No. 23-____

IN THE

Supreme Court of the United States

ANTERO RESOURCES CORPORATION, *Petitioner*,

v.

MATTHEW R. IRBY, in his official capacity as WEST VIRGINIA TAX COMMISSIONER; JOSEPH ROMANO, in his official capacity as ASSESSOR OF HARRISON COUNTY; COUNTY COMMISSION OF HARRISON COUNTY, SITTING AS THE BOARD OF ASSESSMENT APPEALS; ARLENE MOSSOR, in her official capacity as ASSESSOR OF RITCHIE COUNTY; RITCHIE COUNTY COMMISSION, SITTING AS THE BOARD OF ASSESSMENT APPEALS; DAVID SPONAUGLE, in his official capacity as ASSESSOR OF DODDRIDGE COUNTY; DODDRIDGE COUNTY COMMISSION, SITTING AS THE BOARD OF ASSESSMENT APPEALS; LISA JACKSON, in her official capacity as ASSESSOR OF TYLER COUNTY; & COUNTY COMMISSION OF TYLER COUNTY, SITTING AS THE BOARD OF ASSESSMENT APPEALS, *Respondents.*

On Petition For A Writ Of Certiorari To The West Virginia Supreme Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For the tax assessments at issue in these appeals, West Virginia did not allow owners of natural gas wells to deduct their actual post-production expenses, including those incurred to process and transport their natural gas, oil, and natural gas liquids ("post-production expenses") for tax purposes. Instead, the State permitted only an "average" deduction for all operators.

Owners who sell gas only within the State have far lower post-production expenses than those who sell out of state. That is mainly because transportation and other costs are much lower for in-state sellers since the gas does not travel as far. Thus, the "average" deduction is much *lower* than the actual post-production expenses for out-of-state sellers. This resulted in a windfall and competitive advantage for in-state sellers because they not only have lower costs but in some cases they also got to deduct a higher amount than their actual costs. The State admitted to using this approach to favor in-state sellers.

Although West Virginia's Legislature has temporarily changed the calculation method for tax years 2022 through 2024 only, its high court blessed the discriminatory approach and the State has enforced it against Antero for the tax years at issue.

The question presented is:

Whether West Virginia's refusal to allow natural gas producers to deduct actual post-production expenses for property tax purposes, which favors in-state sellers over out-of-state sellers, violates the dormant Commerce Clause.

CORPORATE DISCLOSURE STATEMENT

Petitioner Antero Resources Corporation is a publicly traded company. No publicly held company owns more than 10% of Antero Resources Corporation's stock.

PARTIES TO THE PROCEEDING

Petitioner, who was the Petitioner in the West Virginia Supreme Court of Appeals, is Antero Resources Corporation.

Respondents, who were the Respondents in the West Virginia Supreme Court of Appeals, are Matthew R. Irby, in his official capacity as West Virginia Tax Commissioner; Joseph Romano, in his official capacity as Assessor of Harrison County; County Commission of Harrison County, sitting as the Board of Assessment Appeals; Arlene Mossor, in her official capacity as Assessor of Ritchie County; Ritchie County Commission, sitting as the Board of Assessment Appeals; David Sponaugle, in his official capacity as Assessor of Doddridge County; Doddridge County Commission, sitting as the Board of Assessment Appeals; Lisa Jackson, in her official capacity as Assessor of Tyler County; and County Commission of Tyler County, sitting as the Board of Assessment Appeals.

RELATED PROCEEDINGS

Antero Resources Corp. v. Irby, et al. (Harrison County Tax Year 2019)

- No. 22-0048 in the West Virginia Supreme Court of Appeals
- No. 20-P-83-2 in the Circuit Court of Harrison County, Business Court Division

Antero Resources Corp. v. Irby, et al. (Ritchie County Tax Year 2018)

- No. 22-0049 in the West Virginia Supreme Court of Appeals
- No. CC-43-2018-AA-1 in the Circuit Court of Ritchie County, Business Court Division

Antero Resources Corp. v. Irby, et al. (Harrison County Tax Year 2018)

- No. 22-0050 in the West Virginia Supreme Court of Appeals
- No. 18-F-235-3 in the Circuit Court of Harrison County, Business Court Division

Antero Resources Corp. v. Irby, et al. (Doddridge County Tax Year 2019)

- No. 22-0051 in the West Virginia Supreme Court of Appeals
- No. CC-09-2019-AA-1 in the Circuit Court of Doddridge County, Business Court Division

Antero Resources Corp. v. Irby, et al. (Doddridge County Tax Year 2018)

- No. 22-0052 in the West Virginia Supreme Court of Appeals
- No. CC-09-2018-AA-1 in the Circuit Court of Doddridge County, Business Court Division

Antero Resources Corp. v. Irby, et al. (Tyler County Tax Year 2018)

- No. 22-0144 in the West Virginia Supreme Court of Appeals
- No. 18-AA-1 in the Circuit Court of Tyler County, Business Court Division

The West Virginia Supreme Court of Appeals entered its memorandum decision in these consolidated cases on June 13, 2023.

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INTRODUCTION

West Virginia's property tax regime for natural gas wells facially and in effect favored producers who sell produced natural gas in state over those who sell out of state. For the tax years at issue here, the State permitted only an "average" deduction for post-production expenses. That benefitted companies who sell within the State because their costs are lower than the average. But those who sold out of state were severely disadvantaged because their actual post-production expenses far exceed the "average" deduction allowed. So, effectively, West Virginia taxed producers who sell out of state at a higher rate than those who sell in state. Indeed, the State has admitted that this is the rule's *intended* effect, saying that if producers want to avoid the higher tax burden, then all they have to do is sell their product in West Virginia. What's worse, the State has also whipsawed the industry—first claiming only average deductions could be taken, then saying actual expenses could be deducted, then finally reverting back to its original position.

This system and process no doubt violate basic notions of due process and equal protection. But the issue that deserves this Court's attention is that West Virginia's tax system violates the dormant Commerce Clause. The court below held it did not, and in the process, ignored this Court's precedents. Moreover, the court below deepened a split among lower courts. At least four federal courts of appeals and four state supreme courts have *invalidated* regimes like West Virginia's, whereas the Ninth Circuit and two state supreme courts have upheld similar ones. This split is one that only this Court can resolve.

Simply put, the Constitution does not permit the blatant discrimination West Virginia employed. Time and again, this Court has enforced the dormant Commerce Clause and invalidated state tax systems (including several others from West Virginia) aimed at avoiding this core tenet of our constitutional structure. As these tax systems become more creative (through complex deductions and circuitous windfalls), and as lower courts increasingly divide over whether and how to examine a challenged tax system's actual effects, this Court's intervention is required.

OPINION BELOW

The West Virginia Supreme Court of Appeals' decision is not reported in the South Eastern Reporter but is available at 2023 WL 3964054 and is reproduced at Pet.App.1a–13a.

JURISDICTION

The West Virginia Supreme Court of Appeals entered judgment on June 13, 2023. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are at Pet.App.17a–46a.

STATEMENT OF THE CASE

A. Factual Background

After natural gas is extracted from the ground, it may flow through a variety of different downstream processes before sale. Such downstream processes may include gathering, compression, processing, and transportation, all of which result in additional expenses being incurred prior to sale. *Steager v.*

Consol Energy, Inc., 832 S.E.2d 135, 142 (W. Va. 2019); *see also* W.V.A.R. 9, 573–74, 1175–76, 2019–20, 2786.[1] Those substantial expenses are at the heart of this case. (For simplicity, this petition refers to these expenses collectively as "post-production expenses.")

Antero is an independent oil and natural gas company that explores, develops, and produces natural gas, oil, and natural gas liquids from properties located in the Appalachian Basin in West Virginia and Ohio. Over the last decade, Antero has employed hundreds of West Virginians in connection with its operations across the State and contributed to the local community in numerous other ways.

Antero also serves the energy needs of the Nation by selling natural gas to buyers at sales points located in the United States, and predominantly to buyers located outside of West Virginia. In doing so, Antero incurs significant post-production expenses to gather, compress, process, and transport gas through interstate pipelines to out-of-state markets. *Consol Energy, Inc.*, 832 S.E. 2d at 142; *see also* W.V.A.R. 9, 573–74, 1175–76, 2019–20, 2786.

B. Legal Background

1. West Virginia's Constitution provides that property taxes—including, as relevant here, *ad valorem* property taxes on natural gas wells—must be "equal and uniform" and "in proportion to [the property's] value." W. Va. Const. art. X, § 1. State statutes likewise provide that all "natural resources property" located in the state, including "natural gas-

[1] Citations to W.V.A.R. refer to the "Appendix Record" filed in the West Virginia Supreme Court of Appeals.

producing property," "shall be assessed" according to its "true and actual value." W. Va. Code §§ 11-6K-1(a), 11-6K-2(5). *See generally Consol Energy, Inc.*, 832 S.E.2d at 140–42 (describing "gas well valuation and deduction of operating expenses").

In accordance with the State Legislature's direction that the Tax Commissioner "develop a plan" for the "valuation of natural resources property" that complies with these mandates, W. Va. Code § 11-1C-10(e); *see also* W. Va. Code § 11-6K-8, the Commissioner promulgated regulations for valuing natural gas wells, *see* W. Va. Code St. R. § 110-1J-4. These regulations provide for revenue-based valuation of natural gas wells, starting with a well's "gross receipts." W. Va. Code St. R. § 110-1J-4.1. The term "gross receipts" is defined as "total income received from production on any well, at the field line point of sale, during a calendar year before subtracting any royalties and/or expenses." W. Va. Code St. R. § 110-1J-3.8.

But a well owner is not actually taxed on a well's full "gross receipts" for *ad valorem* tax purposes, because the owner is allowed to "subtract[t]" "any … expenses" incurred in getting the natural gas to the "field line point of sale." *Id.* at § 110-1J-4.1 (defining "net receipts" as "gross receipts … less … operating expenses"). That valuation is then the basis for calculating the *ad valorem* tax.

Nevertheless, the Tax Commissioner has prevented well owners from deducting the actual expenses incurred in getting their gas to the point of sale. Instead, for the tax years at issue here, the Commissioner permitted only a flat deduction called

the "average annual industry operating expenses per well," as determined about every five years by administrative fiat. W. Va. Code St. R. § 110-1J-4.3; *see, e.g.*, State Tax Dep't, Admin. Notice 2020-08 (Jan. 30, 2020), https://tinyurl.com/y7dbda73 (setting tax year 2020's "average annual operating expenses" per well).

Under the challenged tax system, the "average" deduction does not accurately account for actual post-production expenses incurred in getting the natural gas, oil, and natural gas liquids to its sales point. *See Consol Energy, Inc.*, 832 S.E. at 141–42 & nn. 5, 7. Disallowing full deductions for such expenses operates as an effective tax on any post-production expenses above the administratively determined "average." Indeed, a prior West Virginia Tax Commissioner conceded that this approach "significantly understat[es] actual operating expenses for" well owners, "fails to acknowledge all expenses," and causes the "values to be assigned" to gas wells to be "grossly overstated." W.V.A.R. 337, 984, 1781, 2557, 3617.

The Tax Department is well aware that out-of-state sellers like Antero incur significantly higher post-production expenses than in-state sellers. *See Consol Energy, Inc.*, 832 S.E. at 141–42. But the Department nonetheless has refused to allow deductions for actual post-production expenses for the years at issue here.

Simply put, West Virginia required Antero to pay taxes on its actual sales revenues, but did not allow Antero to deduct its actual incurred expenses in getting the natural gas, oil, and natural gas liquids to this point. By contrast, it is possible producers who

sell in West Virginia got to deduct *more than* their actual expenses, so their effective tax rate was reduced disproportionately to their actual expenses. Thus, the in-state sellers are not taxed on their expenses like Antero, but may get a deduction for *more* than their expenses. For example, in Tyler County, Antero's average operating expenses in tax year 2018 were $1,314,396 per well. W.V.A.R. 99. But the State assessed a deduction based on a 20% operating expense percentage and capped the deduction at $175,000. *Id.* That's an 87% haircut, solely because Antero incurred higher post-production expenses to get its gas to out-of-state markets.

Indeed, Antero showed that its post-production expenses have far exceeded the State's arbitrary "average" deduction dating back to tax year 2015. *See Consol Energy, Inc.*, 832 S.E. 2d at 141–42 & nn. 5, 7. *See also* W.V.A.R. 12–13, 19–20, 99, 572, 585, 587–88, 630, 1175–76, 1190, 1193–1200, 1202–05, 1261, 2018–19, 2034–38, 2151, 2784, 2802, 2861.[2]

In contrast, local sellers that sell their natural gas only or primarily to buyers located in West Virginia—and thus engage only or primarily in intrastate commerce—incur post-production expenses well

[2] Indeed, Antero is effectively taxed twice on its expenses. First, the State disallows Antero from deducting its actual expenses, limiting the company to only deduct a lower, "average" amount of expenses. So Antero must pay taxes on any expense above that average. Second, the State bases the tax Antero is required to pay, in part, on the sales price Antero receives from its out-of-state purchasers, a price which is typically higher than the price that would be received from an in-state purchaser. So Antero has to pay tax on that revenue as well. And this effective double-taxation redounds to the State.

below those incurred by out-of-state sellers like Antero. *See id.* In practical terms, two neighboring wells producing and selling essentially identical natural gas can incur significantly different post-production costs depending solely on whether the producer sells the gas in-state or out-of-state.

Imagine two companies that both bottle and sell water from the same stream and at the same price. Company A sells only to customers in-state, while Company B sells primarily to customers out-of-state. If the State allows only the "average" expenses of the two to be deducted, that will obviously benefit Company A to the detriment of Company B. To continue the analogy, imagine companies are allowed an average expense deduction of $200. Both companies sell $1,000 of water and face a tax liability of $200, but A incurs $100 of actual expenses and B incurs $300 of actual expenses. Nonetheless, both companies owe $200 in taxes. So Company A will net $700 ($1,000 - $100 in expenses - $200 in taxes), while Company B will net only $500 ($1,000 - $300 in expenses - $200 in taxes). And the only reason for the $200 discrepancy in what each company nets is that Company A sells only within the State, while Company B sells outside the State. Moreover, Company A is entitled to deduct *more* than its actual expenses from its revenue—although its expenses were only $100, it actually deducts $200. That further compounds the unfairness.

2. Not only is the system deeply unfair, but in 2020 the State actually flip-flopped on the legality of this approach—*twice*. The challenged approach (that is, allowing only the average deduction) first arose in the course of litigation over how to calculate Antero's

deductions. *See* Pet.App.7a–10a (summarizing history of relevant guidance). But when Antero pointed out the unfairness of the challenged approach, the State issued new interpretative Guidance saying that deductions for post-production expenses were allowed under existing law. W. Va. State Tax Dep't, *Important Notice to Producers of Natural Gas and Oil for Property Tax Year 2021* (June 30, 2020). That was because the challenged approach illegally "overvalued" wells for tax purposes. *Id.*

However, after Antero submitted valuations in reliance on the June 2020 Guidance and sued to get back the money it was owed under the correct approach, the State realized the fiscal consequences of its flip. And the State flopped back to the challenged approach. W. Va. State Tax Dep't, *Notice of Withdraw [sic] of Important Notice to Producers of Natural Gas and Oil for Property Tax Year 2021* (Oct. 9, 2020); *see* Pet.App.7a–10a.

There is currently a temporary statute in force in West Virginia that has changed the method of calculating these expenses for only the 2022, 2023, and 2024 tax years. W. Va. Code Ann. § 11-1C-10(d)(3). But that law is currently scheduled to sunset in 2025.

In sum, West Virginia's tax methodology imposed a greater burden on out-of-state sellers, such as Antero, than it does on in-state sellers—solely because those out-of-state sellers sell their gas to buyers located outside of the State. The "average annual industry operating expenses" methodology, moreover, dramatically undercounts Antero's post-production expenses while over-counting the much-smaller

operating expenses of in-state sellers, thus handing in-state sellers a tax windfall and competitive advantage at Antero's expense.

C. Procedural Background

1. Antero protested Respondents' valuations and adoptions of those valuations for the tax years 2018 and 2019, demonstrating how its average operating expenses per producing well were significantly higher than (upwards of seven times) the assessment allowed. Pet.App.4a–5a. This disparate treatment, Antero argued, violates equal protection principles, and the State's flip-flop on whether actual deductions were allowed violates due process. Pet.App.11a. But as relevant here, Antero also argued that taxing the company at a significantly higher rate simply because it does business across state lines presents a textbook violation of the dormant Commerce Clause. *Id.*

In the county-level proceedings, Antero educed evidence that West Virginia uses its tax system to benefit in-state industry over out-of-state industry. In particular, the Tax Department has repeatedly stated that Antero should "sell [its] gas at the wellhead" in West Virginia if it wants to "pay less taxes" than it must pay by selling its product in other States. Pet.App.50a, 56a, 59a.

In other words, the State has said explicitly that the only way to avoid the literal tax on doing business out of the State, is to not do business out of the State.

2. After the county commission proceedings, where the challenged assessments were upheld, the State flip-flopped on the challenged approach. Initially, the State conceded its position unlawfully overvalued wells, but then, after realizing the fiscal consequences

of that concession, the State reinstated the challenged approach. *See supra* Part B.2. Antero then appealed to the county circuit courts, and those six appeals were consolidated and referred to a single judge within the business court division, a specialized court in West Virginia to hear certain cases, including cases involving property tax disputes. Pet.App.6a; *see supra* Related Proceedings. That court affirmed the assessments at issue largely based on the West Virginia Supreme Court of Appeals' decision in *Consol Energy, Inc.*, 832 S.E. 2d at 149 (holding that challenged approach was "a reasonable construction of the regulation and not facially inconsistent with the enabling statute"). *Consol*, however, did *not* address a dormant Commerce Clause claim. *See id.*

3. The West Virginia Supreme Court of Appeals affirmed the business court's dismissals of Antero's claims on June 13, 2023. Pet.App.1a. The sum total of the court's dormant Commerce Clause analysis was a scant three sentences. Misconstruing Antero's claim (which focused on intent and effect), the Court held that the dormant Commerce Clause does not "requir[e] states to allow an entity to deduct the expenses associated with transporting the entity's products to its chosen marketplace." Pet.App.12a–13a. The court confirmed this misunderstanding of the inquiry by stating there is "no evidence that such a deduction is critical to interstate commerce." *Id.* The court therefore found "no error in the business court's order." *Id.*

As noted above, West Virginia's tax system also violates other constitutional guarantees, including those of due process and equal protection. And the decision below was wrong to reject those claims. But

Antero seeks *certiorari* on its dormant Commerce Clause claim given that the decision below patently conflicts with this Court's precedent and deepens intractable disagreement among the lower courts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Commerce Clause prohibits state taxation measures that discriminate against out-of-state economic interests, and West Virginia's contrary decision conflicts with this Court's precedents upholding that rule.

1. Just last Term, this Court held, "Assuredly, under this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests." *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1150 (2023). Indeed, all nine Justices agreed with that conclusion. *See id.* at 1167 (Roberts, C.J., dissenting in part) ("I agree with the Court's view in its thoughtful opinion that many of the leading cases invoking the dormant Commerce Clause are properly read as invalidating statutes that promoted economic protectionism").

It is true that the Court fractured over the constitutionality of California's prohibition on the in-state sale of whole pork meat that comes from pigs that are confined in a cruel manner. *See* 143 S. Ct. at 1149 (majority op.); *id.* at 1165 (Sotomayor, concurring in part); *id.* at 1166 (Barrett, J., concurring in part); *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part). But the

Court was unanimous in recognizing that the "antidiscrimination principle lies at the very core of our dormant Commerce Clause jurisprudence," *id.* at 1153 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)); *id.* at 1166 (Sotomayor, J., concurring in part); *id.* at 1166–67 (Barrett, concurring in part); *id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part). And it "prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 1153 (majority op.) (quoting *Dep't of Rev. of Ky. V. Davis*, 553 U. S. 328, 337–38 (2008)).

Creative protectionist tax arrangements are frequent flyers in this Court, which has repeatedly held that States may not use taxation to discriminate against interstate commerce. Different tax rates for in-state versus out-of-state interests present the simplest violations. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (describing such "tariffs" as the "paradigmatic example of a law discriminating against interstate commerce"). But no less noxious to our national economy and federalism are more circuitous tax arrangements (like West Virginia's) that deploy deductions, exemptions, credits, or rebates to "effectively" discriminate. *Id.* at 194.

As the Court has long held, "[t]hat the tax discrimination comes in the form of a deprivation of a generally available tax benefit, rather than a specific penalty on the activity itself, is of no moment." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 578–79; *see Guy v. Baltimore*, 100 U.S. 434, 443 (1879)

(discriminatory wharfage fee was "mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz. build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States"). "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). For example, in *Camps Newfound/Owatonna*, a Maine statute provided a general exemption from real estate and personal property taxes for charitable institutions incorporated in-state. 520 U.S. at 568. But if an institution "in fact conducted or operated principally for the benefit of persons who are not residents of Maine," the charity could only qualify for a more limited tax benefit. *Id.* (quoting statute at issue). This Court had no trouble holding that "Maine could not tax petitioner more heavily than other camp operators simply because its campers come principally from other States." *Id.* at 572.

Confronting another differential tax burden, this one on securities sales in New York, *Boston Stock Exchange v. State Tax Commission* held that the Commerce Clause "demand[s]" "evenhanded treatment" in state taxation. 429 U.S. 318, 332 (1977). Under New York's law, "transactions by nonresidents [were] afforded a 50% reduction" in taxation "when the transaction involve[d] an in-state sale," while "[t]axable transactions … by nonresidents selling outside the State d[id] not benefit from the rate decrease." *Id.* at 324. The law also capped taxes at $350 per transaction "when [the transaction] involve[d] a New York sale," but did not cap taxes for sales "made out-of-State." *Id.* This unequal treatment

violated the "fundamental principle" that "[n]o State, consistent with the [dormant] Commerce Clause, may impose a tax which discriminates against interstate commerce … by providing a direct commercial advantage to local business." *Id.* at 329. Because sellers could "substantially reduce [their tax] liability by selling in State," the "obvious effect of the tax [was] to extend a financial advantage to sales on the New York exchanges at the expense of the regional [out-of-state] exchanges." *Id.* at 331.

Similarly, this Court invalidated an Ohio tax credit for ethanol fuel sales that applied only if the ethanol was produced in-state (or in a State that granted a similar tax advantage to Ohio-produced ethanol). *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271 (1988). There, writing for a unanimous Court, Justice Scalia described and applied the Constitution's "cardinal requirement of nondiscrimination" in-state taxation. *Id.* at 274. Likewise, in *West Lynne Creamery, Inc.*, this Court invalidated a Massachusetts milk pricing order that assessed a tax on all milk sold by dealers to retailers in the State but then distributed proceeds from the tax only to in-state dairy farmers. 512 U.S. at 194.

More recently, the Court cut through the thicket of Maryland's individual income tax system, which had the "unusual feature" of denying Maryland residents "a full credit against the income taxes that they pay to other States." *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 545 (2015). The scheme's effective double-taxation of that out-of-state revenue created an unlawful "incentive for taxpayers to opt for intrastate rather than interstate economic activity." *Id.*

And this case would not be the first in which the Court faces down a discriminatory tax system from West Virginia specifically. In *Armco Inc. v. Hardesty*, the Court invalidated a gross receipts tax that treated wholesalers of tangible property in the State differently depending on whether the taxpayers conducted manufacturing in West Virginia or elsewhere. 467 U.S. 638, 642 (1984). Although small as a percentage (0.27%), the tax nonetheless violated the Commerce Clause because it differentiated "between transactions on the basis of some interstate element." *Id.* (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977)).

The Court has rebuked other West Virginia taxes as unconstitutional as well. *E.g.*, *Dawson v. Steager*, 139 S. Ct. 698, 703 (2019) (intergovernmental tax immunity violations); *Allegheny Pittsburgh Coal Co. v. Webster Cnty. Comm'n*, 488 U.S. 336, 345 (1989) (Equal Protection Clause violations).

In sum, time and again, this Court has appropriately policed inventive state tax measures that had the intended effect of favoring in-state versus out-of-state economic interests and commerce.

2. The decision below, however, ignores this Court's repeated command not to impose this kind of "differential burden on any part of the stream of commerce." *W. Lynn Creamery, Inc.*, 512 U.S. at 202. West Virginia's deduction for "average" expenses for post-production expenses effectively punishes out-of-state sellers (by permitting only a reduced deduction that is lower than their actual expenses) and could provide a windfall to in-state sellers (by raising their deduction higher than their actual expenses).

The Supreme Court of Appeals simply ignored this upshot of the State's tax regime, mistakenly reframing the dormant Commerce Clause inquiry as whether the Constitution "requires states to allow an entity to deduct the expenses associated with transporting the entity's product to its chosen marketplace." Pet.App.12a–13a. Antero does not ask the Court to impose such an affirmative requirement; of course there is no federal constitutional imperative to provide specific state tax relief. Rather, Antero's argument is that if West Virginia allows deductions for post-production expenses, the State must not impose a "differential burden" simply based on whether a producer sells in-state versus out. *See W. Lynn Creamery, Inc.*, 512 U.S. at 202. That is especially true here where the State reaps the benefit of taxing a higher price for out-of-state sales (through a discounted cash flow model), but does not allow a deduction for the costs to generate that revenue.

The tax arrangement at issue here is no different "in effect" than the many this Court has invalidated. *New Energy Co.*, 486 U.S. at 276. Perhaps more complex arithmetic is needed to peel back the layers under which the State attempted to shroud the discriminatory effects. But a simple analogy confirms the "average" deduction's discriminatory economic effect: Take a father who decides to help both his daughter and his nephew set up lemonade stands in his neighborhood with startup money. The father decides to cover the two's "average" costs. His daughter lives with him, but his nephew lives a train ride away in a nearby state. The costs of ingredients and materials are equal for the two—say $10.00. But the nephew must also pay for his train ticket—say

$5.00 roundtrip. The total costs for the two children combined are $25.00, so the father gives them each $12.50. His daughter's startup funding will actually mean she pockets $2.50 ($12.50 average - $10.00 actual), while his nephew is out $2.50 ($15.00 actual - $12.50 average). Economically, you have the same situation here: In-state sellers got a boost and out-of-state sellers suffered a blow simply because of where they sell their product.[3]

Discriminating against interstate commerce violates the "core" of the Commerce Clause's proscription against protectionism. *Nat'l Pork Producers Council*, 143 S. Ct. at 1153. That is true whether the State uses a facially discriminatory tax rate or a more "indirect[ ]" (but no less effective) deduction maneuver. *Newfound/Owatonna, Inc.*, 520 U.S. at 578–79. By upholding West Virginia's unfair tax system, and ignoring the clear evidence of discriminatory purpose, the court below reached a decision that cannot be squared with this Court's precedents.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM BOTH FEDERAL COURTS OF APPEALS AND OTHER STATE SUPREME COURTS.

West Virginia's decision also deepens an existing split among the federal courts of appeals and other state supreme courts. Despite this Court's repeated

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[3] For purposes of the analogy, the revenue each child generates is irrelevant. That is because for dormant Commerce Clause purposes, it is the *treatment* that matters, not the end result. Thus, the point here is that the father (the State) is treating the children (in-state and out-of-state companies) unequally even while reimbursing "average" costs.

policing of protectionist state tax arrangements, intervention is required again, because some courts still fail to fully appreciate that indirect unlawful discrimination is still unlawful discrimination. On the one hand, at least four federal circuit court decisions and four state supreme court decisions have invalidated indirectly discriminatory state tax laws in recent decades. On the other hand, the decision below followed recent decisions of the Ninth Circuit, Washington Supreme Court, and Oklahoma Supreme Court in failing to recognize the unfair effects of increasingly crafty tax regimes.

A. Numerous courts of appeals and state supreme courts have invalidated discriminatory measures that are similar to West Virginia's.

1. Decisions from four federal courts of appeals demonstrate a willingness (embraced by this Court) to see past a tax's veneer and recognize its differential burden on interstate commerce. In doing so, they sharply depart from the narrow view of the dormant Commerce Clause's antidiscrimination protection reflected in the decision here.

For example, in *Foresight Coal Sales, LLC v. Chandler*, the Sixth Circuit recently held that Kentucky's method of taxing coal producers violated the dormant Commerce Clause. 60 F.4th 288, 293 (6th Cir. 2023), *pet. for cert. distributed*, No. 22-1083 (U.S. Aug. 23, 2023). Kentucky imposed a severance tax on coal extracted within its borders (unlike some other states). But it also directed its utilities to buy the most competitive coal. To buoy locally sourced coal, the state legislature directed local utilities to subtract any

state severance tax paid when evaluating coal prices. In other words, Kentucky utilities paid a reduced price for coal produced in-state but paid full price for coal produced in other states without severance taxes. So, like West Virginia's system here, Kentucky's "treated [sellers of in-state resources] one way" and sellers of out-of-state resources "another." *Id.* at 297.[4]

Likewise, the Third Circuit has recognized that discriminatory *implementation* of an otherwise fair-seeming tax arrangement nonetheless violates the Commerce Clause. *Reefco Servs., Inc. v. Virgin Islands*, 830 F. App'x 81, 85 (3d Cir. 2020). In that case, the Virgin Islands implemented only part of an excise tax; it collected the excise tax from importers but not local manufacturers. *Id.* at 83. The court focused on the tax's real-world effects, appropriately recognized this "blatant" and "obvious" discrimination, and affirmed a refund to the challenging importer. *Id.* at 85.

In *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, the First Circuit confronted an alternative minimum tax that effectively only applied to cross-border transactions between a company and its home office (or related entity offshore). 834 F.3d 110, 126 (1st Cir. 2016). Like here, the differential burden "applie[d]

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[4] It is true that Kentucky's tax system could have benefited some out-of-state producers if the producers' home state imposed a higher severance tax than Kentucky. But as the Sixth Circuit explained, "The facial unconstitutionality of [a state regulation] cannot be alleviated by examining the effect of legislation enacted by its sister States." *Foresight Coal Sales*, 60 F.4th at 293.

only to interjurisdictional transfers" and was discriminatory. *Id.*

The Second Circuit has similarly invalidated a tax credit that applied differently for out-of-state residents or out-of-state taxes than for in-state ones. *Barringer v. Griffes*, 1 F.3d 1331, 1332 (2d Cir. 1993) (credit against motor vehicle use tax for any sales tax paid to state in question, but not for sales tax paid to another state). That court framed the inquiry as "whether a tax discriminates against interstate commerce when its secondary effects—not the operation of the tax on its face—create a bias towards in-state purchases." *Id.* at 1338. Here, West Virginia accomplishes the same sort of effective discrimination: the State exacts a greater tax on resources transported *out of* West Virginia than it does on resources transported only *within* West Virginia. *See id.* at 1338–39.

2. Numerous state supreme courts have also seen through creative regimes to invalidate effectively discriminatory measures.

For example, Louisiana's high court rejected a credit for out-of-state income taxes that only applied if the other State offered reciprocal credit to Louisiana residents. *Smith v. Robinson*, 265 So. 3d 740, 751–52 (La. 2018). The State's "disparate treatment between interstate and intrastate commerce" began and ended the discrimination analysis. *Id.*

Next door in Mississippi, a tax exemption for dividends from in-state subsidiaries that the State denied to out-of-state subsidiaries faced the same fate. *Miss. Dep't of Rev. v. AT & T Corp.*, 202 So. 3d 1207, 1209 (Miss. 2016). And the Minnesota Supreme Court

likewise invalidated a charitable tax deduction the State made available only for contributions to in-state charities. *Chapman v. Comm'r of Rev.*, 651 N.W.2d 825, 835 (Minn. 2002).

Moreover, recognizing that "[j]udicial scrutiny focuses on the practical operation of a challenged statute, since the validity of the State laws must be judged chiefly in terms of its actual effect," New York's high court invalidated a preapportionment tax deduction that effectively benefited in-state telephone carriers in New York over interstate carriers. *Am. Tel. & Tel. Co. v. N.Y. State Dep't of Tax'n & Fin.*, 637 N.E.2d 257, 259 (N.Y. 1994). "By requiring the interstate long-distance carrier to calculate the deduction before apportionment, the statute has the practical and real effect of treating differently long-distance carriers similarly situated in all respects except for the percentage of their property located within New York State." *Id.*[5]

B. Other courts have upheld similarly discriminatory state measures.

Despite this Court's repeated admonition that the dormant Commerce Clause protects against effectively discriminatory state tax systems, some courts have failed to fully appreciate this protection.

For example, the Ninth Circuit upheld California's fuel standard that, according to the trial court,

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[5] *See also Emerson Elec. Co. v. Tracy*, 735 N.E.2d 445 (Ohio 2000) (deduction for net dividends that varied between foreign and domestic subsidiaries was invalid under dormant *Foreign* Commerce Clause); *Conoco, Inc. v. Tax'n & Revenue Dep't of N.M.*, 931 P.2d 730 (N.M. 1996) (similar).

"facially discriminated against out-of-state corn ethanol." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1088 (9th Cir. 2013). California assigned a higher "total carbon intensity" level to out-of-state corn ethanol than it did to in-state corn ethanol, thereby making in-state ethanol cheaper. *Id.* at 1080. But the Ninth Circuit (like the West Virginia Supreme Court) upheld that discrimination, finding that California had based the intensity level on the method of production rather than the origin of the fuel. *Id.* at 1088–1101. Like the decision below, *Rocky Mountain Farmers Union* missed the tax's "preferential treatment" for in-state sales versus out-of-state ones. *Id.* at 1108 (Murguia, J., concurring in part and dissenting in part).

Similarly, the Washington Supreme Court approved a tax deduction for compensation received only from in-state Medicaid and CHIP programs. *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Rev.*, 196 Wash. 2d 1, 11–16 (2020). Although the deduction "exclude[d only] compensation qualifying hospitals receive from other states' CHIP and Medicaid programs," the high court found no differential treatment. *Id.* at 9, 16. Because the same approach applied equally to "every qualifying public and nonprofit Washington hospital," it was upheld—even though the ultimate impact was discriminatory. *Id.* at 16. The court's misapplication of this Court's precedents mirrors the West Virginia Supreme Court's decision here in its failure to adequately police such protectionism.

And Oklahoma has upheld a capital gains deduction the State makes available only if the company has been headquartered there for three

years prior to its sale. *CDR Sys. Corp. v. Okla. Tax Comm'n*, 339 P.3d 848, 853–59 (Okla. 2014). In its analysis of the deduction's alleged "discriminatory effect," the court refocused the inquiry to whether the measure was "coercive" as to a company's relocation decisions. *Id.* at 857–59. But the dissent recognized that the deduction's availability was "based upon the level of business a company conducts in Oklahoma" and therefore impermissibly discriminatory. *Id.* at 863 (Combs, J., dissenting).

* * *

Here, West Virginia deepened this split of authority by failing to examine the tax rule's practical effects (as well as its protectionist purpose). The three sentences of reasoning offered by the West Virginia Supreme Court entirely ignored both, Pet.App.12a–13a, placing West Virginia on the wrong side of a growing conflict that requires this Court's resolution. The Court should resolve the conflict by reaffirming that effective discrimination (especially purposeful, effective discrimination) cannot stand.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND FREQUENTLY RECURRING.

A. The Constitution's protection against discriminatory state taxation measures is an issue of exceptional public importance.

The dormant Commerce Clause "protects free trade among the States," *Armco Inc.*, 467 U.S. at 642, by "prohibit[ing] certain state actions that interfere with interstate commerce," *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992), *overruled on other grounds*, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). And this Court has recognized the protection's "important

role in the economic history of our Nation." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). So too did the Founding Fathers; for example, James Madison considered the "negative aspect" of the Commerce Clause even "more important" than its affirmative grants of Congressional power. *W. Lynn Creamery, Inc.*, 512 U.S. at 193 n.9 (1994) (noting that). Accordingly, this Court has repeatedly reviewed state taxation policies to ensure that they do not unduly encumber free interstate trade, either on their face or in their effect. *E.g.*, *Wynne*, 575 U.S. 542; *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 595 *see supra* Part I.A.1. (collecting additional cases).

Thus policing discriminatory state tax regimes is an established, vital undertaking of this Court. *See New Energy Co.*, 486 U.S. at 273 ("It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce.").

B. The issue is important because States are deploying increasingly creative measures to discriminate in favor of in-state economic interests.

As James Madison warned, allowing States to restrict commerce and impose requirements on producers and suppliers beyond their borders "tends to beget retaliating regulations." *See* James Madison, *Vices of the Political System of the United States*, in 2 Writings of James Madison 361, 363 (Gaillard Hunt ed., 1901). Alexander Hamilton likewise worried that, if allowed to "multip[y] and extend[ ]," "[t]he

interfering and unneighborly regulations of some States" would become "serious sources of animosity and discord." *The Federalist No. 22* (Alexander Hamilton).

The decision below brings the Founders' concerns to a head. The decision is a greenlight for every State to adopt discriminatory policies like West Virginia's, including arbitrarily through regulatory guidance as changing as the wind. States can favor in-state sellers over out-of-state sellers by cleverly disguising the (here, admitted) preference through tax deductions. Indeed, as the cases above show, States are quite adept at tailoring tax regimes to favor domestic industry. *See New Energy Co.*, 486 U.S. at 274 ("[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down….").

Although West Virginia's regime facially applies one "average" deduction to producers, its purpose and (most importantly) effect are to benefit in-state sellers and incumber out-of-state sellers like Antero. Indeed, the State admitted as much on the record in lower court proceedings. *See* Pet.App.50a, 56a, 59a (State's counsel saying Antero should sell its gas at the wellhead if it wants to avoid the greater tax burden for selling out of state). And West Virginia's flip-flopping regulatory guidance—first disallowing the deduction for actual expenses, then allowing it in the face of Antero's legal arguments, and then disallowing it in the face of the fiscal consequences—highlights the lengths to which States will go to favor domestic interests. *See supra* Part A.2. This Court's intervention is needed to put a stop to such preferential antics once and for all.

C. The issue is important because West Virginia's tax system targets the economically and geopolitically important natural gas industry.

"Natural gas has been a part of the Nation's energy supply since at least the 1820s…." *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2252 (2021). Congress has declared that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 581 (1942) (quoting 15 U.S.C. § 717(a)). And West Virginia is an important player in that industry, ranking fourth in natural gas production. U.S. Energy Info. Admin., *Natural Gas Explained*, https://tinyurl.com/39hwxt4j.

But West Virginia's tax system interferes in this important interstate industry. And, if allowed to stand, it invites other States to do the same. Moreover, the negative consequences of states' economic protectionism in this sector will extend beyond just the natural gas industry, to the broader economic, national security, and geopolitical interests in efficient domestic fuel production. *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 420 (1983) ("The regulation of energy production … is a matter of national concern.").

D. The issue is also frequently recurring.

As the bevy of cases in this Court and the lower courts demonstrates, States are increasingly deploying more and more creative tax regimes to protect local interests and disfavor out-of-state ones. This Court's intervention is needed to stem the tide.

III. THE DECISION BELOW IS WRONG.

The West Virginia Supreme Court of Appeals failed to recognize the discriminatory effects and intent of the State's tax rule, which violates not only the dormant Commerce Clause but also Antero's due process and equal protection rights.

As discussed, the court below misconstrued Antero's dormant Commerce Clause claim to be one about "requir[ing] state to allow" certain deductions. Pet.App.12a; *see supra* Parts C.3., I.2. Antero did not ask for a rule that West Virginia provide specific tax deductions to all companies—rather, it simply asked that the State be prohibited from providing discriminatory tax deductions that turn on whether natural gas is sold in-state or out. By failing to appreciate this distinction, the court below plainly erred.

And under a correct dormant Commerce Clause analysis, the State's tax arrangement plainly fails. Rather than asking whether the Federal Constitution requires a deduction, the court below should have asked whether the deduction applies differently depending on whether the economic activity crosses state lines. *See Boston Stock Exchange*, 429 U.S. at 332 & n.12. "Assuredly, under this Court's dormant Commerce Clause decisions, [West Virginia] may [not] use its laws to discriminate purposefully against out-of-state economic interests." *Nat'l Pork Producers Council*, 143 S. Ct. at 1150.

Yet differential treatment (indeed, purposeful differential treatment) is precisely what the decision below greenlit. Just like the numerous taxes this Court has precluded in the past, West Virginia's

deduction "effectively" discriminates against out-of-state sales. *W. Lynn Creamery, Inc.*, 512 U.S. at 194; *see supra* Part I.2. (detailing deduction's economic effects). Thus, like the differential tax burdens on charitable institutions, securities sales, ethanol fuel sales, milk sales, individual income, and tangible property sales (in West Virginia specifically) that this Court has previously invalidated, *see supra* Part I.1. (collecting cases), the differential tax burden on natural gas sales here cannot stand.

Simply put, like it did in *Armco Inc.*, West Virginia differentiates "between transactions [for tax purposes] on the basis of some interstate element." 467 U.S. at 642 (quoting *Boston Stock Exchange*, 429 U.S. at 332 n.12). Selling your gas out-of-state incurs a greater tax burden than selling in-state. The State has even admitted as much, saying that the only way for Antero to avoid the increased burden is to "sell [its] gas at the wellhead." Pet.App.50a, 56a, 59a. Moreover, selling your gas in-state begets a windfall (at out-of-state sellers' expense). This discrimination strikes "at the very core of [this Court's] dormant Commerce Clause jurisprudence." *Nat'l Pork Producers Council*, 143 S. Ct. at 1153.

Not only did the State's tax rule give rise to this petition's dormant Commerce Clause claim, but it also raised serious due process and equal protection concerns. West Virginia's vacillating positions on the rule's legality and its unequal treatment of producers who sell in interstate commerce—although not the focus of this petition—underscore the infirmities of the State's taxation regime.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE.

The question presented was squarely (albeit briefly) passed upon below, Pet.App.12a–13a, is dispositive, and has been addressed by numerous appellate court decisions. West Virginia's tax regime forthrightly discriminates in favor of in-state economic interests. This case is an outstanding vehicle for the Court to provide clear guidance that such discriminatory taxation tricks are constitutionally impermissible.

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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