No. 22-1083

In the Supreme Court of the United States

KENT CHANDLER, in his official capacity as Chairman and Commissioner of Kentucky Public Service Commission, et al.,
Petitioners,

v.

FORESIGHT COAL SALES, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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INTRODUCTION

Any lawyer worth his salt knows that framing matters. Compare the Petitioners' framing with Foresight's. The Petitioners see this case as a mistaken extension of a judge-made doctrine limiting state sovereignty. Foresight sees it as an attempt to copy the pigs in *Animal Farm*. One framing offers compelling reasons to grant certiorari: The decision below conflicts with this Court's precedent, presents multiple circuit splits, and limits Kentucky's sovereignty. The other framing offers what, exactly?

As Foresight tells it, SB 257 is Kentucky's attempt to make bids from businesses in severance-tax States more reasonable than others—like the pigs in *Animal Farm* making themselves more equal. In other words, because Foresight believes SB 257 facially discriminates, the Court should deny review for that reason alone.

That's some argument given that the lower court never held that SB 257 facially discriminates. One judge below even thought the opposite (as did the district court). So Foresight's driving reason to deny review boils down to a merits argument that did not carry the day below. Of course, the Petitioners welcome the Court granting review to decide in part whether SB 257 facially discriminates (spoiler: it doesn't). But Foresight's facial-discrimination argument cannot justify not reviewing the questions presented. Those questions flow from holdings that do not

turn on facial discrimination. Falling back on its facial-discrimination argument does not help Foresight.

Rather, doing so hurts its case. It shows what Foresight does not want to talk about. For example, Foresight never contests that the questions presented are important. Even worse, Foresight mentions this Court's latest dormant Commerce Clause decision just once (when discussing purpose). That omitted discussion is all the more stark given the repeated references to *Animal Farm*. For all that, Foresight never ties its pig analogy to *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023).

That's because *Pork Producers* does not help Foresight. The case only adds to the many reasons to grant review. It reiterates that courts should not lightly prevent enforcement of a law under the dormant Commerce Clause. Yet the lower court did just that. And the case's *Pike* holding has double bearing on the first specific question presented here. It calls into question the distinction between practical-effect discrimination and *Pike*—suggesting that this Court should clarify the law. And it supports that a de minimis burden cannot show such discrimination. If even the backstop of *Pike* requires a substantial burden, then how can a de minimis one show practical-effect discrimination?

In short, on top of everything else, *Pork Producers* drives home that the Court should grant review. Or at a minimum, it provides compelling reason to GVR the

case to let the Sixth Circuit first consider *Pork Producers*. Either way, the decision below broadens a judge-made doctrine to limit Kentucky's sovereignty.

ARGUMENT

Foresight largely argues the merits for why the Court should deny review. And that merits argument focuses on something the lower court never decided. But before considering what Foresight argues, consider what it doesn't. Nowhere does Foresight contest that the questions presented are important or argue that the Court should wait to review them. Nor does Foresight discuss how *Pork Producers* affects this case beyond purpose. The former speaks for itself. The latter is worth drawing out.

I. *Pork Producers* supports review.

Three things in *Pork Producers* add to the many reasons to grant review. Consider the first two now and the third later.

First, the Court highlighted the "extreme caution" courts should have before enjoining a law's enforcement under the dormant Commerce Clause. *Id.* at 1165 (citation omitted). Whenever a court does so, it is a big deal—"a matter of 'extreme delicacy,'" appropriate only when the violation is clear. *Id.* (citation omitted). So courts should be cautious, not bold.

Yet the lower court "cast aside caution for boldness." *Id.* Unlike the district court, which was properly cautious before SB 257's effects "have been borne out," the Sixth Circuit refused to wait. App. 49a. It went beyond this Court's cases and extended the reach of a judge-made doctrine in multiple ways.

Second, the Court's *Pike* discussion has bearing here. *Pike* "serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." *Pork Producers*, 143 S. Ct. at 1157. *Pike*'s heartland tracks the antidiscrimination rule at the core of the dormant Commerce Clause. *Id.* at 1157–59. And so most *Pike* cases "smoke out" discrimination by looking to a law's practical effect. *Id.* at 1164 n.4 (plurality opinion). Plus, a plurality explained (and all nine justices agreed) that *Pike* applies only to laws that impose a *substantial* burden on interstate commerce. *Id.* at 1161.

That discussion underscores the need to decide whether a de minimis burden shows practical-effect discrimination. For one thing, it calls for the Court to clarify the law. If *Pike* chiefly smokes out discrimination by looking to a law's practical effect and requires a substantial burden, then what separates it from practical-effect discrimination? When should courts apply the practical-effect test and when should they apply *Pike*? To be sure, even before *Pork Producers*, there was "no clear line" separating the two. *Id.* at 1157 (majority opinion) (citation omitted). Yet one way lower courts distinguished was to look to the degree of the burden. Pet. 15–18. The Court should clarify the interplay between *Pike* and practical-effect discrimination.

For another, *Pork Producers* confirms that a de minimis burden for a facially neutral law cannot show such discrimination. *Pike* serves as the backstop to catch laws that at first blush do not appear discriminatory. So it should apply more broadly than the practical-effect test. And yet *Pike* is rightfully easier to satisfy because a law that appears neutral might well be

neutral. But under the decision below, courts will never get to *Pike*. Laws will fail the practical-effect test well before that. And the result is plain: more laws being held unconstitutional.

Remember, the lower court did not hold that SB 257 facially discriminates. Its practical-effect holding turned only on some out-of-state businesses in the abstract being a little disadvantaged. App. 12a–16a. So under the decision below a facially neutral law applying evenhandedly is likely unconstitutional just because it imposes a de minimis burden.

That cannot be right. Such a law would not meet even *Pike*'s first step—a substantial burden on interstate commerce. Laws not subject to the *Pike* backstop would fail practical-effect discrimination. If *Pike* requires a substantial burden, then at a minimum the practical-effect test does too. In short, *Pork Producers* emphasizes why the Court should grant review or at the very least GVR this case.

II. Foresight's facial-discrimination claim does not weigh against review.

Foresight argues that the Court should deny review because of its facial-discrimination claim. To put it lightly, this is not a strong argument. It is a merits argument that did not persuade the lower courts. It does away with none of the holdings raising the questions presented. And it's wrong.

Foresight misunderstands what facial discrimination means. In its view, such discrimination occurs when a law leads to businesses being treated differently depending on their home state. But facial discrimination is when the words of a law standing alone "benefit in-state economic interests by burdening out-

of-state competitors." *Pork Producers*, 143 S. Ct. at 1153 (citation omitted). Even Foresight's favorite case confirms that. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

In *Limbach*, the Court held a law facially discriminatory because it "explicitly deprive[d] certain products of generally available beneficial tax treatment because they [were] made in certain other States." *Id.* at 274. On its face, the law singled out products made outside Ohio. *Id.* at 272 n.1. SB 257 does not do the same. It applies evenly to any coal-severance tax from any jurisdiction. Its words by themselves do not benefit in-state businesses by burdening out-of-state ones.

No doubt, SB 257 affects businesses differently depending on if their state has a severance tax or not. But that does not make the law facially discriminatory. Judge Batchelder below was spot on when she explained that SB 257 could not facially discriminate. If Kentucky were to repeal its severance tax, then SB 257 could not even arguably favor in-state businesses. App. 26a–27a. If a law requires another law to possibly benefit in-state businesses, then the former does not facially discriminate.

Foresight offers two responses. First, it says that, even if Kentucky repealed its severance tax, SB 257 would still fashion "a preferential trade area." Opp'n 19 n.10. But as Foresight admits elsewhere, discrimination against interstate commerce must benefit in-state businesses. Opp'n 17–18; *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Second, Foresight notes that Kentucky has not repealed its severance tax. But that only confirms that Foresight misunderstands facial discrimination. It does not matter whether Kentucky

still has its tax; what matters is whether SB 257's words themselves discriminate. And they don't.

III. Foresight's responses to the specific questions presented do not cut against review.

1. On practical effects, Foresight makes several arguments. First, the big one: Foresight says that the decision below tracks decisions from this Court and other circuit courts. But its argument rests on the premise that SB 257 is not evenhanded while the laws in those cases were. Opp'n 25. In other words, Foresight all but concedes that without its facial-discrimination argument, the decision below conflicts with this Court's precedent and creates a circuit split.

The problem is that the decision below did not turn on facial discrimination. The lower court held that SB 257 discriminates in practical effect whether facially discriminatory or not. So it's just like the holdings in all seven of the decisions Foresight tries to distinguish—except it comes out the other way. Those decisions rejected a de minimis burden alone showing practical-effect discrimination. The decision below did the opposite. And that conflict justifies review.

Second, Foresight claims that the lower court did not hold that a de minimis burden shows practical-effect discrimination. True, the court did not say "de minimis." But it didn't have to. It expressly held that "*any* economic disadvantage will do," rejecting the district court's conclusion that Kentucky utilities might still buy Illinois coal and that Foresight might lose no market share. App. 14a–15a (emphasis added). Just because Foresight was a little worse off in the abstract was enough. That's holding that a de minimis burden is enough.

Third, Foresight says that this Court has held that any discrimination is enough for both facial and practical-effect discrimination. But every case Foresight cites had facial discrimination. Opp'n 23–24. Its arguments that the Court has applied the principle in cases finding both facial and practical-effect discrimination and that facially discriminatory laws often have discriminatory effects do not show that a de minimis burden is enough for a *facially neutral* law.

Fourth, Foresight says that we do know SB 257's practical effects. But we do not know whether Foresight will lose contracts because of SB 257. We do not know whether Kentucky businesses will gain any. We do not know whether businesses in States with a higher severance tax than Kentucky will benefit. At bottom, as the district court found, the record does not show whether the law will have any real-world effect on interstate commerce. App. 48a–49a.

Fifth, Foresight says that if SB 257 does not affect interstate commerce, it does nothing and enjoining its enforcement harms no one. That could not be more wrong. Any time a State is enjoined from enforcing a duly enacted law it is irreparably harmed—no matter how effective the law. Pet. 29. Besides, SB 257 does something even if it doesn't affect much. It evens the playing field between businesses in severance-tax and non-severance-tax States.

Sixth, Foresight says that SB 257's effects are not de minimis. It thinks 4.5% is a big swing. But the key is that SB 257 may not affect which bid wins. The PSC's review is holistic, going beyond just price. And there is no record evidence of SB 257 affecting winning bids. Foresight may have to change nothing to secure the same contracts it otherwise would have. The only

known effect—and only effect the decision below turned on—is de minimis.

2. Next, Foresight argues that the Court has already held that a law discriminates when it offsets self-imposed disadvantages for all States without affecting any business's earned or natural advantage. Wrong again.

Take the main case Foresight relies on: *Maryland v. Louisiana*, 451 U.S. 725 (1981). There, the Court held that Louisiana's first-use tax discriminated. The tax was imposed on any imported gas not previously subject to taxation and was equal to Louisiana's severance tax for in-state producers. *Id.* at 731. That was the purported justification: a compensatory tax. *Id.* at 732. The first-use tax, however, could not meet the compensatory-tax criteria. *Id.* at 759. But there were more obvious problems too.

There were several credits and exceptions to the tax—each of which resulted in practical-effect discrimination (and some showed facial too). Certain in-state uses were exempt from the tax, while out-of-state uses weren't. *Id.* at 733, 756. Companies owning both gas subject to the tax and gas that normally would be subject to the severance tax could avoid the latter. *Id.* at 732, 756–57. And certain in-state businesses affected by the tax could defray their costs through other tax credits, but out-of-state ones could not. *Id.* at 733, 757–58.

None of that helps Foresight. The first-use tax was a direct burden on interstate commerce; SB 257 is not. So it is not subject to the same compensatory-tax criteria. Pet. 21–22. Plus, SB 257 has no parallels to the several direct benefits given to in-state businesses in

Maryland v. Louisiana that did not offset a self-imposed disadvantage. And those benefits flowed in-state only. SB 257 offsets the self-imposed disadvantage from all States. *Maryland v. Louisiana* does not answer the question presented.

Nor do the other two cases Foresight cites. It relies on *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), for the broad proposition that laws cannot artificially encourage in-state production or neutralize out-of-state businesses' cost advantages. But that does not answer whether a law can neutralize out-of-state businesses' *unearned* advantage flowing from States' self-imposed disadvantage. And Foresight relies on *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). It argues that the reason Washington apple growers had an earned advantage was because of policy decisions like the one Illinois made here. But the earned advantage in *Hunt*—gained from significant work using the state grading system to make Washington apples more marketable—is nothing like the unearned advantage Illinois businesses gain by the State not imposing a severance tax. All told, nothing Foresight says changes that the Court should answer this question.

And what it says on the circuit split is no better. Foresight argues that the Ninth Circuit's decisions do not conflict with the decision below because the laws in them did not differentiate based on state of origin while SB 257 does. Opp'n 32 n.16. At bottom, Foresight retreats again to its facial claim, which is not relevant to whether a law discriminates by merely offsetting States' self-imposed disadvantages. And that argument in no way shows that the Ninth Circuit agrees

with the Sixth that taking away an unearned advantage discriminates in practical effect.

3. Lastly, Foresight argues that purpose does matter, that *Pork Producers* made that clear, and that based on everything SB 257's purpose is clear.

The big point is the second: Foresight finally brings up *Pork Producers*. But the case again cuts against Foresight. *Pork Producers* adds to why the Court should decide whether purpose matters as a stand-alone test. The case throughout casts the dormant Commerce Clause as preventing States from "purposefully" discriminating. *Pork Producers*, 143 S. Ct. at 1150. So the facial, practical-effect, and *Pike* tests all often go to showing States purposefully discriminating. But that does not resolve whether there is some separate, stand-alone test to assess purpose, examining the amorphous concept of legislative intent. Put differently, if a law passes all the other tests, can it fail just on purpose? This Court's cases are still unclear on that, lower courts will continue to puzzle over it, and the potential circuit split remains. Pet. 26–27. *Pork Producers* only adds fuel to the fire.

Finally, Foresight thinks SB 257's purpose is clear based on its text and everything that happened before it was enacted (its legislative history, the prior regulation, and so on). Indeed, Foresight devotes pages in its facts section to trying to show a discriminatory purpose. The Petitioners have already addressed text. Pet. 28. As to the rest, there's not space here. So just note that the Sixth Circuit relied on none of it in holding that SB 257 purposefully discriminates. App. 16a–17a. And the district court expressly rejected much of it. App. 46a–48a. There's a reason for that. Foresight's purpose arguments are not any good. The Petitioners

showed that below. Appellee Br. 30–36, 60 F.4th 288 (No. 21-6069). And if the Court grants review and considers whether purpose matters as a stand-alone category, they're happy to do so again.

* * *

Nothing Foresight says suggests the Court should deny review. Its *Animal Farm* framing, facial-discrimination reliance, and other responses all come up short. Even before *Pork Producers*, this case checked all the boxes for a grant. After it, only more so. Or at the very least, *Pork Producers* calls for a GVR. This case simply cannot go back to district court without the Sixth Circuit first considering *Pork Producers*. But a grant is more fitting given the decision below. It raises multiple important questions affecting state sovereignty, presents multiple circuit splits, and extends the reach of a judge-made doctrine.

CONCLUSION

The Court should grant the petition or GVR this case in light of *Pork Producers*.

Respectfully submitted,

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