commerce Clause jurisprudence. First, one state's discriminatory policy doesn't authorize another's. *See Limbach*, 486 U.S. at 278 ("[E]ven if [an] Indiana subsidy were invalid [under the Commerce Clause], retaliatory violation of the Commerce Clause by Ohio would not be acceptable."). Such a tit for tat is precisely the kind of economic balkanization the dormant Commerce Clause seeks to prevent. *See Wayfair*, 138 S. Ct. at 2089. And "[a]ny other rule would mean that the constitutionality of [a regulation] would depend" on the

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[3] The Commission offers *Lebamoff Enters. Inc. v. Whitmer*, where we briefly suggested in dictum that "evening the playing field" might be a "legitimate goal." 956 F.3d 863, 874 (6th Cir. 2020). But *Lebamoff* is a Twenty-First Amendment case, which has an "accordion-like interplay" with the Commerce Clause and, therefore, requires a "different" test. *Id.* at 869, 871. "The Twenty-first Amendment 'gives the states regulatory authority that they would not otherwise enjoy." *Id.* (quoting *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2474 (2019)). *Lebamoff* didn't consider *Limbach*, *Hunt*, or the other dormant Commerce Clause cases. Anyway, our comment about legitimate ends was just one response to a "doubtful" piece of legislative history that didn't affect the outcome. *Id.* at 874.

laws in "49 other States." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644–45 (1984). So SB 257 isn't somehow justified by Illinois' policy not to have a severance tax.

Second, with one exception discussed below, a policy that benefits out-of-state interests doesn't justify another that burdens them. In *Armco Inc. v. Hardesty*, the Court rejected West Virginia's argument that it could exempt local manufacturers from a gross receipts tax because they paid "a much higher manufacturing tax." 467 U.S. at 641–42. In *Tyler Pipe*, the Court invalidated Washington's exemption to its manufacturing tax for goods sold locally, even though "absent the exemption, a local manufacturer might be at an economic disadvantage because it would pay both a manufacturing and a wholesale tax, while the manufacturer from afar would pay only the wholesale tax." 483 U.S. at 243. And, in *Baldwin*, the Court held that New York couldn't protect local milk, which had to conform to New York minimum price laws, from Vermont milk, which had no such minimum price restrictions. 294 U.S. at 520, 528. The caselaw is clear: SB 257 must be judged discriminatory or not, regardless of other Kentucky policies that might benefit out-of-state coal. So SB 257 isn't justified by Kentucky's severance tax.

Third, a policy is discriminatory if its claim to neutrality depends on another state enacting the same policy. *See id.* at 521 ("New York has no power to project its legislation into Vermont."). The Court has repeatedly rejected attempts by states to condition favorable treatment for out-of-state interests on reciprocal or similar legislation. *See, e.g.*, *Tyler Pipe*, 483 U.S. at 242; *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380–81 (1976); *Sporhase v. Nebraska ex rel.*

Douglas, 458 U.S. 941 (1982). In *Limbach*, the state regulation at issue gave tax subsidies to local ethanol as well as to out-of-state ethanol that returned the favor. 486 U.S. at 272. Nonetheless, the Court found that the state regulation was facially discriminatory, even though "many States" would be treated equally. *Id.* at 271; *see also Hunt*, 432 U.S. at 349 (holding that North Carolina's statute banning state grading of apples was discriminatory even though six other states also had no state grading). So, here, SB 257's discrimination isn't alleviated either by the fact that some states already impose severance taxes (in varying amounts) and that others *may* choose to impose severance taxes of their own. *See Tyler Pipe*, 483 U.S. at 242 (1987) (noting that a discriminatory policy cannot be alleviated by "examining the effect of legislation" in other states).

A contrary result in this case would violate these three principles. And it would mean that a state could "force its own judgments" on other states by using access to its market to encourage them to enact certain policies. *See Cottrell*, 424 U.S. at 380. A state with a high minimum wage, like Illinois, or California, might, for example, manipulate its sales tax to "level out" its high labor costs relative to states like Kentucky, whose policy has been to track the federal minimum wage. Ky. Rev. Stat. Ann. § 337.275. This process could play out in every state; no doubt every tapestry of regulations has some economic effects to "even out." But the principal aim of the dormant Commerce Clause cases is to avoid such "commercial warfare." *See H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949).

B.

The Commission draws our attention to the one exception where the Supreme Court has deemed leveling a permissible purpose. In *Henneford v. Silas Mason Co.*, the Supreme Court held that a 2% use tax on out-of-state goods did not violate the Commerce Clause because it was equivalent to the 2% sales tax on goods sold in the state. 300 U.S. 577, 579–81 (1937). The Court pointed to the complementary nature of the two taxes, noting that "retail sellers in Washington will be helped 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. The Commission compares SB 257 to the use tax in *Silas Mason*, arguing that SB 257 helps Kentucky coal "compete upon terms of equality" with Illinois coal not subject to a severance tax. *See id.*

Initially, we note that *Silas Mason* confirms our conclusion that leveling the playing field is discriminatory under the Commerce Clause. A compensatory tax à la *Silas Mason* is still a facially discriminatory tax, just one that is sufficiently justified. *See Or. Waste Sys.*, 511 U.S. at 102 ("Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.").

And *Silas Mason* created a narrow exception. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 344 (1996) ("While we doubt that . . . a [compensatory tax] showing can ever be made outside the limited confines of sales and use taxes, it is enough to say here that no such showing has been made."); *Or. Waste Sys.*, 511

U.S. at 105 n.8 (calling the compensatory tax cases "carefully confined"). The compensatory tax exception exists to ensure that states can collect revenue through sales taxes, *see generally Wayfair*, 138 S. Ct. at 2096, but it has not extended further, *Fulton*, 516 U.S. at 338 (The Supreme Court "ha[s] shown extreme reluctance to recognize new compensatory categories"; indeed, "use taxes on products purchased out of state are the only taxes [the Court] ha[s] upheld in recent memory under the compensatory tax doctrine"). It does not apply here.

First, SB 257 is not a tax. *Silas Mason* appears to extend only to use taxes—not even other kinds of taxes—so it certainly doesn't apply to regulatory schemes that aren't taxes at all. *See Fulton*, 516 U.S. at 344. Expanding *Silas Mason* to a non-tax would hardly keep the doctrine "carefully confined," as the Supreme Court has directed us to do. *Id.* at 335 (quoting *Or. Waste Sys.*, 511 U.S. at 105 n.8). Second, even if SB 257 were a tax, it wouldn't qualify for the *Silas Mason* exception. Compensatory taxes must meet three criteria. First, the State must identify a "burden for which the State is attempting to compensate." *Tyler Pipe*, 483 U.S. at 242 (quoting *Maryland*, 451 U.S. at 758). Second, the State must demonstrate "[e]qual treatment of interstate commerce." *Id.* at 243 (quoting *Bos. Stock Exch.*, 429 U.S. at 331) (alteration in original). Third, the State must show "'substantially equivalent' events on which the 'mutually compensating taxes'" are imposed. *Id.* at 244 (quoting *Armco*, 467 U.S. at 643). SB 257 doesn't pass the test.

The "substantially equivalent" prong asks whether the taxes fulfill the same purpose. *Tyler Pipe*, 483 U.S. at 244. But the purpose of the severance tax and SB

257 are different. We know this because the Supreme Court told us so in a remarkably similar case. In *Maryland v. Louisiana*, the Supreme Court held that a severance tax is not substantially equivalent to a use tax. 451 U.S. at 759. There, Louisiana had a 7-cent severance tax for natural gas, imposed per thousand cubic feet extracted. *Id.* at 731. Concerned about the influx of gas from federal reserves in the Gulf of Mexico, Louisiana imposed an equivalent use tax on gas coming from territories without a severance tax. *Id.* Most states had a severance tax equal to Louisiana's at the time and would have been treated equally, but the Court still found that the use tax could not be justified as a compensatory tax; instead, it violated the Commerce Clause. *Id.* at 758–59. The Court emphasized the difference between a sales tax and a severance tax. Specifically, a severance tax serves the "interest in protecting [the State's] natural resources." *Id.* at 759. But a use tax could not be "designed to meet these same ends since Louisiana ha[d] no sovereign interest in being compensated for the severance of resources from [federally owned land]." *Id.* Here, Kentucky has no interest in the extraction of natural resources from Illinois land, so it can't enact a *Silas Mason*-like tax to level the effects of its severance tax. *Id.*

C.

Framing the argument another way, the Commission contends that Illinois coal did not "earn" whatever advantage it had before the enactment of SB 257, so Kentucky is free to nullify it. But that argument also misunderstands Commerce Clause jurisprudence. The Commission gleans its "earned advantage" principle from *Hunt*. There, the Supreme Court held a stat-

ute unenforceable where it stripped away "the competitive and economic advantages [the Washington apple industry] ha[d] earned for itself through its expensive inspection and grading system." *Hunt*, 432 U.S. at 351. But *Hunt* didn't say that "unearned" advantages *could* be stripped away. The cases remark on whether there *is* an advantage; they do not turn on how it is derived. *See, e.g.*, *Or. Waste Sys.*, 511 U.S. at 99 (focusing on "differential treatment," not the source of the difference); *W. Lynn Creamery*, 512 U.S. at 194 (asking whether the state policy "neutraliz[es] advantages belonging to the place of origin" (quoting *Baldwin*, 294 U.S. at 527)).

What's more, the Commission does not tell us what it means by "earned." It might mean that only the fruits of human labor and ingenuity, perhaps combined with the blessings of nature, are protected by the Commerce Clause. The Commission suggests, for example, that if Foresight had shown that its "coal [was] of a better quality" or that it could "transport its coal more cheaply or quickly," those advantages would be protected. Appellee Br. at 13. That leaves in the unprotected category state-created advantages, like (the lack of) a severance tax. But this argument is squarely foreclosed by *Hunt* itself; it was the Washington "state legislature [that] ha[d] sought to enhance the market for Washington apples through the creation of . . . the Washington State Apple Advertising Commission." 432 U.S. at 336. The state's "stringent, mandatory inspection program, administered by the State's Department of Agriculture" graded the apples. *Id.* And this state-created grading system was the advantage protected in *Hunt*. *Id.* The dormant Commerce Clause prohibited North Carolina from leveling

the playing field that Washington law had tilted toward itself. *Id.* at 350.

Limbach, too, stands in the way. There, the Court took note of Indiana's cash subsidy "program for in-state ethanol producers," remarking that it was surely "effective in conferring a commercial advantage over out-of-state competitors." *Limbach*, 486 U.S. at 278. Still, the Court cautioned that Ohio could not erase the effects of this state-created advantage through a discriminatory tax: "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]; discriminatory taxation of out-of-state manufacturers does." *Id.*

In any event, the Commission never explains how it would have us distinguish between human (or nature)-created and state-created advantages. How much of a business's "economic and competitive advantage" is traceable to natural resources or individual pluck? And what portion shall we assign to labor policies, the educational system, corporate tax rates, or environmental policy in the State? For good reason, the caselaw doesn't parse whether an advantage is state created. *See Tyler Pipe*, 483 U.S. at 234 (manufacturing taxes); *Limbach*, 486 U.S. at 271 (ethanol tax credits).

D.

Foresight Coal is likely to be able to show that SB 257 discriminates against interstate commerce. There remains, however, the question whether that discrimination can nonetheless be justified. Laws that discriminate against interstate commerce are "virtually per se" invalid, *City of Philadelphia*, 437 U.S. at 624. But a few survive. *E.g.*, *Maine v. Taylor*, 477 U.S. 131,

148 (1986) (upholding absolute ban on the importation of baitfish into Maine because of environmental risks). Here, the Commission has proffered no explanation for SB 257 except that it is designed to nullify the competitive disadvantages created by Kentucky's severance tax. *See City of Philadelphia*, 437 U.S. at 624 (noting that the "crucial inquiry" is whether the policy "is basically a protectionist measure" or is instead directed "to legitimate local concerns" with only "incidental" effects on interstate commerce). Because Kentucky may not level the playing field in this way, Foresight Coal is likely to succeed on the merits.

* * *

Having concluded that Foresight Coal was not likely to succeed on the merits, the district court declined to address the rest of the preliminary injunction factors. We remand for the district court to examine the other three factors in the first instance. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 738 (9th Cir. 2017).

We REVERSE and REMAND for further proceedings consistent with this opinion.

CONCURRING IN THE JUDGMENT

ALICE M. BATCHELDER, Circuit Judge, concurring in the judgment. While I agree with the majority's conclusion, I depart slightly from the underlying analysis.

As I see it, SB 257 is not facially discriminatory. To be sure, SB 257 treats different states differently based on their differing severance taxes. But suppose Kentucky were to repeal its coal severance tax. In that scenario, SB 257 would not favor Kentucky, meaning it would not discriminate against out-of-state interests. Therefore, SB 257 does not discriminate on its face; it discriminates in effect due to the existence of Kentucky's coal severance tax.

SB 257 is discriminatory in effect because Kentucky's coal severance tax makes it discriminatory. By requiring the Commission to pretend that the price of Kentucky coal is 4.5% lower than its true price, SB 257 gives Kentucky coal a comparative price advantage over out-of- state coal that does not receive this pretend discount. This is virtually the same case as *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), in which the Court rejected Ohio's attempt to deny its tax credit to Indiana's ethanol. I would stop there and take the analysis no further.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

[November 3, 2021]

FORESIGHT COAL SALES, LLC Plaintiff, v. KENT CHANDLER, *et al.*, Defendants.	))))))))))	Civil No. 3:21-cv-00016-GFVT **OPINION & ORDER**

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

This case gives the Court a distinct sense of déjà vu. Although the factual predicate has changed somewhat over the past year, Plaintiff Foresight Coal Sales, LLC, and the Defendants[1] are essentially back

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[1] Originally, the Defendants included Michael Schmitt, Chairman and Commissioner of the Kentucky Public Service Commission; Kent Chandler, Vice Chairman and Commissioner of the Kentucky Public Service Commission; Talina Mathews, Commissioner of the Kentucky Public Service Commission; and Linda Bridwell, Executive Director of the Kentucky Public Service Commission. However, on September 10, Defendants filed a Notice of Substitution of Parties to replace Michael Schmitt with Kent Chandler, Kent Chandler with Amy Cubbage, and Talina Mathews with Marianne Butler. [R. 34.] Linda Bridwell remains

for round two. On May 15, 2020, this Court issued a Memorandum Opinion and Order denying Plaintiff Foresight Coal Sales, LLC's Motion for Preliminary Injunction because Foresight had failed to show a strong likelihood of success on the merits. *Foresight Coal Sales, LLC v. Schmitt*, 2020 WL 2513821, at *13 (E.D. Ky. May 15, 2020). At issue in the prior case was a regulation the Kentucky Public Service Commission adopted that permitted the Commission to "evaluate the reasonableness of fuel costs in contracts and competing bids" without considering any coal severance tax. *Id.* at *1.

The matters presently before the Court are Foresight's Motion for Preliminary Injunction [R. 20] and Defendants' Motion to Dismiss.[2] [R. 22.] Foresight argues that Senate Bill 257, which became law on March 25, 2021, violates the dormant Commerce Clause by discriminating against out of state coal producers from states that do not impose severance taxes. [R. 1; R. 19.] The parties agree that the language of S.B. 257 is essentially identical to the language of the regulation at issue in the prior litigation between these parties. [R. 19 at 26; R. 25 at 6.] For the following reasons, Defendants' Motion to Dismiss is DENIED and Foresight's Motion for Preliminary Injunction is also DENIED.

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the Executive Director of the Kentucky Public Service Commission. All individuals are being sued in their official capacities.

[2] Defendants initially filed a motion to dismiss on May 12, 2021. [R. 18.] However, Foresight amended its complaint on June 1, and Defendants subsequently filed a motion to dismiss the amended complaint. [R. 19; R. 22.] Therefore, Defendants' first motion to dismiss will be denied as moot.

I

Plaintiff Foresight Coal Sales, LLC, is a coal producer that sells coal produced in Illinois. [R. 19 at 2.] Foresight directly competes with companies that sell coal produced in Kentucky and other states through the submission of bids in response to requests for proposals from regulated utilities in Kentucky. *Id.* Kentucky's Public Service Commission, which is an administrative agency, "directly regulates the award of regulated utilities' coal supply contracts through its laws and regulations, including 807 Ky. Admin. Regs. 5:056, the Fuel Adjustment Clause." *Id.*

Because of Kentucky's fuel adjustment clause, utilities may "adjust the rates they charge consumers, above or below the utilities' base rates, to account for these ever-fluctuating fuel costs." *Id.* at 8. Fuel prices can wildly fluctuate in a short period of time, as can purchase power. *Id.* Because of the nature of fluctuating costs, the Commission has broad discretion to regulate the "rates and service of utilities" and determine whether the rates are "fair, just, and reasonable." [*Id.* (citing KRS § 278.040; KRS § 278.2207); *see also* R. 21 at 4.]

This matter involves Senate Bill 257, which was passed by the Kentucky General Assembly during the 2021 legislative session and signed into law by Governor Andrew Beshear. Senate Bill 257 reads:

> 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.

S.B. 257.

The Commonwealth levies a 4.5% severance tax on any coal that is mined within its borders. *See* K.R.S. § 143.020. Illinois, by contrast, does not impose a severance tax on coal producers in Illinois. [R. 19 at 11.] Foresight argues that the impact of S.B. 257 is that if "a Kentucky coal producer bid $50 per ton for a utility contract, while an Illinois coal producer bid $48 per ton…the Kentucky coal producer would appear, artificially, to be the lowest-cost provider." *Id.* at 20. This law, Foresight argues, is aimed at "giving a leg up to Kentucky's coal producers and discouraging utilities from purchasing coal from out-of-state producers." *Id.* at 33. Foresight argues that this new law violates the dormant Commerce Clause facially, purposefully, and in practical effect. *Id.* at 29. Foresight also argues that the law fails the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). [R. 21 at 24.] The parties both agree that the language of S.B. 257 is identical to the language of the regulation at issue in the prior case involving these parties. [R. 19 at 26; R. 25 at 6.] The Court held a motion hearing with the parties on July 23, and the parties have filed their responses and replies with the Court.

II

A

An initial matter is the question of standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("a plaintiff must demonstrate standing for each claim he seeks to press and for each form of

relief that is sought") (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y.*, 137 S. Ct. at 1651.

Standing is a threshold inquiry in every federal case that may not be waived by the parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). "To satisfy the 'case' or 'controversy requirement' of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted). Plaintiffs' injury-in-fact must be both particularized and concrete. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* (internal quotation marks omitted). Further, a "concrete" injury is a de facto injury that actually exists. *Id.* Finally, "a plaintiff must also establish, as a prudential matter, that he or she is the proper proponent of the rights on which the action is based." *Haskell v. Washington Twp.*, 864 F.2d 1266, 1275 (6th Cir. 1988) (citations omitted).

Here, Defendants argue in their response to the preliminary injunction motion that Foresight lacks standing for three reasons: (1) Foresight has failed to

establish that an injury is "certainly impending;" (2) Foresight cannot "manufacture standing" by inflicting harm on itself based on a hypothetical fear of future harm; and (3) Foresight's alleged harm is not fairly traceable to S.B. 257. [R. 25 at 9–15.] In reply, Foresight argues that it does have a certainly impending injury, that Foresight's argument regarding economic loss and competitive disadvantage are sufficient to both establish injury and to confer standing, and finally that the altered marketplace because of S.B. 257 has created a sufficient injury to confer standing. [R. 29 at 2–6.]

Here, Foresight has established standing in this case for many of the same reasons Foresight established standing in the prior litigation.[3] First, Defendants argue that Foresight has failed to establish an injury in fact because they have not demonstrated that their injury is "certainly impending." [R. 25 at 9.] However, Foresight states that 807 KAR 5:056(3)(5) caused the Commission to begin "singling out severance taxes as an individual input." [R. 29 at 3.] Foresight argues that this constituted a "substantial shift in the agency's operating procedure" and caused Foresight to have to alter its bidding practices as a result.

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[3] Defendants once again argue that the law does not "directly regulate any of the market participants or those with whom the market participants do business." [R. 25 at 10.] However, as the Court previously held, although it is "substantially more difficult" to establish standing "when a plaintiff is not himself the object of the government action or inaction he challenges," Foresight has established standing by alleging both a constitutional violation and economic harm stemming directly from the regulation, and now S.B. 257. *Foresight Coal Sales, LLC*, 2020 WL 2513821, at *5 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

[R. 29 at 3.] Given that the parties agree that the language of S.B. 257 is identical to the now-withdrawn 807 KAR 5:056(3)(5) regulation, the Court finds that Defendants' first argument is without merit.

Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656 (1993), is instructive. In *Northeastern Florida*, the plaintiffs brought an equal protection challenge against a city ordinance that gave preferential treatment to minority-owned businesses in awarding city contracts. The Supreme Court wrote:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.... And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Id. at 666. "Courts have applied [*Northeastern Florida*'s] 'equal footing' doctrine to find standing where plaintiffs challenge state laws they allege are discriminatory under the dormant Commerce Clause." *Byrd v. Tenn. Wine and Spirits Retailers Ass'n*, 2017 WL 1021296, at *2 (M.D. Tenn. Mar. 16, 2017) (citing cases from the Ninth Circuit and the Seventh Circuit applying the *Northeastern Florida* equal footing test

to the dormant Commerce Clause context). Here, Foresight is alleging that they cannot "compete on an equal footing in the bidding process" because of S.B. 257. *Northeastern Florida*, 508 U.S. at 666. Therefore, the Court finds that Foresight has sufficiently established injury in fact.

Next, Defendants argue that Foresight has inflicted harm on itself because of fear of hypothetical future harm. [R. 2 at 13.] However, Foresight argues that rather than inflicting harm on itself, S.B. 257 (and the regulation before) has compelled Foresight to change its behavior because S.B. 257 has skewed the marketplace and promoted discrimination in favor of state interests in violation of the dormant Commerce Clause. [R. 29 at 7.] Foresight's argument, that S.B. 257 has created a discriminatory environment that benefits in-state actors at the expense of out-of-state actors, directly implicates S.B. 257 and the Commission, not self-inflicted harm. *See E. Ky. Res. v. Fiscal Court of Magoffin Cnty.*, 127 F.3d 532, 540 (6th Cir. 1997) ("The purpose of the Commerce Clause is to prohibit outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors."). Therefore, Foresight has established standing as to this argument.

Finally, Defendants argue that any alleged harms are not fairly traceable to S.B. 257. [R. 25 at 14.] However, the Court finds that Foresight has sufficiently demonstrated that its injuries are fairly traceable to S.B. 257, and therefore the Commission. First, the plain language of the statute mandates that the commission, when evaluating the reasonableness of fuel costs, subtract any coal severance tax imposed by any jurisdiction. This subtraction of coal severance taxes

is precisely what Foresight is alleging creates the discrimination and economic harm in this case, and therefore Defendants' argument attempting to distance S.B. 257 and the commission from Foresight's alleged harm is without merit. Furthermore, if the Commission determines a fuel charge is unreasonable, there is a mandatory penalty, which would directly impact Foresight and is fairly traceable to S.B. 257 and the Commission. *See* 807 Ky. Admin. Reg. 5:056 § 3(1).

Ultimately, "[s]tanding is not intended to be a particularly high bar; instead, the doctrine serves to prevent a litigant from raising another's legal right." 59 Am. Jur. 2d *Parties* § 29 (2020). Accordingly, Foresight has met the threshold inquiry of standing, and the Court will proceed to the merits.

B

1

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a plaintiff's complaint. In reviewing a Rule 12(b)(6) motion, the Court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all inferences in favor of the plaintiff." *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citation omitted). The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby Cnty.*, 220 F.3d 433, 446 (6th Cir. 2000)). The Supreme Court explained that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570

(2007)); *see also Courier v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009).

Moreover, the facts that are pled must rise to the level of plausibility, not just possibility; "facts that are merely consistent with a defendant's liability ... stop[ ] short of the line between possibility and plausibility." *Iqbal*, 556 U.S. 662 at 678 (quoting *Twombly*, 550 U.S. 544 at 557). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Long v. Insight Comm. of Cent. Ohio, LLC*, 804 F.3d 791, 794 (6th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678).

2

Here, the parties disagree over whether Defendants' motion to dismiss is procedurally proper. Foresight argues in response to Defendants' motion to dismiss that the Defendants are attempting to dismiss various legal theories or parts of Foresight's claims at the 12(b)(6) stage, which they are not permitted to do. [R. 28 at 7.] Foresight argues that "as long as the plaintiff can, in response to a motion to dismiss, identify some plausible theory that would entitle it to relief on its claim, that claim may move forward and a motion to dismiss other legal theories must be denied." *Id.* (quoting *KFC Corp. v. Iron Horse of Metaire Rd., LLC*, 2020 WL 3892989, at *3 (N.D. Ill. July 10, 2020)). In reply, Defendants argue that Foresight alleges four separate legal theories in their complaint, and that if Foresight's argument is accepted, it will "open the door to burdensome discovery regarding legally meritless grounds for relief." [R. 31 at 2.] Defendants also attempt to distinguish the legal authority Foresight

relies on from this case and point to Sixth Circuit jurisprudence[4] about Rule 54(b) to argue that Foresight's "four separate legal theories" are in fact separate claims under the Federal Rules of Civil Procedure. *Id.* at 3.

Determining what constitutes a "claim" can be a difficult undertaking. *See In re Fifth Third Early Access Cash Advance Litigation*, 925 F.3d 265, 273 (6th Cir. 2019). In the Rule 54(b) context, the Sixth Circuit has applied the "operative facts" test, which defines a claim as "the aggregate of operative facts which give rise to a right enforceable in the courts even if the party has raised different theories of relief." *Id.* (quoting *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 442 (6th Cir. 2004)); *Zidek v. Analgesic Healthcare, Inc.,* 2014 WL 2566527, at *2 (N.D. Ill. June 6, 2014) ("a claim is a set of facts producing an injury") (*citing N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992)). Thus, there is a difference between "claims," defined above, and "counts," which "describe legal theories by which those facts purportedly give rise to liability and damages." *Zurbriggen v. Twin Hill Acquisition Co., Inc.*, 338 F. Supp. 3d 875, 882 (N.D. Ill. 2018) (citing *ACF 2006 Corp. v. Mark C. Ladendorf, Attorney at Law, P.C.*, 826 F.3d 976, 981 (7th Cir. 2016)).

The "claim" proffered by Foresight is that S.B. 257 harms Foresight by protecting in- state interests at the expense of out-of-state coal producers in states that do not levy a coal severance tax. And Foresight's primary legal theory, which gives rise to liability and

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[4] *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490, 500 (6th Cir. 2012).

damages, is that S.B. 257 violates the dormant Commerce Clause by way of 42 U.S.C. § 1983. Ultimately, to prevail on a 12(b)(6) motion, Defendants must "show that none of the legal theories [Foresight] advance[s] against them, or any other legal theory, plausibly establishes a right to relief for the harm alleged." *Zurbriggen*, 338 F. Supp. 3d at 882; *see also Iqbal*, 556 U.S. at 678.

The Sixth Circuit has described dormant Commerce Clause analysis as a "two-step inquiry," the first step of which involves "determining whether the statute directly burdens interstate commerce or discriminates against out-of-state interests." *E. Ky. Res.*, 127 F.3d at 540. As discussed above, the Supreme Court has determined that a statute "can discriminate against out-of-state interests facially, purposefully, or in practical effect." *Id.* (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992)). However, even if a statute is not discriminatory in the three aforementioned ways, the Court must then proceed to the second step, which is the *Pike* balancing test. *Id.* Under *Pike*, a "statute is valid unless the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Here, although Defendants argue that Foresight fails to satisfy the first step of the dormant Commerce Clause analysis, Defendants completely ignore the second step of the dormant Commerce Clause analysis in their motion to dismiss. Thus, by only addressing half of the two-step inquiry, Defendants do not meet their burden of showing that the dormant Commerce Clause claim fails to plausibly establish "a right to relief for the harm alleged." *Zurbriggen*, 338 F. Supp. 3d

at 882. However, even if Defendants had addressed the *Pike* analysis in their motion to dismiss, it would be difficult to make a *Pike* test determination at this early stage in the litigation. *See Huskey*, 666 F.3d 455 (Hamilton, J. concurring) ("The *Pike* test thus requires a state agency to mobilize personnel, resources, and evidence to justify its policies, and often to do so where good evidence may be hard to come by.")

At this point in the litigation, the Court finds that Foresight's claim that S.B. 257 harms Foresight by protecting in-state interests at the expense of out-of-state coal producers in states that do not levy a coal severance tax is plausible. Although Foresight faces an uphill battle in demonstrating that the law facially or purposefully discriminates, as discussed below, it is plausible that additional discovery may demonstrate that S.B. 257 violates the dormant Commerce Clause, particularly in effect or under the *Pike* test.[5]

Perhaps sensing this outcome was likely to occur, Defendants provide in a footnote that if the motion to dismiss is denied, "nothing prevents the Defendants from immediately filing a summary-judgment motion on the same grounds." [R. 31 at 6 n.4.] Though additional discovery may be necessary in this case, Defendants' footnote is procedurally correct, and the two motions differ in how a court may analyze claims and portions of claims. *See, e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) (comparing a motion

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[5] The Court is cognizant, however, that courts within the Sixth Circuit rarely invalidate a law under the *Pike* test. *See Garber*, 888 F.3d at 845 ("Keep in mind that the Court has not invalidated a law under *Pike* balancing in three decades.").

to dismiss under 12(b)(6) which "doesn't permit piecemeal dismissals of *parts* of claims" with Rule 56, which allows parties to identify claims or defenses, or parts of claims or defenses, on which summary judgment is sought).

Although Foresight has not demonstrated that it is entitled to the extraordinary remedy of a preliminary injunction, as addressed in greater detail below, Foresight has established a plausible right to relief, which is all that is required to withstand a Rule 12(b)(6) motion. Therefore, Defendants' motion to dismiss will be denied.

C

1

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington–Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (cleaned up) ("[A] preliminary injunction involv[es] the exercise of a very far-reaching power")). To issue a preliminary injunction, the Court must consider: 1) whether the movant has shown a strong likelihood of success on the merits; 2) whether the movant will suffer irreparable harm if the injunction is not issued; 3) whether the issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by issuing the injunction. *Overstreet*, 305 F.3d at 573.

The Court of Appeals clarified that, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success

on the merits often will be the determinative factor." *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). However, even if the plaintiff is unable "to show a strong or substantial probability of ultimate success on the merits" an injunction can be issued when the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

2

Article I of the United States Constitution states, in part, that "Congress shall have the Power … To regulate Commerce with foreign Nations, and among the several States." *E. Ky. Res.*, 127 F.3d at 539 (quoting U.S. Const. Art. I, § 8 cl. 3). Although the text of the Commerce Clause is "an affirmative grant of power to Congress," the Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce," and this is known as the dormant Commerce Clause. *Id.* (quoting *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 82 (1984)). Under the dormant Commerce Clause, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose." *Tenn. Wine and Spirits Ret. Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019). The purpose of the dormant Commerce Clause is to restrict state protectionism. *Id.*; *see also E. Ky. Res.*, 127 F.3d at 540.

Evaluation of claims under the dormant Commerce Clause involves a two-step inquiry. "To determine whether a statute violates the Commerce Clause, this Court must first determine whether the statute discriminates against interstate commerce, either by discriminating on its face, by having a discriminatory purpose, or by discriminating in practical effect." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431–32 (6th Cir. 2008). "If the statute is not discriminatory, it is valid unless the burdens on interstate commerce are clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)).

Foresight argues in its Preliminary Injunction motion that S.B. 257 violates the dormant Commerce Clause facially, purposefully, in practical effect, and that S.B. 257 fails the *Pike* balancing test because the law "seems to *harm* local interests, not benefit them." [R. 21 at 17, 25.] Defendants, in their Motion to Dismiss Foresight's Amended Complaint, argue that Foresight has failed to adequately allege discrimination under the dormant Commerce Clause facially, purposefully, or in practical effect. Although Defendants fail to address Foresight's *Pike* argument in their motion to dismiss, Defendants do argue in their response to Foresight's Preliminary Injunction that Foresight failed to adequately address the *Pike* balancing test. [R. 22 at 6; R. 25 at 28–29.] At the preliminary injunction stage, the determinative question is "whether the movant has shown a strong likelihood of success on the merits." *Overstreet*, 305 F.3d at 573. Here, Foresight can demonstrate a strong likelihood of success on their dormant Commerce Clause challenge

if they can demonstrate that the law discriminates facially, purposefully, in practical effect, or fails the *Pike* balancing test.

a

Foresight argues that S.B. 257 is facially discriminatory "because it creates a favored bloc of states that employ a particular tax scheme." [R. 21 at 17.] "State laws that discriminate on their face against interstate commerce are presumptively invalid." *E. Ky. Res.*, 127 F.3d at 540 (citing *Ore. Waste Sys. Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99–100 (1994)).

Foresight once again relies on *New Energy Co. of Ind. v. Limbach* to argue that S.B. 257 "expressly favors coal producers from certain states" and is therefore facially discriminatory. 486 U.S. 269, 274 (1988). However, as the Court previously explained, there are several key differences between *Limbach* and the case presently before the Court. First, the *Limbach* regulation granted a tax credit to ethanol producers in Ohio, to the exclusion of producers of ethanol in every other state, unless that state granted a reciprocal tax credit to Ohio. *Schmitt*, 2020 WL 2513821, at *9. Here, the law does not award tax credit and there is no quid pro quo element to the law. Second, there is no monetary benefit to Kentucky should any other states decide to enact, modify, or repeal their severance taxes. *Id.* Finally, the law applies to any jurisdiction that imposes a coal severance tax and therefore is not discriminatory on its face. *Id.*

Foresight does briefly make two additional arguments that were not directly advanced in the prior litigation. First, Foresight argues that the Commission

"freely admits" that S.B. 257 "orders differential treatment of the same freely traded good…based solely on…the state of production." [R. 21 at 19.] However, Foresight fails to mention the subsequent clarification that the Commission "qualif[ied] this testimony to explain that the regulation applied with regard to the severance tax." [R. 25 at 18.] This clarification severely undercuts Foresight's argument by clarifying that the law is not focused on the state of production, but rather on the basis of the severance tax.

Next, Foresight cites to *Daghlian v. DeVry University, Inc.*, 582 F. Supp. 2d 1231 (C.D. Cal. 2007), which is a nonbinding case with a different factual predicate. *Daghlian* involved school accreditation standards that only applied to certain states and territories within a particular geographical region whereas the law here operates exactly the same regardless of the state in question. Any state is free to impose or remove severance tax rates at its discretion, and there is no carrot and stick coercion at issue with this law. In fact, a number of states other than Kentucky, including Montana, West Virginia, and Wyoming, impose a coal severance tax. [R.25 at 2 (citing state statutes).] S.B. 257 asks the Commission to evaluate competing bids not on the basis of the state of origin but instead based on the cost of the fuel "less any coal severance tax imposed by *any* jurisdiction." S.B. 257; *cf. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 911 (9th Cir. 2018) (finding that a law did not facially discriminate because it discriminated "against fuels based on lifecycle greenhouse gas emissions, not state of origin"). Accordingly, the Court finds at this stage in the proceedings that S.B. 257 does not discriminate on its face.

b

Next, Foresight argues that S.B. 257 purposefully discriminates because "it was passed with the intent to favor Kentucky coal producers to the detriment of out of state coal producers." [R. 21 at 20.] "When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute." *E. Ky. Res.*, 127 F.3d at 543. Furthermore, "[t]he party challenging the validity of the regulation has the burden of demonstrating that the regulation has a discriminatory purpose." *Id.* at 542. In the prior case, Foresight relied exclusively on statements made by Chairman Schmitt regarding proposed regulation language that was not enacted, and this Court found that the proffered evidence was not sufficient to demonstrate a discriminatory purpose. *Schmitt*, 2020 WL 2513821, at *10.

Here, Foresight links S.B. 257 to previous failed legislation, H.R. 144, and points to statements made by Senator Robby Mills, Representative Jim Gooch, and Representative Norma Kirk-McCormick as evidence that the law has a discriminatory purpose. [R. 21 at 21–22.] However, "[t]he 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." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 561 n.4 (2015); *see also Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784 ("We are wary of relying on individual legislators' statements, because individual statements are often contradicted or at least undermined by other statements in the legislative record.").

Here, the concerns of the judges in *Isle Royale* regarding the subjective nature of individual legislators' statements are realized in this case. While Foresight points to the statements of one senator and two representatives in arguing that the purpose of the law was to discriminate, Defendants point to statements by two other lawmakers who stated that they considered the implications of the dormant Commerce Clause before voting for the bill, and one legislator specifically emphasized on the House floor that "we understand that these types of laws cannot run afoul of interstate commerce." [R. 25 at 26.] Ultimately, the statements of a few legislators in this case, out of a total of 138 lawmakers, does not definitively point to a discriminatory purpose in S.B. 257. *Isle Royale*, 330 F.3d at 784.

Foresight also argues that H.B. 144 was a precursor to S.B. 257 and had a clearly discriminatory purpose. [R. 25 at 24.] However, as the Defendants argue, H.B. 144 was a nonbinding resolution that was passed in one chamber two years before S.B. 257 went into effect. H.B. 144 therefore holds little weight in determining whether S.B. 257, which passed both the Kentucky House and Senate and was signed by the governor, has a discriminatory purpose.

A better way to determine the purpose of a statute than looking at the statements of a select few legislators is to look to the language of the statute itself. *See E. Ky. Res.*, 127 F.3d at 542 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."). The language of the statute as written does not consider the coal-severance tax of any state when conducting its reasonableness review. This language is neutral, applies equally to all

states, and does not particularly single out Kentucky. Furthermore, despite Foresight's arguments regarding the Commission's efforts related to prior regulations and statutes, the Commission "played no role in the passage of SB 257," took no position on the bill, declined to send a representative to testify to the Senate regarding the bill, and "never expressed an opinion one way or another" about S.B. 257. [R. 25 at 25.] After reviewing the record, at this early stage in the proceedings, the Court finds that S.B. 257 does not have a discriminatory purpose.

c

Foresight next argues that S.B. 257 discriminates in effect because "it incentivizes utilities to purchase coal from producers in severance-tax states." [R. 21 at 22.] Foresight specifically argues that S.B. 257 will cause utilities to "alter their conduct in response to the new law" and that history from the identically worded regulation instructs that utilities will alter their behavior in response to the law. *Id.* at 23–24. The Sixth Circuit has explained that "[t]here are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation." *E. Ky. Res.*, 127 F.3d at 543.

Here, Foresight's argument that S.B. 257 discriminates in effect fails for several reasons. First, as the Court previously held, there simply is not enough evidence in the record to properly ascertain whether S.B. 257 will disadvantage states that do not impose severance taxes. *See Schmitt*, 2020 WL 2513821, at *12. Foresight points to the now repealed regulation and

the fact that utility companies "altered their behavior in response" to the regulation to argue that the same thing will happen with S.B. 257. [R. 19 at 36.] However, Defendants argue that the Commission never actually applied the regulation, so any actions taken by utility companies were anticipatory and not based on actions taken by the Commission. [R. 25 at 19.] Given the short period of time that the regulation was in place before it was repealed, it is difficult to ascertain how the prior regulation will inform S.B. 257.

Furthermore, after the passage of S.B. 257, cost is only one factor that the Commission analyzes when conducting its reasonableness inquiry, and it is unclear at this early stage how S.B. 257 will affect the reasonableness analysis of fuel costs in contracts and bids. *Id.* at 20. It is obvious that cost is an important factor in the reasonableness analysis. However, the Commission is required to conduct a "holistic" review, and on at least one occasion, chose to purchase coal that was more expensive based on "other considerations." *Id.* at 21. Ultimately, the law does not favor in-state coal producers over similarly situated out-of-state coal producers. *O'Keeffe*, 903 F.3d at 915; *see also Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

Although time may ultimately prove Foresight to be correct about the effects of S.B. 257, 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. "Unless a baleful outcome is either

highly likely or ruinous even if less likely, a federal court shall allow a state law . . . to go into force…and the principles of federalism should allow the states that much leeway." *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 998 (7th Cir. 2019) (Easterbrook, J., concurring in the denial of rehearing en banc). Ultimately, it would be imprudent to grant Foresight's preliminary injunction motion at this early stage, and the Court declines to find at this time that S.B. 257 discriminates in effect.

d

Foresight's final argument is that S.B. 257 fails the *Pike* balancing test because the law appears to harm local interests by "requir[ing] utilities to pay higher prices for energy." [R. 21 at 25.] In response, Defendants argue that Foresight's two-paragraph *Pike* balancing test argument appears to be an afterthought and relies exclusively on speculation and conjecture. [R. 25.] Ultimately, the Court is not convinced that at this early stage in the litigation Foresight has satisfied the *Pike* inquiry. Admittedly, the *Pike* inquiry is difficult, and some have questioned whether the *Pike* inquiry should be undertaken at all.[6] Given the difficulty of the *Pike* inquiry, "courts have held that the party challenging the law bears the responsibility of proving that the burdens placed on interstate commerce outweigh the law's benefits…and have turned away challengers who failed to meet that responsibility." *Garber v. Menendez*, 888 F.3d 839 (6th Cir. 2018).

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[6] "[The *Pike*] inquiry is ill suited to the judicial function and should be undertaken rarely if at all." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., Concurring).

Here, Foresight's *Pike* analysis consists of two paragraphs and speculates about harm to Kentucky consumers. This brief analysis and speculation on the part of Foresight is not sufficient to satisfy the *Pike* test. *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 469 (7th Cir. 2012) (Hamilton, J. concurring) ("Speculation is not enough to show real benefits to weigh against the burdens on Commerce Clause plaintiff.") Therefore, at this early stage in the litigation, the Court finds that Foresight has failed to provide more than conjecture, and this is simply not enough to invalidate the law under *Pike* balancing.

III

Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. Defendants' Motion to Dismiss **[R. 18]** is **DENIED AS MOOT**;
2. Foresight's Motion for Preliminary Injunction **[R. 20]** is **DENIED**; and
3. Defendants' Motion to Dismiss **[R. 22]** is **DENIED**.

This the 3rd day of November, 2021.

Gregory F. Van Tatenhove
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

[April 13, 2023]

FORESIGHT COAL SALES, LLC Plaintiff, v. KENT CHANDLER, *et al.*, Defendants.	))))))))))	Civil No. 3:21-cv-00016-GFVT **OPINION & ORDER**

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

This matter is before the Court on remand by the Sixth Circuit Court of Appeals. [R. 63.] For the following reasons, Plaintiff Foresight Coal is entitled to preliminary relief enjoining the Defendants from enforcing Senate Bill 257 against it.

Plaintiff Foresight Coal Sales, LLC, is a coal producer that sells coal produced in Illinois. [R. 19 at 2.] Foresight directly competes with companies that sell coal produced in Kentucky and other states through the submission of bids in response to requests for proposals from regulated utilities in Kentucky. *Id.* Kentucky's Public Service Commission "directly regulates the award of regulated utilities' coal supply contracts

through its laws and regulations, including 807 Ky. Admin. Regs. 5:056, the Fuel Adjustment Clause." *Id.* Due to Kentucky's fuel adjustment clause, utilities may "adjust the rates they charge consumers, above or below the utilities' base rates, to account for these ever-fluctuating fuel costs." *Id.* at 8.

In 2021, the Kentucky Governor signed Senate Bill 257 into law. S.B. 257 requires the Commission 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. Ann. § 278.277(1). Simply put, Senate Bill 257 requires the Commission to artificially discount the price of Kentucky coal by 4.5% of the value of the coal upon extraction—the amount of Kentucky's severance tax. Ky. Rev. Stat. Ann. § 143.020.

Foresight Coal sued the Commission members in their official capacities and sought a preliminary injunction to restrain the Defendants from enforcing S.B. 257. [R. 1; R. 20.] This Court denied Foresight Coal's motion for preliminary injunction, and Foresight Coal appealed. [R. 36; R. 39.] On appeal, the Sixth Circuit held that Foresight Coal is likely to succeed on the merits of its claim because S.B. 257 discriminates against out-of-state coal. [R. 63 at 7.] It then remanded the case for this Court to examine the other preliminary injunction factors. [R. 63 at 18.]

A court balances four factors when considering a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4)

whether the public interest would be served by issuance of the injunction." *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 365-66 (6th Cir. 2022) (quoting *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). The likelihood of success on the merits is often the determinative factor. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 735 (6th Cir. 2021) (per curiam).

With a strong likelihood of success on the merits favoring Foresight Coal, the other three preliminary injunction factors favor Foresight Coal as well. First, showing a substantial likelihood of success on the merits of a constitutional challenge establishes irreparable harm. *See ACLU v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."). Second, enjoining an unconstitutional law causes no substantial harm to others. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001). Third, enjoining an unconstitutional law furthers the public interest. *See Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) ("It is in the public interest not to perpetuate the unconstitutional application of a statute."). The Defendants do not dispute that these other preliminary injunction factors favor Foresight Coal. [R. 71 at 2 ("[T]he Defendants acknowledge that the Sixth Circuit's binding decision weighs in favor of entering a preliminary injunction.").] Consequently, the Court finds that all four factors weigh in favor of issuing a preliminary injunction. *See Union Home Mortg. Corp.*, 31 F.4th at 365-66.

Once a court determines that a party is entitled to injunctive relief, the court must decide the appropriate scope of the injunction. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Because it is an extraordinary remedy, an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 756 (1994) (cleaned up). Thus, an injunction must "redress the plaintiff's particular injury"—but go no further. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted).

Foresight Coal asks the Court to enjoin the Defendants from enforcing S.B. 257 generally. [R. 69 at 2.] Yet enjoining conduct against nonparties raises serious concerns. By enjoining all enforcement of S.B. 257, the Court may deprive other courts of a wider range of perspectives. *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (holding that allowing nonmutual collateral estoppel against the government would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue"); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). In addition, such an injunction deprives nonparties of the opportunity to participate in the case and argue for more limited relief. *See Azar*, 911 F.3d at 583 (noting that "these collateral consequences are not minimal"). Lastly, injunctions operative against nonparties encourage litigants to forum-shop to attain these broad

effects. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (opining that universal injunctions "prevent[] legal questions from percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case a national emergency for the courts and for the Executive Branch."). Here, the Court finds that an injunction applicable to the parties only will be no more burdensome to the Defendants than necessary to provide complete relief to Foresight Coal. *See Madsen*, 512 U.S. at 756.

The Court therefore finds that Foresight Coal is entitled to preliminary injunctive relief. However, the scope of the injunction will be limited to the parties before the Court. And because the case "involves constitutional issues affecting the public," the Court will not require Foresight Coal to post security as a condition of obtaining the injunction. *McLemore v. Gumucio*, No. 3:19-cv-00530, 2019 U.S. Dist. LEXIS 122525, at *42 (M.D. Tenn. July 23, 2019) (quotation omitted). Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. Plaintiff Foresight Coal Sales, LLC's Motion for Preliminary Injunction [**R. 20**] is **GRANTED** and

2. Pursuant to Federal Rule of Civil Procedure 65, and for the reasons above, the Defendants are hereby preliminarily **ENJOINED** from enforcing Senate Bill 257, codified as Ky. Rev. Stat. Ann. § 278.277, against Plaintiff Foresight Coal Sales pending further order of the Court.

This the 13th day of April, 2023.

Gregory F. Van Tatenhove
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

[May 2, 2023]

FORESIGHT COAL SALES, LLC Plaintiff, v. KENT CHANDLER, in his official capacity as Chairman and Commissioner of the Kentucky Public Service Commission, *et al.*, Defendants.	))))))))))	Civil No. 3:21-cv-00016-GFVT **ORDER**

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

This matter is before the Court Plaintiff Foresight Coal's motion to amend the Court's order granting preliminary relief. [R. 74.] On April 13, this Court granted the Plaintiff's motion for preliminary injunction and enjoined the Defendants from enforcing Senate Bill 257 against Foresight Coal Sales pending further order of the Court. [R. 73 at 4-5.] Foresight Coal now

moves to amend the injunction, arguing that the injunction should apply to non-party regulated entities because these nonparties are "the only entities Defendant could have enforced [S.B. 257] against from the beginning." [R. 74 at 2.] Accordingly, the Plaintiff contends, the Court's order provides it no relief in practice. *Id.* Moreover, Foresight Coal represents that the Defendants "do not oppose amending the scope of the Court's preliminary injunction" consistent with Foresight Coal's request. *Id.* at 3. The Court agrees and finds that Foresight Coal Sales cannot receive complete relief without the injunction prohibiting conduct against non-party regulated entities. Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. Plaintiff Foresight Coal Sales, LLC's motion to amend [**R. 74**] is **GRANTED** and

2. Paragraph 2 of the Court's order granting preliminary relief [R. 73 at 4-5] is **AMENDED** to read as follows: Pursuant to Federal Rule of Civil Procedure 65, and for the reasons stated in Record Entry 73, the Defendants are preliminarily enjoined from enforcing or applying Senate Bill 257, codified as Ky. Rev. Stat. Ann. § 278.277, in any six-month or two-year reasonableness review pending further order of the Court.

This the 1st day of May, 2023.

Gregory F. Van Tatenhove
United States District Judge