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80 F.4th 762

United States Court of Appeals, Sixth Circuit.

Phillip TRUESDELL; Legacy Medical
Transport, LLC, Plaintiffs-Appellants,

v.

Eric FRIEDLANDER, in his official capacity as
Secretary of the Kentucky Cabinet for Health and
Family Services; Adam Mather, in his official capacity
as Inspector General for the Kentucky Cabinet
for Health and Family Services; Carrie Banahan,
in her official capacity as Deputy Secretary of the
Kentucky Cabinet for Health and Family Services,
Defendants-Appellees,
First Care Ohio, LLC, fka Patient Transport
Services, Inc., Intervenor-Defendant-Appellee.

No. 22-5808

|
Argued: March 8, 2023

|
Decided and Filed: September 1, 2023

Attorneys and Law Firms

ARGUED: Joshua Polk, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Appellants. David T. Lovely, CABINET FOR HEALTH & FAMILY SERVICES, Frankfort, Kentucky, for Defendants Appellees. David M. Dirr, DRESSMAN BENZINGER LAVELLE PSC, Covington, Kentucky, for Intervenor Appellee. ON BRIEF: Joshua Polk, Anastasia P. Boden, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Appellants. David T. Lovely, Wesley W. Duke, CABINET FOR

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HEALTH & FAMILY SERVICES, Frankfort, Kentucky, for Defendants Appellees. David M. Dirr, Christopher B. Markus, DRESSMAN BENZINGER LAVELLE PSC, Covington, Kentucky, for Intervenor Appellee.

Before: GRIFFIN, BUSH, and MURPHY, Circuit Judges.

OPINION

MURPHY, Circuit Judge.

Legacy Medical Transport, a small family-owned business, provides nonemergency ambulance services in several Ohio counties that border Kentucky. After receiving many inquiries from Kentucky hospitals and nursing homes, Legacy sought to expand into the Commonwealth. But Kentucky required Legacy to show a “need” for its services and to apply for a “certificate of need” with the Kentucky Cabinet for Health and Family Services. Unsurprisingly, existing ambulance providers (Legacy’s potential competitors) objected to Legacy’s request. The Cabinet denied Legacy’s application partly on the ground that these providers offered an adequate supply. Legacy then sued various Cabinet officials, alleging that Kentucky’s certificate-of-need law violated the “dormant” or “negative” part of the Commerce Clause. The district court granted summary judgment in favor of the Cabinet officials. We affirm in part and reverse in part.

We affirm with respect to Legacy’s request to offer *intrastate* ambulance transportation in Kentucky.

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Under the modern approach to the dormant Commerce Clause, a law’s validity largely depends on whether it discriminates against out-of-state businesses in favor of in-state ones. See *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 143 S. Ct. 1142, 1152–53, 215 L.Ed.2d 336 (2023). Yet Kentucky’s law treats in-state and out-of-state providers the same. Legacy responds that such a neutral law can still violate the dormant Commerce Clause if its interstate burdens exceed its local benefits under the “balancing” test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). And the company raises valid concerns about the wisdom of the law’s limits on market competition. For the most part, however, Legacy’s evidence suggests that these limits will harm Kentucky’s own “consumers”; it has not shown a “substantial harm” to interstate commerce. *Nat’l Pork Producers*, 143 S. Ct. at 1162–63 (plurality opinion).

That said, we reverse with respect to Legacy’s request to offer *interstate* ambulance transportation between Kentucky and Ohio. In *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925), the Court held that States may not deny a common carrier a license to provide interstate transportation on the ground that the interstate market contains an “adequate” supply. *Id.* at 316, 45 S.Ct. 324. This bright-line rule barring States from obstructing interstate “competition” does not turn on a finding that a State has discriminated against out-of-state entities. And while the district court thought that later cases had repudiated *Buck*, we find that claim debatable. Besides, the

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Court has told us that we must follow a directly controlling case even if later decisions call it into doubt. *Buck* controls here.

I

A

Phillip Truesdell’s hometown—Aberdeen, Ohio—sits on the banks of the Ohio River just north of Maysville, Kentucky. For years, a power plant operated in this town. With his son and daughter, Truesdell provided maintenance services to the plant. But the plant closed in 2017, ending Truesdell’s power-plant business. Not wanting to see his children and grandchildren leave the Aberdeen area, Truesdell investigated other businesses that might give his children a steady stream of income while keeping them nearby.

Legacy Medical Transport—a limited liability company that provides nonemergency ambulance services—grew out of these entrepreneurial efforts. After seeing an ambulance for sale, Truesdell asked his daughter, Hannah Howe, to research whether they could operate this type of company. Howe found the business viable. In October 2017, she incorporated Legacy for Truesdell, the company’s sole owner.

Before Legacy could serve Ohio customers, it had to apply for an Ohio license. Legacy encountered no difficulties in that process. Ohio merely required Legacy to fill out a “one-page inspection sheet.” Howe Dep., R.107-2, PageID 3207. A regulator then visited the

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company's Aberdeen property to inspect its ambulance, buildings, and protocols.

Legacy started serving Ohio customers in January 2018. The company provides “basic” (in contrast to “advanced”) life-support transportation services. Howe Dep., R.105-2, PageID 2036. It mainly transports nursing-home residents to doctors' offices or hospitals for medical visits. During every run, one EMT drives the ambulance and a second EMT sits in it. But Legacy does not provide any transportation services that would require a paramedic to administer medications or place IVs. It thus does not undertake “emergency” runs, such as those that arise when a person in distress calls 911.

Legacy's operations have grown rapidly. The company has made thousands of runs in the Ohio counties that it serves. It has hired ten employees and amassed a six-vehicle fleet. Truesdell now leaves Legacy's day-to-day operations to his daughter and son. His daughter manages the business; his son services the ambulances. The company gets paid from the Medicare or Medicaid programs for about 90% of its Ohio runs and from private insurers for most of the remaining 10%.

B

1. But this case concerns Legacy's efforts to operate in Kentucky. Kentucky does not allow the free market to determine the supply of health-care services. Its legislature believes that unrestrained competition will lead to “unnecessary health-care facilities” and

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result in the “costly duplication and underuse” of these facilities. Ky. Rev. Stat. § 216B.010. So before a business may open a new “health facility”—including a facility providing ambulance services—the business must obtain a “certificate of need.” *Id.* § 216B.061(1)(a); *see id.* § 216B.015(13).

The Kentucky Cabinet for Health and Family Services oversees this certificate-of-need law. *Id.* §§ 216B.015(6), 216B.040(1)(a). The law instructs the Cabinet to evaluate various factors when deciding whether to grant a certificate of need to an ambulance provider. The Cabinet must consider, among other things, (1) whether the proposed ambulance services would be “consistent with the state health plan”; (2) whether the applicant has shown a “need” for the services in the identified area and would make them “accessible to all”; (3) whether the proposal would allow for “effective linkages” between the ambulance services and other health care; and (4) whether the proposal would efficiently “use” health-care “resources[.]” *Id.* § 216B.040(2)(a)(2).

The second factor is at issue here. To meet that factor, an applicant seeking to offer ambulance services must show a “need” for them in a “defined” “geographic service area” and prove that it can meet this need. 900 Ky. Admin. Regs. 6:070 § 2(2). The Cabinet otherwise has no benchmarks to guide this “need” inquiry. Applicants commonly produce letters of support from local government officials, conduct statistical analyses of the ambulance market, or ask local medical professionals to opine about the lack of services. Competitors who

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oppose the expansion typically use similar evidence in rebuttal. They might attempt to show that they respond promptly to calls or have the capacity to take on additional runs.

To obtain a certificate of need, an ambulance provider must submit a form “application” to the Cabinet and pay the required fee (\$1,000 for smaller projects). Ky. Rev. Stat. § 216B.062(1); 900 Ky. Admin. Regs. 6:020 § 1(2), 6:055 § 2(2), 6:065 § 2(1). Once the Cabinet finds the application complete, it will issue a public notice to ensure that interested parties learn of the proposal. Ky. Rev. Stat. § 216B.062(1); 900 Ky. Admin. Regs. 6:060 § 2(1)(c); 6:065 § 4(2)-(3). “[A]ny affected person,” including a competing ambulance provider, may protest the application and request a hearing over whether the Cabinet should grant it. Ky. Rev. Stat. §§ 216B.015(3), .085(1). A Cabinet hearing officer will conduct the hearing. 900 Ky. Admin. Regs. 6:090 § 3(1)-(2). Applicants and affected parties (including competitors) may present evidence. Ky. Rev. Stat. § 216B.085(3); 900 Ky. Admin. Regs. 6:090 § 3(12). And the officer’s decision must rest solely on the “record,” including the hearing evidence. Ky. Rev. Stat. §§ 216B.015(24), .085(4).

If an ambulance provider makes it through this process and receives a certificate of need, it must next apply for a license with the Kentucky Board of Emergency Medical Services. 202 Ky. Admin. Regs. 7:501 § 1, 7:545E § 1(3); *see* Ky. Rev. Stat. § 311A.020(1)(c)(6). That agency has adopted its own licensing rules to regulate such things as the provider’s ambulances,

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equipment, management, and staff. *See* 202 Ky. Admin. Regs. 7:550, 7:555E, 7:560.

This regulatory regime applies to all ambulance providers that seek to offer *intrastate* transportation in Kentucky. According to the Cabinet, however, the regime does not apply to some *interstate* trips. Appellees' Br. 4–5. Ambulance providers licensed in other States do not need a certificate of need to transport patients through Kentucky. 202 Ky. Admin. Regs. 7:501 § 6(2)(b). Out-of-state providers also may transport patients from outside Kentucky “to a Kentucky medical facility or other location in Kentucky” without obtaining a certificate of need. *Id.* § 6(2)(a). And out-of-state providers do not need such a certificate to take nonresidents “from a Kentucky health care facility” “back to their” home State. *Id.* § 6(2)(d). The law thus applies only to interstate trips transporting a Kentuckian from the Commonwealth to another State.

2. Legacy's Aberdeen station sits only seven miles from a hospital in Maysville, Kentucky. Given Legacy's proximity to the Kentucky market, Howe estimated that it has received daily calls from Kentucky hospitals or nursing homes requesting its services. Because Legacy does not have a certificate of need, however, it cannot offer trips within Kentucky. And while it can take patients from a location in Ohio (or other States) to a “location in Kentucky,” *id.* § 6(2)(a), it may not take Kentuckians to Ohio locations, *id.* § 6(2)(d). So Legacy has declined many of these calls.

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In light of this untapped demand, Legacy applied for a certificate of need with the Cabinet in 2018. The company sought to provide its “basic” (nonemergency) ambulance services from its Aberdeen station to customers in several northern Kentucky counties.

Legacy’s application was met by a deluge of protests. Four entities that provide ambulance services in the areas that Legacy proposed to serve (a private competitor, two county emergency medical service providers, and a fire department) objected to Legacy’s competition. A Cabinet hearing officer thus held a hearing on Legacy’s application.

The officer denied a certificate of need to Legacy for several reasons, including that Legacy had not shown a need for more ambulance services in the relevant counties. Legacy had estimated that it would make 300 runs per year based on the number of times that patients had asked Legacy for transportation from Kentucky to Ohio, which Legacy could not supply because of the certificate-of-need law. According to the officer, Legacy had not shown that these patients “experienced difficulty in securing” other transportation. Order, R.107-12, PageID 4988. The officer also saw no evidence that other patients had been unable to obtain ambulance services or that Legacy’s would-be competitors were “operating at capacity[.]” *Id.*

In response, Legacy and Truesdell (collectively, “Legacy”) brought this suit against several Cabinet officials (collectively, the “Cabinet”). The company challenged the substantive rule requiring it to show a

“need” for its services and the procedural rule allowing competitors to object to its application—both of which allegedly created a “Competitor’s Veto.” Compl., R.63, PageID 650. Legacy claimed that these two features of Kentucky’s certificate-of-need law violated the dormant Commerce Clause, the Due Process Clause, the Privileges or Immunities Clause, and the Equal Protection Clause. It sought an injunction against the challenged parts of the law.

At the pleading stage, the district court dismissed all but Legacy’s dormant-commerce claim. *See Truesdell v. Friedlander*, 2022 WL 1394545, at *2–7 (E.D. Ky. May 3, 2022). After discovery, the court then granted summary judgment to the Cabinet on this remaining claim. *See Truesdell v. Friedlander*, 626 F. Supp. 3d 957, 964–72 (E.D. Ky. 2022).

Legacy has appealed, raising three constitutional challenges. We can make short work of its first challenge: that Kentucky’s regime violates the Fourteenth Amendment’s Privileges or Immunities Clause. In the *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873), the Court upheld a law granting a monopoly to a local slaughterhouse against a similar privileges-or-immunities claim. *Id.* at 72–80. As Legacy concedes, *Slaughter-House* forecloses its argument. Appellants’ Br. 47. But it has preserved that argument for further review in the Supreme Court.

This conclusion leaves Legacy’s two challenges to Kentucky’s “need” requirement under the dormant Commerce Clause. Legacy raises both a broad challenge

and a narrow one. As a broad matter, Legacy asserts that Kentucky's certificate-of-need law violates the Commerce Clause in all applications, even those that involve purely *intrastate* ambulance trips within Kentucky. As a narrow matter, Legacy asserts that this need requirement at least runs afoul of the Commerce Clause as applied to *interstate* ambulance runs that cross between Kentucky and Ohio. We take these arguments in turn, reviewing them de novo. See *Ferndale Lab's, Inc. v. Cavendish*, 79 F.3d 488, 492 (6th Cir. 1996).

II. Broad "Intrastate" Challenge

The Constitution gives Congress the power to "regulate Commerce . . . among the several States[.]" U.S. Const. art. I, § 8, cl. 3. Some of the Constitution's other grants of authority to Congress come with twin prohibitions barring the States from exercising the same power. So, for example, the Constitution both grants Congress the power "[t]o coin Money" and denies the States the power to "coin Money[.]" Compare U.S. Const. art. I, § 8, cl. 5, with *id.* art. I, § 10, cl. 1. The Commerce Clause lacks such a twin. Nevertheless, the Supreme Court eventually held that the clause of its own force prohibits the States from restricting interstate trade even when Congress has not passed a law imposing such a limit on them. See *Nat'l Pork Producers*, 143 S. Ct. at 1152–53; see also David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 168–81, 222–36, 330–42, 403–16 (1985) (recounting history).

The Court’s modern cases applying this “dormant” or “negative” part of the Commerce Clause divide the legal inquiry into two steps. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *Foresight Coal Sales, LLC v. Chandler*, 60 F.4th 288, 295 (6th Cir. 2023). At step one, a court must ask if a challenged state law “discriminates” against out-of-state economic interests to benefit local economic interests. *C & A Carbone*, 511 U.S. at 390, 114 S.Ct. 1677. This “antidiscrimination rule” represents “the core” principle of the Court’s “dormant Commerce Clause jurisprudence.” *Nat’l Pork Producers*, 143 S. Ct. at 1157. So if a law discriminates, the courts will “almost always” find it invalid, *Garber v. Menendez*, 888 F.3d 839, 843 (6th Cir. 2018), and States must meet a demanding test to save it, *see Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, ___ U.S. ___, 139 S. Ct. 2449, 2461, 204 L.Ed.2d 801 (2019); *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005). If a law does not discriminate in this way, a court must ask at step two whether it nevertheless inflicts a “substantial harm” on interstate commerce. *Nat’l Pork Producers*, 143 S. Ct. at 1162–63 (plurality opinion). If so, the law may still violate the Commerce Clause if its interstate “burden[s]” “clearly” exceed its “local benefits” under a benefits-burdens balancing test that the Supreme Court adopted in *Pike*, 397 U.S. at 142, 90 S.Ct. 844.

Legacy argues that Kentucky’s certificate-of-need law flunks both steps. According to Legacy, the law discriminates against out-of-state ambulance providers.

At the least, it claims that the law's interstate burdens clearly exceed its in-state benefits under *Pike* balancing. Although the Cabinet responds that Legacy forfeited its discrimination claim, we find this argument debatable and so opt to reject both claims on the merits.

A. *Does Kentucky's law discriminate against out-of-staters?*

Legacy first argues that we should find Kentucky's certificate-of-need law presumptively invalid because it "discriminates" against out-of-state ambulance providers. *C & A Carbone*, 511 U.S. at 390, 114 S.Ct. 1677. To reject this argument, we must start by distinguishing a *discriminatory* law (which triggers rigorous scrutiny) from a *neutral* law (which does not). According to the usual definition, a discriminatory law treats "in-state and out-of-state economic interests" differently by "benefit[ing] the former and burden[ing] the latter." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)). So a West Virginia law discriminated against interstate commerce by taxing interstate transactions but not intrastate transactions, thereby effectively imposing a "tariff" on the goods of out-of-state manufacturers. See *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984); see e.g., *Tenn Wine & Spirits*, 139 S. Ct. at 2461.

Conversely, a neutral law that “regulates evenhandedly” by treating interstate and intrastate commerce the same does not discriminate against interstate commerce simply because it affects more out-of-state businesses than in-state ones. *Pike*, 397 U.S. at 142, 90 S.Ct. 844; see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470–74, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). For example, a California law that imposed uniformly strict regulations on the production of all pork sold in the State—whether produced inside or outside its borders—applied neutrally. See *Nat’l Pork Producers*, 143 S. Ct. at 1153. The law did not “discriminate” against out-of-state producers even if most of the production occurred outside California. See *id.* at 1151–52; see also *Clover Leaf Creamery*, 449 U.S. at 471–72, 101 S.Ct. 715; *Exxon*, 437 U.S. at 125–26, 98 S.Ct. 2207.

How should courts distinguish discriminatory laws designed to help local businesses from neutral laws designed to achieve other goals? We have traditionally asked three questions to ferret out laws that seek to achieve improper “economic protectionism”: Does the law discriminate *on its face* against interstate commerce? If not, does it have a *discriminatory effect* on that commerce? And if not, did the legislature pass the law to achieve a *discriminatory purpose*? See *LensCrafters*, 403 F.3d at 802. Kentucky’s certificate-of-need law passes muster under all three inquiries.

Inquiry One: Does Kentucky's law discriminate on its face? A prototypical discriminatory law will differentiate on its “face” (that is, expressly) between in-state and out-of-state commerce or entities. *Foresight Coal Sales*, 60 F.4th at 296. The West Virginia tax law in *Armco* provides an obvious example of this sort of law. 467 U.S. at 642, 104 S.Ct. 2620. “On its face,” this law treated interstate manufacturers worse than intrastate ones by taxing only the sales of the former group. *Id.*

Yet *C & A Carbone* shows that a law's facial discrimination need not be so precise. There, the Town of Clarkstown agreed to have a local contractor operate a trash-processing facility. 511 U.S. at 387, 114 S.Ct. 1677. Clarkstown guaranteed that the contractor would receive a certain quantity of trash to process each year. *Id.* To meet this guarantee, the town passed a “flow control ordinance” that required residents to send their trash to the facility. *Id.* The Court held that this ordinance facially “discriminate[d]” against out-of-state processors by permitting “only the favored operator to process waste that is within the limits of the town.” *Id.* at 391, 114 S.Ct. 1677. Clarkstown had argued that its grant of a monopoly treated in-state and out-of-state facilities the same because none could process the trash set aside for the contractor. *Id.* But the Court refused to find the ordinance neutral simply because it disfavored all other processors—whether in-state or out-of-state. *Id.* at 391–92, 114 S.Ct. 1677. The Court reasoned that the ordinance discriminated against interstate commerce because it favored one “local”

processor at the expense of “out-of-state competitors or their facilities.” *Id.* at 394, 114 S.Ct. 1677.

At the same time, our decision in *Garber* teaches that a law can be facially neutral even if it refers to a State’s borders. There, an Ohio law tolled the statute of limitations for tort claims each day that a defendant spent outside the State. 888 F.3d at 841–43. We held that the law did not facially discriminate because it drew “no distinctions based on residency.” *Id.* at 843. Both an Ohioan and an Alaskan were subject to the tolling provision whenever they remained outside Ohio. *Id.*

Kentucky’s certificate-of-need law looks more like the Ohio law in *Garber* than the Clarksville ordinance in *C & A Carbone*. Nothing on the face of this law “explicitly” favors in-state ambulance providers over out-of-state providers. *Id.* The law requires *every* “person” that seeks to offer ambulance services to obtain a certificate of need. Ky. Rev. Stat. § 216B.061(1)(a). And it defines “person” to include in-state and out-of-state entities. *Id.* § 216B.015(22). Likewise, Kentucky’s law gives “any affected person” the right to challenge any applicant’s proposal. Ky. Rev. Stat. §§ 216B.015(3), .085(1). So an out-of-state competitor may challenge an in-state applicant. Kentucky’s law thus facially “imposes the same burdens” and grants the same benefits to “in-state” and “out-of-state” providers alike. *Nat’l Pork Producers*, 143 S. Ct. at 1153. As the Fourth Circuit held when rejecting a similar challenge to a certificate-of-need law, this equal treatment means that the law is “not facially discriminatory.” *Colon Health Ctrs.*

of Am., LLC v. Hazel, 813 F.3d 145, 152 (4th Cir. 2016) (Wilkinson, J.); *see also Ferndale*, 79 F.3d at 495.

Legacy responds that Kentucky’s law engages in the same facial discrimination as the Clarkstown ordinance in *C & A Carbone* because it bars new *out-of-state* entrants who fail to obtain a certificate of need from competing with incumbent providers. Under *C & A Carbone*, Legacy adds, this fact makes the law discriminatory even if it also harms new *in-state* entrants too. After all, *C & A Carbone* held that the ordinance facially discriminated even though it harmed both out-of-state and in-state processors. 511 U.S. at 391, 114 S.Ct. 1677. Yet Legacy overlooks a key distinction. The ordinance in *C & A Carbone* granted a monopoly to a “*local enterprise*[.]” *Id.* at 394, 114 S.Ct. 1677 (emphasis added). Kentucky’s law, by contrast, does not automatically grant certificates of need to local entities; it neutrally requires everyone to apply. So Kentucky’s law does not engage in the explicit discrimination against out-of-state entities that *C & A Carbone* forbids.

Inquiry Two: Does Kentucky’s law have a discriminatory effect? Even if a statute appears facially neutral, it still might discriminate against interstate commerce in its operation. *See Foresight Coal Sales*, 60 F.4th at 296. These types of real-world effects can render the law “discriminatory” and so presumptively invalid. *See, e.g., id.* at 296–97.

Critically, however, a court must not confuse a law that has only a disparate impact on out-of-state

businesses for one that has discriminatory effects on interstate commerce. Assume that a State decides to regulate a market made up of primarily out-of-state suppliers. By definition, *any* regulation of that market will affect more out-of-state suppliers than in-state ones. Yet the Court’s decision in *Exxon* shows that this disparate impact alone does not suffice. The Maryland law in that case did not permit gasoline producers to vertically integrate and operate ordinary retail gas stations in the State. *Exxon*, 437 U.S. at 119–21, 98 S.Ct. 2207. This law had a 100% disparate impact on out-of-state companies because Maryland imported all of its gas. *Id.* at 125, 98 S.Ct. 2207. But this economic fact did not prove a discriminatory effect. *See id.* at 125–26, 98 S.Ct. 2207. Why? The law did not give a “competitive advantage” to in-state entities over out-of-state entities. *Id.* at 126, 98 S.Ct. 2207. That is, it had no “reallocation” effects by incentivizing consumers to shift market share to in-state gas from out-of-state gas. *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995). Instead, it shifted market share from producer-owned retailers to independent retailers. *See Nat’l Pork Producers*, 143 S. Ct. at 1161 (plurality opinion). But the Commerce Clause does not bar a State from disfavoring certain corporate forms as long as that discrimination will not cause consumers to shift away from interstate commerce. *See id.*

By contrast, our decision in *Foresight Coal Sales* illustrates a law with the required effects. When regulating the rates that public utilities may charge

consumers, Kentucky’s Public Service Commission encourages utilities to buy the cheapest coal. *See* 60 F.4th at 293. Because Kentucky imposes a severance tax on Kentucky coal, this tax made in-state coal more expensive and so discouraged Kentucky utilities from buying it. *See id.* Kentucky thus passed a law ordering the Commission not to take severance taxes into account when evaluating the utilities’ rates. *See id.* at 294. We held that this law had a discriminatory effect because it “artificially discounted” the cost of coal from severance-tax States (like Kentucky) at the expense of States without such a tax. *Id.* at 298–300. “[A]s a matter of basic economics,” the change in the relative costs favored Kentucky coal and harmed out-of-state coal from non-tax States. *Id.* at 299; *see also McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442 (6th Cir. 2000). In short, a facially neutral law has a discriminatory effect if it gives in-state entities a “competitive advantage” that will lead consumers to shift market share to those entities. *Exxon*, 437 U.S. at 126, 98 S.Ct. 2207.

This definition of “discriminatory effects” dooms Legacy. Both as a matter of economic theory and as a matter of empirical evidence, Legacy has not shown that Kentucky’s certificate-of-need law will shift (or has shifted) market share to in-state ambulance providers by giving them a “competitive advantage” over out-of-state ones. *Id.* For starters, Legacy identifies no economic principle showing that Kentucky’s “need” requirement for new entrants will somehow incentivize consumers to prefer in-state ambulance providers.

Foresight Coal Sales, 60 F.4th at 299. As far as we can tell, the relative cost structures for in-state ambulance providers and out-of-state ambulance providers will remain the same with or without this “need” requirement.

Next, the operation of Kentucky’s law fails to disclose any discriminatory effects on out-of-state ambulance providers. The Cabinet’s unchallenged statistics show that the agency has approved applications from in-state and out-of-state providers at virtually identical rates. In fact, local applicants succeed *less* often, receiving certificates to operate ambulance services at a rate of 55% compared to the outsiders’ rate of 56%. Sullivan Rep., R.107-4, PageID 3401. Legacy also cites no evidence that local providers mount protests (or that outsiders face them) more often. *Cf. Am. Trucking Ass’ns, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 434–36, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005). So the law has treated in-state and out-of-state entities the same. *Cf. Colon Health Ctrs.*, 813 F.3d at 153.

To be sure, Legacy suggests that the law favors *incumbents* who have obtained certificates of need over *new entrants* who seek those certificates. According to Legacy, a strong correlation exists between the Cabinet’s denial of a certificate and an incumbent competitor’s objection to an application. That correlation does not change things. This case may well involve incumbency favoritism. But that favoritism is not the type of discrimination that sits “at the core” of the dormant Commerce Clause: discrimination against out-of-staters. *Nat’l Pork Producers*, 143 S. Ct. at 1157; *see*

Colon Health Ctrs., 813 F.3d at 154. Just as the law in *Exxon* did not discriminate against interstate commerce merely because it favored independent gas stations over producer-owned gas stations, 437 U.S. at 126–27, 98 S.Ct. 2207, so too Kentucky’s “need” law does not discriminate against interstate commerce simply because it favors incumbents over new entrants. The Commerce Clause does not bar laws incentivizing certain market “structure[s]” where, as here, this favoritism does not effectively place a competitive disadvantage on out-of-state businesses. *Nat’l Pork Producers*, 143 S. Ct. at 1161 (plurality opinion) (quoting *Exxon*, 437 U.S. at 127, 98 S.Ct. 2207); see also *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 649 (6th Cir. 2010).

The lack of discriminatory effects also distinguishes the certificate-of-need decision on which Legacy relies: *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005). There, the First Circuit found unconstitutional Puerto Rico’s certificate-of-need law for retail pharmacies. *Id.* at 60. Although this law applied neutrally on its face, Puerto Rico had enforced it in a way that favored local pharmacies. *Id.* at 55. A “grandfather clause” exempted existing pharmacies from the need requirement, and local entities owned 92% of these favored businesses. *Id.* at 55–56 (citation omitted). Moreover, existing pharmacies objected about twice as much to the proposed entry of foreign competitors as compared to local ones during the application process. *Id.* at 56. And only 58% of opposed outsiders received certificates of need as compared to 90% of opposed local

applicants. *Id.* Legacy has shown nothing like these effects. *Cf. Colon Health Ctrs.*, 813 F.3d at 153–54. The company identifies no similar “grandfather clause.” And no evidence suggests that in-state ambulance providers receive certificates of need more often than out-of-staters.

Inquiry Three: Does Kentucky’s law have a discriminatory purpose? At times, we have suggested that a discriminatory purpose alone may invalidate a law that lacks discriminatory effects. *See LensCrafters*, 403 F.3d at 802–03. Yet the Supreme Court’s precedent leaves unclear how this purpose inquiry fits into the mix. *See Foresight Coal Sales*, 60 F.4th at 296. The Court has noted that the Commerce Clause concerns itself with protectionist “effects, not motives,” and thus does not require courts to investigate the subjective mindsets of the legislators who passed the law. *Id.* (quoting *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 561 n.4, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015)). This disclaimer follows from the Court’s longstanding caution against trying to deduce a single “intent” behind legislation enacted by a body of individuals. *See Va. Uranium, Inc. v. Warren*, ___ U.S. ___, 139 S. Ct. 1894, 1906, 204 L.Ed.2d 377 (2019) (plurality opinion); *Palmer v. Thompson*, 403 U.S. 217, 225, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971).

As in *Foresight Coal Sales*, though, we need not resolve this debate about the proper role of legislative purpose. 60 F.4th at 296. Both the historical context and the plain text of Kentucky’s certificate-of-need law show that its legislature did not enact it to harm

out-of-state businesses. First the context: Kentucky’s law dates to 1980, a time when certificate-of-need laws remained a “sensation” in the country. *Tiwari v. Friedlander*, 26 F.4th 355, 365 (6th Cir. 2022); 1980 Ky. Acts 360. In 1974, Congress even required States to enact these laws. *Tiwari*, 26 F.4th at 365. So Kentucky passed its law in part because this federal legislation made the law “a condition for the receipt of federal funds.” 1980 Ky. Acts at 360. And while Congress rescinded the federal law in 1987, *see Tiwari*, 26 F.4th at 365, it is a stretch to claim that Kentucky had a hidden motive to harm out-of-state entities merely by attempting to comply with the then-existing federal mandates.

Next the text: The certificate-of-need law expressly identifies its “purposes.” Ky. Rev. Stat. § 216B.010. And we generally find a law’s text conclusive as to its objectives. *See Foresight Coal Sales*, 60 F.4th at 300. The law states that Kentucky sought to ensure that its citizens “have safe, adequate, and efficient medical care” and to minimize the “proliferation” of unneeded “health services” that “increases the cost of” care. Ky. Rev. Stat. § 216B.010. Kentucky thus sought to give its citizens high-quality, inexpensive care. Legacy cites nothing in the legislative record that would suggest Kentucky’s legislature “really” sought to favor in-state businesses.

All told, Kentucky’s certificate-of-need law does not facially discriminate against out-of-state ambulance providers. The law does not discriminate against them in its practical effect. And no evidence suggests

that it stems from a discriminatory motive. So the law is not discriminatory.

B. *Does Kentucky's law survive Pike balancing?*

Because Kentucky's certificate-of-need law "regulates even-handedly" between in-state and out-of-state ambulance providers, we may enjoin the law only if Legacy shows that its burdens on interstate commerce "clearly" exceed its "local benefits" under the *Pike* balancing test. 397 U.S. at 142, 90 S.Ct. 844; see *LensCrafters*, 403 F.3d at 805. But just as a State faces a nearly impossible task in proving the validity of a discriminatory law, so too a challenger faces a similarly tall order in proving the invalidity of a seemingly neutral law. See *Garber*, 888 F.3d at 843, 845. To put things in perspective, the Supreme Court "has not invalidated a law under *Pike*" in more than 30 years. *Id.* at 845; see *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 891, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988).

This cautious approach follows from the difficult nature of the task. An unconstrained balancing test asking judges to weigh a law's benefits against its costs requires them to make "subjective" policy "judgments" far outside their area of expertise in neutrally interpreting legal texts. *Garber*, 888 F.3d at 845. Because judges are generally not "economists or statisticians," we will have trouble assessing the validity of the empirical studies required for this balance even if experts can calculate the benefits and costs. *Colon Health Ctrs.*, 813 F.3d at 156. And often those calculations will be in

the eye of the beholder. As one of many examples, the California law in *National Pork Producers* prohibited what many voters believed to be “cruel” methods of pork production. 143 S. Ct. at 1150–51 (citation omitted). How does one put a dollar value on a voter’s moral distaste for animal cruelty so as to weigh the moral “benefits” from the law against the economic “costs” of its more expensive production methods? *See id.* at 1160 (opinion of Gorsuch, J.). There is a reason that one of Justice Scalia’s better-known lines—that the weighing of incomparable interests is like judging “whether a particular line is longer than a particular rock is heavy”—arose in this *Pike* context. *Id.* (quoting *Bendix*, 486 U.S. at 897, 108 S.Ct. 2218 (Scalia, J., concurring in the judgment)). These difficulties suggest that judges should hesitate to “second-guess” the “judgments of lawmakers concerning the utility of legislation.” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (citation omitted).

Perhaps for these reasons, the controlling plurality opinion in *National Pork Producers* recently imposed important constraints on the *Pike* inquiry. *See* 143 S. Ct. at 1161–64 (plurality opinion). The plurality held that courts should not even attempt to quantify a state law’s local “benefits” or compare those benefits to the law’s costs unless a challenger has first shown that the law inflicts “‘substantial burdens’ on interstate commerce[.]” *Id.* at 1161 (citation omitted). And the “costs” side of the *Pike* balance does not consider *all* burdens that a state law might impose; it considers

only *interstate-commerce* burdens. *See id.* at 1161–63. This limit means that the costs incurred by specific interstate *businesses*—in contrast to interstate *commerce* generally—do not matter. *Id.*; *see Tenn. Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 451 (6th Cir. 2009). The California law in *National Pork Producers*, for example, would likely “shift market share” from out-of-state producers wedded to noncompliant production methods to other producers willing to change. 143 S. Ct. at 1162 (plurality opinion). But this effect on some businesses did not plausibly allege a substantial harm to interstate commerce. *Id.* Likewise, the “costs ultimately borne by in-state consumers” from a law that their legislature passed also fall outside *Pike*’s calculus. *Id.* Here again, the California law in *National Pork Producers* would raise the cost of pork production and so harm California consumers by making their pork more expensive. *Id.* But that price increase likewise did not show a substantial burden on interstate commerce. *Id.*

Legacy’s case is on all fours with *National Pork Producers*. For three reasons, the company has not introduced enough evidence that Kentucky’s certificate-of-need law places “substantial burdens’ on interstate commerce.” *Id.* at 1161 (citation omitted). We thus need not attempt to measure the size of the law’s benefits or balance those benefits against its burdens. *Id.*

First, Legacy has not gotten off to an “auspicious start” in proving a substantial burden because it has failed to establish that Kentucky’s certificate-of-need law has discriminatory effects on out-of-state ambulance

providers. *Id.* at 1159 (majority opinion). In that respect, Legacy is wrong to suggest that this lack of “discrimination” is “irrelevant” under *Pike*. Appellants’ Br. 37. To the contrary, it goes a long way toward showing that Kentucky’s certificate-of-need law passes muster. As the Court explained in *National Pork Producers*, the difference between the first and second steps of its Commerce Clause framework is a matter of degree, not of kind. 143 S. Ct. at 1157–59. Because both steps seek to implement the same “antidiscrimination rule” at the heart of the dormant Commerce Clause, *id.* at 1157, “no clear line” shows when a court’s search for “discrimination” at step one should end and when its *Pike* balancing at step two should begin, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 291 n.12, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). Even if a law lacks the stark effects that would render it presumptively invalid, see *Foresight Coal Sales*, 60 F.4th at 296–97, a court should still undertake *Pike* balancing with an eye toward the law’s “practical effects” in search of a “discriminatory purpose,” *Nat’l Pork Producers*, 143 S. Ct. at 1158. And while the Court has “left” open the possibility that a purely nondiscriminatory law might flunk *Pike* balancing on rare occasions, Legacy’s challenge here “falls well outside *Pike*’s heartland.” *Id.* at 1158–59.

Second, Legacy identifies two types of costs that Kentucky’s certificate-of-need law imposes on out-of-state ambulance providers. The law entirely blocks ambulance providers who cannot obtain a certificate of need from selling their services to Kentuckians.

Appellants' Br. 26. And even the providers who obtain certificates of need often must spend thousands of dollars and months of time in the application process. *Id.* Both arguments share the same defect. They might prove that the law imposes harms on “particular . . . firms” in interstate commerce, but they do not show substantial harm to interstate commerce generally. *Nat'l Pork Producers*, 143 S. Ct. at 1161 (plurality opinion) (quoting *Exxon*, 437 U.S. at 127, 98 S.Ct. 2207).

As an initial matter, Kentucky's certificate-of-need law will cause consumers to “shift market share from” new entrants to incumbent ambulance providers. *Id.* at 1162. Yet this harm to new entrants alone does not establish any burdens on the interstate market. For all we know, the relative percentages of in-state and out-of-state applicants is the same as the relative percentages of in-state and out-of-state incumbents. Legacy's own expert also suggested that the total “volume” of market transactions might be “unaffected” by Kentucky's certificate-of-need law because the demand for health-care services is “relatively inelastic” (insensitive to price changes). Mitchell Rep., R.107-4, PageID 3494–95. So a shift from a free market to a regulated one might not change the proportions of interstate and intrastate commerce that make up the market. And the dormant Commerce Clause does not insulate a “particular” market “structure” from state legislation. *Nat'l Pork Producers*, 143 S. Ct. at 1162 (plurality opinion) (quoting *Exxon*, 437 U.S. at 127, 98 S.Ct. 2207). “That goes” for ambulances “no less” than “pigs” or “gas stations.” *Id.*

Besides, the effects that Legacy has identified here pale in comparison to those that the plurality found insufficient in *National Pork Producers*. There, the challengers alleged that California’s law would increase the cost of pork production by 9.2% per pig. 143 S. Ct. at 1151; *id.* at 1170 (Roberts, C.J., concurring in part and dissenting in part). While Legacy cites an expert who testified that he had prepared certificate-of-need applications that cost between \$7,000 and \$50,000, *see* Sullivan Dep., R.107-4, PageID 3302, he was discussing all health-care projects (not just ambulance services). And Legacy cites nothing to suggest that Kentucky’s application process has increased the cost of ambulance trips by anything approaching 10% per trip.

In addition, as the dissent in *National Pork Producers* noted, the challengers in that case alleged that the California law had significant *national* effects. According to their complaint, the law would practically compel the entire pork industry to comply with California’s restrictions because of that industry’s “interconnected nature[.]” *Nat’l Pork Producers*, 143 S. Ct. at 1170–71 (Roberts, C.J., concurring in part and dissenting in part) (citation omitted). So even pork farmers with no interest in serving California’s market would have to meet its requirements. *Id.* Legacy, by contrast, has not shown that Kentucky’s certificate-of-need law has these sorts of “extraterritorial effects” on the national ambulance market. *Id.* at 1170; *cf. Tenn. Scrap Recyclers Ass’n*, 556 F.3d at 451. The fact that Kentucky requires a certificate of need does not bar Legacy

(or other providers) from competing freely in Ohio or any other State. If the allegations in *National Pork Producers* did not show a substantial burden, then, the evidence in this case cannot either.

Third, Legacy spends many pages describing the “human cost” of certificate-of-need laws like Kentucky’s. Appellants’ Br. 28–32. Kentucky’s legislature suggested that, by restricting the supply of health care, its law would increase quality and decrease price. Ky. Rev. Stat. § 216B.010. But Legacy’s expert explained that these laws have had the opposite effect. Under the standard economic model, this expert noted, a government-imposed limit on supply (like a cartel-imposed limit) will allow the quasi-monopolistic producers to raise their prices above competitive levels, reducing both the available services and consumer welfare. Mitchell Rep., R.107-4, PageID 3480–82. The expert added that the many empirical papers studying certificate-of-need laws show that the hypothesized effects have occurred in the real world. The laws “increase spending, limit access, and undermine the quality of care.” *Id.*, PageID 3471. They also produce supra-competitive profits for incumbent providers (profits that the incumbents use to lobby the government to keep the protections) to the detriment of consumers and new entrants. *Id.*, PageID 3481, 3505.

The Cabinet disputes many of these findings because the health-care market (with its large Medicare and Medicaid payors) is far from the one studied by perfect-competition models. But we need not enter this debate for purposes of Legacy’s constitutional

challenge. Even accepting Legacy's version, the "human costs" that it bemoans are costs that Kentucky's legislature has inflicted on its own people. And "no one thinks that costs ultimately borne by in-state consumers thanks to a law they adopted count[] as a cognizable harm under" the dormant Commerce Clause. *Nat'l Pork Producers*, 143 S. Ct. at 1162 (plurality opinion). Kentuckians instead should seek to fix these in-state costs through the in-state "political process." *United Haulers*, 550 U.S. at 345, 127 S.Ct. 1786; see also *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

Since the days of Sir Edward Coke, many have suggested that government-procured monopolies violate the natural "liberty" of the people. 2 Edward Coke, *Institutes of the Laws of England* 47 (1642). Adam Smith, for example, described such monopolies as "nuisances in every respect" and "destructive to those which have the misfortune to fall under their government." 2 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 140 (Edwin Cannan, ed., 1904). Like Smith and many other classical economists since, Legacy may think that unfettered competition will produce the most efficient allocation of health-care resources for Kentuckians. But it must take this debate to Kentucky's legislature. The dormant Commerce Clause "does not require the States to subscribe to any particular economic theory." *CTS Corp.*, 481 U.S. at 92, 107 S.Ct. 1637. And "[a] law can be both economic folly and constitutional." *Nat'l Paint & Coatings Ass'n*, 45 F.3d at 1132 (quoting *CTS*, 481 U.S. at

96–97, 107 S.Ct. 1637 (Scalia, J., concurring)). As applied to intrastate ambulance trips, Kentucky’s law “may well be folly; we are confident that it is constitutional.” *Id.*

III. Narrow “Interstate” Challenge

Legacy thus falls back on its narrow challenge to Kentucky’s certificate-of-need law. Even if this law does not run afoul of the Commerce Clause for *intra-state* trips between two places in Kentucky, Legacy argues that the law violates the clause as applied to the *interstate* trips between Kentucky and Ohio that it also seeks to offer. According to Legacy, Kentucky’s law “directly” obstructs this interstate commerce in violation of *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925). The district court rejected this claim on two grounds. The court found the law in *Buck* distinguishable from Kentucky’s “more carefully crafted” law. *Truesdell*, 626 F. Supp. 3d at 971. It next held that *Buck* had been “repudiated.” *Id.* (citation omitted). We disagree on both fronts.

A. *Is Buck distinguishable?*

We would not have to consider *Buck*’s current validity if we could distinguish the Washington law in that case from the Kentucky law in this one. But we find *Buck* directly on point. A.J. Buck wanted to provide a bus line from Seattle, Washington, to Portland, Oregon. *Buck*, 267 U.S. at 313, 45 S.Ct. 324. He obtained Oregon’s permission for this interstate line

without difficulty. *Id.* But a Washington law barred “common carriers” from selling transportation services to passengers unless they obtained a certificate from a state administrator finding that the “public convenience and necessity” warranted the additional services. *Id.* at 312–13, 45 S.Ct. 324. This administrator refused to grant Buck a certificate because he decided that competing companies “were already” offering “adequate” transportation options to interstate travelers. *Id.* at 313, 45 S.Ct. 324.

The Supreme Court held that Washington’s certificate-of-public-necessity law violated the Commerce Clause as applied to Buck’s proposed interstate bus line. *Id.* at 314–16, 45 S.Ct. 324. The Court recognized that Washington could adopt many regulations for interstate carriers, including those designed to promote public safety or maintain public roads, as long as these “safety” or “maintenance” regulations imposed only “indirect” and reasonable burdens on interstate commerce. *Id.* at 315, 45 S.Ct. 324. But Washington’s law served no such purposes. Rather, Washington sought to exercise a veto power over interstate competition even though Oregon had granted Buck a license and found his new bus line warranted. *Id.* at 316, 45 S.Ct. 324. The Court held that the States lack the power to prohibit interstate “competition” in this way. *Id.* at 315, 45 S.Ct. 324. It reasoned that the federal government “peculiarly” maintained the authority to decide whether the existing “facilities for conducting interstate commerce” were adequate. *Id.* at 316, 45 S.Ct. 324. And the “commerce clause” barred state “regulation” of this

“interstate commerce.” *Id.*; see also *Sprout v. City of South Bend*, 277 U.S. 163, 169–71, 48 S.Ct. 502, 72 L.Ed. 833 (1928); *George W. Bush & Sons Co. v. Maloy*, 267 U.S. 317, 324–25, 45 S.Ct. 326, 69 L.Ed. 627 (1925).

Buck controls here. Like Washington, Kentucky bars businesses that sell *interstate* transportation from offering their services unless they obtain a certificate of need from the Cabinet. Ky. Rev. Stat. § 216B.061(1)(a). And like Washington, Kentucky requires prospective suppliers to prove that a “need” exists for this interstate commerce. 900 Ky. Admin. Regs. 6:070 § 2(2). The Cabinet’s denial of a certificate to Legacy based on the lack of such a need also has the “effect” “not merely to burden, but to obstruct,” that type of “commerce.” *Buck*, 267 U.S. at 316, 45 S.Ct. 324. Yet the question whether there are “adequate facilities for conducting interstate commerce” belongs “peculiarly” to the federal government. *Id.* So Kentucky lacks the power “to prevent competition deemed undesirable.” *Bradley v. Pub. Util. Comm’n of Ohio*, 289 U.S. 92, 95, 53 S.Ct. 577, 77 L.Ed. 1053 (1933).

The Cabinet responds that Kentucky’s certificate-of-need law imposes a smaller burden on interstate commerce than the burden that the Washington law in *Buck* imposed. According to the Cabinet, the Kentucky law does not require a certificate of need for Legacy to transport Kentucky residents or nonresidents from Ohio to Kentucky. See 202 Ky. Admin. Regs. 7:501 § 6(2)(a). The Cabinet also reads the law to permit Legacy to take Ohioans “from a Kentucky health care facility” “back to” Ohio without obtaining a certificate of

need. *Id.* § 6(2)(d). The law thus bars Legacy only from transporting Kentuckians to Ohio venues.

We fail to see why the Cabinet’s narrow reading of Kentucky’s law saves it under *Buck*’s categorical logic. The Court there held that the States may not prohibit interstate transportation services on the ground that other businesses are supplying an “adequate” amount of “interstate commerce.” 267 U.S. at 316, 45 S.Ct. 324. The Court did not say that a State could prohibit a “little” interstate transportation on this forbidden ground. It said that the State could prohibit none at all. Because Kentucky’s “need” requirement would deny Legacy a certificate of need on the ground that *Buck* prohibited (that Legacy’s “competition” is “undesirable” to the interstate market), the narrower nature of Kentucky’s ban does nothing to distinguish *Buck*. *Bradley*, 289 U.S. at 95, 53 S.Ct. 577.

The hearing officer’s rationales for denying Legacy a certificate of need confirm that *Buck* applies. In the hearing, Legacy predicted that it would provide 300 additional Kentucky runs each year. This estimate was based on the number of times that Legacy had driven a patient from Ohio to Kentucky but been barred from taking the patient “back to Ohio” because of the certificate-of-need law’s application to those return trips. Legacy Denial, R.107-12, PageID 4988. The officer found a lack of “need” for Legacy to return its customers to Ohio because Legacy did not show that they had struggled to obtain “return transportation.” *Id.* But this officer lacked the constitutional power to decide on “the existence of adequate facilities for conducting

interstate commerce.” *Buck*, 267 U.S. at 316, 45 S.Ct. 324. That decision is “peculiarly” for Congress. *Id.*

Admittedly, interstate ambulance services do not resemble interstate busing services. A State might well have greater concerns with ensuring the safety of potentially life-saving ambulance trips. But *Buck* takes this factor into account. That decision allows Kentucky to impose all manner of “safety” regulations on interstate carriers. *Id.* at 315, 45 S.Ct. 324. “Regulation to ensure safety is an exercise of the police power” as applied to both interstate and intrastate commerce. *Bradley*, 289 U.S. at 95, 53 S.Ct. 577. But the Cabinet does not defend Kentucky’s “need” requirement on this basis. In fact, other Kentucky regulations that Legacy does not challenge impose many safety requirements. *See, e.g.*, 202 Ky. Admin. Regs. 7:550. This case concerns only Kentucky’s attempt to regulate interstate competition—something that the Cabinet may not do if *Buck* remains good law.

B. *Has Buck been repudiated?*

The Cabinet alternatively asks us to set *Buck* to the side on the ground that the Supreme Court’s modern cases have repudiated it. Yet even taking the Court’s current precedent into account, we find ourselves bound by *Buck*.

1. To begin with, the Cabinet identifies no Supreme Court case that has expressly overruled (or even disapproved of) *Buck*. To the contrary, the Court’s modern cases repeatedly cite it. Take *C & A Carbone*. It

analogized Clarkstown’s flow-control ordinance to the Washington law in *Buck* when holding that the ordinance violated the Commerce Clause. 511 U.S. at 394, 114 S.Ct. 1677. The Court held that the ordinance regulated interstate commerce in “practical effect and design.” *Id.* This fact rendered it invalid under *Buck*’s rule that States may not adopt a “prohibition” on interstate “competition.” *Id.* (quoting *Buck*, 267 U.S. at 315–16, 45 S.Ct. 324).

Or take *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). There, the Court found that the Commerce Clause rendered unconstitutional a New Jersey law that barred the import of garbage into an instate landfill. *See id.* at 623–29, 98 S.Ct. 2531. It cited *Buck* in support of the rule that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” *Id.* at 624, 98 S.Ct. 2531 (citing, among others, *Buck*, 267 U.S. at 315–16, 45 S.Ct. 324).

Lastly consider *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949). The Court in that case found that a New York licensing regime for milk dealers violated the Commerce Clause. *See id.* at 529–40, 545, 69 S.Ct. 657. A state administrator had denied a license to a dealer who planned to ship milk to Boston because that export would divert supply from local New York markets. *Id.* at 526–28, 69 S.Ct. 657. The Court found this denial unconstitutional because the administrator had sought to restrict “the volume of interstate commerce” in order to subsidize “local economic interests[.]” *Id.* at 530–31, 69 S.Ct. 657.

It relied on *Buck*'s rule that States may not prohibit interstate "competition." *Id.* at 538, 69 S.Ct. 657.

Given this precedent, we and many courts have cited *Buck* as good law in decidedly "modern" Commerce Clause cases. See *McNeilus*, 226 F.3d at 443; see also *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 321 (5th Cir. 2022); *Walgreen*, 405 F.3d at 57; *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 395–99 (9th Cir. 1995). Even the Washington Supreme Court continues to believe that *Buck* bars it from applying the "state's certification" law "to a common carrier in exclusively interstate commerce." *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wash.2d 789, 597 P.2d 383, 390 (1979) (citing *Buck*, 267 U.S. at 316, 45 S.Ct. 324). So if the Supreme Court has overruled *Buck*, nobody seems to have noticed.

2. The Cabinet instead argues that we may disregard *Buck* because the Supreme Court no longer follows its *reasoning*. Recall that *Buck* adopted a bright-line rule that States may not prohibit competition in an interstate market based on the conclusion that the existing supply suffices. 267 U.S. at 315–16, 45 S.Ct. 324. The Cabinet suggests that this rule rested on outdated caselaw distinguishing between "direct" and "indirect" regulations of interstate commerce. See *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 549 (6th Cir. 2001). According to the Cabinet, the Supreme Court has "repudiated" this direct-vs.-indirect distinction and now applies its modern two-step test in all contexts. *Id.* Because we have found

that Kentucky’s certificate-of-need law does not discriminate against out-of-state ambulance providers or flunk the *Pike* balancing test, the Cabinet concludes, we may uphold that law in this interstate context too.

The Cabinet correctly notes that the Supreme Court has jettisoned the direct-vs.-indirect divide in other contexts. *Cf. Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 377–78 (6th Cir. 2013) (Sutton, J., concurring). The Court, for example, once used that distinction to evaluate laws regulating energy sales. *See Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 87–90, 47 S.Ct. 294, 71 L.Ed. 549 (1927). It permitted States to regulate *retail* energy sales to end users because this “local” regulation burdened interstate commerce “indirectly[.]” *Id.* at 87, 47 S.Ct. 294 (citation omitted). But it barred States from regulating *wholesale* energy sales to distributors because this “national” regulation placed a “direct burden” on interstate commerce. *Id.* at 88, 47 S.Ct. 294 (citation omitted); *see Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377–78, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983). Eventually, the Court abandoned this “bright-line” wholesale/retail divide. *Gen. Motors Corp.*, 519 U.S. at 291 n.8, 117 S.Ct. 811. It found the “mechanical” rule inconsistent with its more flexible analysis in later cases. *Ark. Elec. Coop. Corp.*, 461 U.S. at 390–91, 103 S.Ct. 1905. The Court now applies its “ordinary” two-step test under the negative Commerce Clause to all energy regulations. *Gen. Motors Corp.*, 519 U.S. at 291 n.8, 117 S.Ct. 811.

Similarly, the Court once adopted the direct-vs.-indirect divide in the tax context. It barred States from imposing a “direct” tax (but not an “indirect” one) on interstate commerce. *See Wynne*, 575 U.S. at 552, 135 S.Ct. 1787; *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180–83, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). Under this divide, the Court treated taxes on “the privilege of doing interstate business” or on “interstate sales” as impermissible direct taxes. *See Spector Motor Serv. v. O’Connor*, 340 U.S. 602, 609, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Freeman v. Hewit*, 329 U.S. 249, 255–56, 67 S.Ct. 274, 91 L.Ed. 265 (1946). But it treated many others, such as taxes on net income, as indirect taxes. *See Wynne*, 575 U.S. at 552, 135 S.Ct. 1787. The Court later overruled this formalistic approach tied to the type of tax because it ignored the “economic realities” of taxation. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 288, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The Court switched to a test that looks to a tax’s “practical effect,” asking such questions as whether the tax is “fairly apportioned” to a company’s in-state business and whether it “discriminate[s] against interstate commerce[.]” *Id.* at 279, 97 S.Ct. 1076; *see also Wynne*, 575 U.S. at 552–53, 135 S.Ct. 1787; *Maharg*, 249 F.3d at 549–50.

How should this precedent apply to *Buck*’s reasoning? The answer is unclear. On the one hand, we see two reasons why the caselaw might call *Buck* into doubt. As an initial matter, both sets of cases shed rules that drew a “mechanical line” between laws that imposed direct burdens on interstate commerce (such

as interstate sales taxes or regulations of wholesale energy) and those that imposed indirect burdens on that commerce (such as net income taxes or regulations of retail energy). *Ark. Elec. Coop. Corp.*, 461 U.S. at 390, 103 S.Ct. 1905. And one could view *Buck* as adopting a similar “mechanical” rule: States *categorically* may not bar a new entrant from supplying interstate transportation on the ground that an adequate supply exists. 267 U.S. at 316, 45 S.Ct. 324. *Buck* viewed such an anticompetitive law, without more, as a direct “regulation” “of interstate commerce.” *Id.*

In addition, the Court’s modern Commerce Clause cases treat as presumptively invalid only laws that *discriminate* against out-of-state entities to favor in-state ones. Yet *Buck*’s bright-line test does not turn on a finding that the Washington law discriminated against out-of-state bus lines in favor of in-state lines. *Buck* himself was a “citizen of Washington,” so the law in his own case had injured in-state interests. *Id.* at 313, 45 S.Ct. 324.

On the other hand, two competing factors might suggest *Buck*’s continued vitality. For one thing, *Buck*’s bright-line rule does not adopt a “formalistic” distinction that categorically bars States from regulating interstate carriers but categorically permits them to regulate intrastate ones. *Ark. Elec. Coop. Corp.*, 461 U.S. at 390–91, 103 S.Ct. 1905. Rather, *Buck* recognized that States may impose many regulations on interstate and intrastate carriers alike, including those designed to ensure the “safety” of public roads. 267 U.S. at 315, 45 S.Ct. 324. So a later case applying *Buck*

upheld a State’s refusal to grant a license to an interstate carrier when the State found the denial “necessary to promote the public safety.” *Bradley*, 289 U.S. at 96, 53 S.Ct. 577. *Buck* has a much narrower scope: It bars States only from prohibiting new interstate carriers in order to protect the existing carriers from that increased “competition.” *Buck*, 267 U.S. at 315, 45 S.Ct. 324. This safety-vs.-competition divide—one that turns on the reason behind a State’s refusal to grant a license—does not resemble the “formalism over substance” that was the hallmark of the older cases in the energy and taxation contexts. *Complete Auto Transit*, 430 U.S. at 281, 97 S.Ct. 1076. *Buck*’s distinction instead turns on substance.

At its core, moreover, the Commerce Clause was designed to stop the “economic protectionism” that had spread among the States at the time of the founding. *City of Philadelphia*, 437 U.S. at 623–24, 98 S.Ct. 2531; see *Tenn. Wine & Spirits*, 139 S. Ct. at 2460. And a State’s denial of a certificate to engage in interstate transportation because of “the existence of adequate” interstate transportation options is a form of protectionism for incumbent providers at the expense of new entrants. *Buck*, 267 U.S. at 316, 45 S.Ct. 324. Perhaps stricter rules should apply when States regulate *interstate* commerce itself, even if States may engage in incumbent protection for *local* commerce when they do not discriminate in favor of in-state providers. After all, the modern antidiscrimination rule was a byproduct of the Court’s expansion of the Commerce Clause to cover local activities that substantially affected

interstate commerce. *See Am. Beverage Ass'n*, 735 F.3d at 377–78 (Sutton, J., concurring); *see also United States v. Lopez*, 514 U.S. 549, 558–59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The States had long regulated these local activities. So an absolute prohibition on state oversight of the activities under the guise of the dormant Commerce Clause would have enacted a sea change to our federalist structure. An antidiscrimination rule, by contrast, leaves room for state regulation of intrastate activities that Congress may now reach with its own commerce power.

But when a State imposes a direct ban on competition in the “interstate transportation” market, it enters a field long subject to the federal government’s oversight. *Nat’l Pork Producers*, 143 S. Ct. at 1158 n.2; *see Lopez*, 514 U.S. at 558–59, 115 S.Ct. 1624. The Court’s modern cases might still suggest that States cannot do so at all when regulating interstate (rather than local) commerce. These cases note that the Court will enjoin a law *not just* if it promotes “in-state economic interests over out-of-state interests” *but also* if it “directly regulates or discriminates against interstate commerce” itself. *Tenn. Wine & Spirits*, 139 S. Ct. at 2471 (citation and emphases omitted). Many courts thus continue to suggest that “a state may not require a certificate of convenience and necessity from a carrier engaged exclusively in interstate commerce before it can operate within the state’s borders.” *Medigen of Ky., Inc. v. Pub. Serv. Comm’n of W. Va.*, 787 F. Supp. 590, 598 (S.D. W. Va. 1991) (collecting cases), *aff’d* 985 F.2d 164 (4th Cir. 1993).

In the end, we need not resolve this debate about whether *Buck* comports with the Supreme Court's modern cases. The Court has repeatedly reminded lower courts that we must apply one of its cases that is directly on point even if the logic of its later decisions has undercut the case. See *Bosse v. Oklahoma*, 580 U.S. 1, 3, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016) (per curiam); *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Agostini v. Felton*, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Indeed, the Court has summarily reversed a court that jumped ahead of it by finding that the logic of a later decision had impliedly overruled the holding of an earlier one. See *Bosse*, 580 U.S. at 3, 137 S.Ct. 1.

This instruction applies here. Whether or not the Court's later cases disavowing the direct-vs.-indirect distinction call *Buck* into question, our marching orders are clear. We must continue to follow *Buck* as long as it "directly controls" our case. *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917. For the reasons that we have explained, *Buck*'s holding applies with full force to the interstate transportation that Legacy seeks to provide. Kentucky's certificate-of-need law would bar Legacy from engaging in interstate commerce from Kentucky to Ohio on the ground that Kentucky "deem[s]" that increased interstate "competition" "undesirable." *Bradley*, 289 U.S. at 95, 53 S.Ct. 577. *Buck*

prohibits a law that serves such an anticompetitive purpose. *Id.* So *Buck* binds us.

* * *

We affirm in part and reverse in part. We affirm the district court's grant of summary judgment to the Cabinet with respect to Legacy's request to provide intrastate ambulance services. But we reverse its grant of summary judgment to the Cabinet with respect to Legacy's request to provide interstate ambulance services and remand for proceedings consistent with this opinion.

App. 46

626 F.Supp.3d 957
United States District Court, E.D. Kentucky,
Central Division.
Frankfort

Phillip TRUESDELL, et al., Plaintiffs,
v.
Eric FRIEDLANDER, et al., Defendants.

Civil No. 3:19-cv-00066-GFVT

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Signed September 8, 2022

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Filed September 9, 2022

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MEMORANDUM OPINION & ORDER

Gregory F. Van Tatenhove, United States District Judge.

This matter is before the Court on the parties' cross-motions for summary judgment. [R. 98; R. 105; R. 107.] For the reasons set forth herein, Plaintiff

Legacy Medical Transport, LLC’s motion for summary judgment [R. 105] will be DENIED, Defendant Eric Friedlander’s motion for summary judgment as to subject matter jurisdiction [R. 98] will be DENIED, and Secretary Friedlander’s motion for summary judgment as to the dormant Commerce Clause [R. 107] will be GRANTED.¹

I

Plaintiff Phillip Truesdell is the owner of Plaintiff Legacy Medical Transport, LLC, which is a “ground ambulance business” located in Ohio approximately one mile from the Kentucky border. [R. 63 at 2.] The Court’s May 2, 2022, Memorandum Opinion and Order provided the factual background of this case, and the Court will therefore only provide the facts and procedural history necessary to address the present motions.

On September 24, 2019, Legacy filed the Complaint in this matter and argued that Kentucky’s

¹ The Defendants in this matter include Eric Friedlander, Secretary of the Kentucky Cabinet for Health and Family Services, Adam Mather, Inspector General for the Kentucky Cabinet for Health and Family Services, Carrie Banahan, Deputy Secretary of the Kentucky Cabinet for Health and Family Services, and Intervenor Defendant First Care Ohio, LLC. The Cabinet officials are being sued in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Defendants collectively will be referred to as “Secretary Friedlander.” Because Mr. Truesdell is the sole owner of Legacy Medical Transport, LLC, Plaintiffs collectively will be referred to as “Legacy.”

Certificate of Need (CON) regulations, specifically the protest procedure and need requirement, violated the dormant Commerce Clause, Due Process Clause, Equal Protection Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment. [R. 1 at 11–14.] As the Court has addressed in previous orders, the need requirement and protest procedure are two components of the Certificate of Need application process for a business to operate ground ambulance services in Kentucky. Legacy is not contesting any other aspects of the certification process in this litigation.

Under the need requirement, a “proposal shall meet an identified need in a defined geographic area and be accessible to all residents of the area.” KRS 216B.040(2)(a). The protest procedure allows “Affected Persons” to request a hearing on a CON application and to present evidence for the hearing officer at the public hearing to consider. KRS 216B.085; 900 KAR 6:090, Sec. 3. “Affected persons” include:

the applicant; any person residing within the geographic area served or to be served by the applicant; any person who regularly uses health facilities within that geographic area; health facilities located in the health service area in which the project is proposed to be located which provide services similar to the services of the facility under review; health facilities which, prior to receipt by the agency of the proposal being reviewed, have formally indicated an intention to provide similar services in the future; and the cabinet and third-party payors who reimburse health facilities

for services in the health service area in which the project is proposed to be located.

KRS 216B.015.

Legacy is not challenging the denial of its Certificate of Need or seeking money damages. [R. 63 at 3, 13.] Instead, Legacy is seeking prospective declaratory and injunctive relief. *Id.* at 13, 19–20. On October 29, 2019, Secretary Friedlander filed his first Motion to Dismiss. [R. 16.] In response, Legacy amended its Complaint on November 19, which mooted Secretary Friedlander’s Motion to Dismiss. [R. 17; *see also* R. 57 at 18.] Secretary Friedlander filed his second Motion to Dismiss on January 17, 2020. [R. 33.] On February 5, the Court granted Patient Transport Services, Inc.’s Motion to Intervene, and Patient Transport Services filed a Motion to Dismiss the same day.² [R. 34; R. 36.]

On August 5, 2020, the Court denied Secretary Friedlander’s Motions to Dismiss as to the dormant Commerce Clause claim and granted the motion as to Legacy’s Due Process, Equal Protection, and Privileges and Immunities claims. [R. 57 at 18.] On September 30, Legacy filed a Motion to Amend the First Amended Complaint, which the Court granted on August 24, 2021. [R. 62; R. 75.] On September 7, 2021, Secretary Friedlander filed two motions to dismiss all the claims in this case. [R. 78; R. 79.] On May 3, 2022, the Court granted Secretary Friedlander’s motions to dismiss as to the Due Process, Equal Protection, and Privileges or

² Intervenor Defendant Patient Transport Services, Inc. has since been renamed First Care Ohio, LLC.

Immunities claims and denied the motion as to the dormant Commerce Clause claim. [R. 94 at 15.] On May 20, following the close of discovery, Secretary Friedlander filed a motion for summary judgment arguing that Legacy lacked standing. [R. 98.]

On July 15, the parties filed cross-motions for summary judgment on the dormant Commerce Clause claim, which is the only remaining claim. [R. 105; R. 107.] Secretary Friedlander argues that Kentucky's CON program does not impose a burden on the national ground ambulance market and that the putative local benefits of Kentucky's CON program "are well documented and not merely speculative." [R. 105-1.] Legacy argues that (1) the burdens imposed on interstate commerce "outweigh any putative local benefits;" and (2) Kentucky's Certificate requirement is *per se* unconstitutional to the extent it applies to wholly interstate transport. [R. 107.]

The parties requested oral argument on their dormant Commerce Clause summary judgment motions. [R. 105 at 2; 107 at 1.] However, the Court finds that the parties' briefing is sufficient to address the summary judgment motions and that oral argument is unnecessary. *See, e.g., Scott v. Metro. Health Corp.*, 234 F. App'x 341, 359 (6th Cir. 2007) (finding "dispositive motions are routinely decided on papers filed by the parties, without oral arguments, just as this court often hears and determines appeals without oral argument") (citing *Commodities Export Co. v. United States Customs Serv.*, 888 F.2d 431, 439 (6th Cir. 1989)); *Schentur v. United States*, 1993 WL 330640, at *5 (6th

Cir. 1993) (finding “this court has stated that district courts may dispense with oral argument on motions for ‘any number of sound judicial reasons’”) (quoting *Yamaha Corp. of America v. Stonecipher’s Baldwin Pianos & Organs*, 975 F.2d 300, 301, n. 1 (6th Cir. 1992)); *Carter v. Porter*, 2012 WL 298479, at *3 (E.D. Ky. Feb. 1, 2012) (noting that while Local Rule 7.1 permits parties to request oral argument, the decision to grant that request is within the court’s discretion).

II

Summary judgment is appropriate when the pleadings, discovery materials, and other documents in the record show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “A genuine dispute exists on a material fact, and thus summary judgment is improper, if the evidence shows ‘that a reasonable jury could return a verdict for the nonmoving party.’” *Olinger v. Corp. of the Pres. of the Church*, 521 F. Supp. 2d 577, 582 (E.D. Ky. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The moving party bears the initial burden of demonstrating the basis for its motion and identifying those parts of the record that establish the absence of a genuine issue of material fact. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). The movant may satisfy its burden by showing “that there is an absence of evidence to support the

non-moving party's case." *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. 2548. Once the movant has satisfied this burden, the non-moving party must go beyond the pleadings and come forward with specific facts demonstrating there is a genuine issue in dispute. *Hall Holding*, 285 F.3d at 424 (citing *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548).

The Court then must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251–52, 106 S.Ct. 2505). In making this determination, the Court must review the facts and draw all reasonable inferences in favor of the non-moving party. *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir. 2001).

A

Secretary Friedlander's first motion for summary judgment challenges Legacy's Article III standing, which is a challenge to subject matter jurisdiction. *See Accord v. Anderson Cnty., Tenn.*, 2021 WL 6135691, at *2 (M.D. Tenn. Dec. 28, 2021) (citing *Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 507 (6th Cir. 2019)). "Standing is a threshold question in every federal case." *Coal Operators & Assocs., Inc. v. Babbitt*, 291 F.3d 912, 915 (6th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Article III's "irreducible constitutional

minimum” of standing has three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The plaintiff must: (1) have suffered “an ‘injury-in-fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual an imminent, not conjectural and hypothetical;” (2) show that the injury is “fairly traceable to the challenged action of the defendant;” and (3) show that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *White v. United States*, 601 F.3d 545, 551 (6th Cir. 2010) (quoting *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130). “The party invoking federal jurisdiction bears the burden of establishing these three elements.” *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

Secretary Friedlander argues that Legacy lacks standing because Legacy cannot satisfy the redressability prong. [R. 98 at 11.] Secretary Friedlander specifically argues that Legacy “would not be able to operate in Kentucky because they would not meet the remaining CON criteria or Kentucky’s ambulance licensure regulations that they are not challenging in this lawsuit.” *Id.* Secretary Friedlander points to 202 KAR § 7:555, Section 2 to argue that Legacy is not in compliance with Kentucky’s licensure requirements and is not currently capable of doing so. *Id.* Secretary Friedlander also points to deposition testimony of Legacy’s administrator Hannah Howe in which Ms. Howe admitted that Legacy is not currently meeting certain requirements for licensure in Kentucky. *Id.* at 6–7.]

In response, Legacy argues that Secretary Friedlander mischaracterized the testimony of Ms. Howe to argue that Legacy could not comply with Kentucky's ambulance licensure regulations. [R. 103 at 6.] Legacy points to Ms. Howe's deposition testimony in which she stated that if Legacy "were able to secure permission to operate in Kentucky" Legacy would "abide by all relevant Kentucky laws and regulations." [R. 98-3 at 140.] Furthermore, Legacy argues that even if they are not currently satisfying all of Kentucky's ambulance licensure regulations, courts across the country have held that "plaintiffs may use litigation to tackle just one obstacle they face, even though future obstacles may remain as to their ultimate goal." [R. 103 at 7 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-64, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012); *Idaho Bldg. & Constr. Trades Council, AFL-CIO v. Wasden*, 32 F. Supp. 3d 1143, 1153 (D. Idaho 2014); *cf. Larson v. Valente*, 456 U.S. 228, 243, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982); *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 742 (W.D. Ky. 2012); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014)).] Finally, Legacy argues that the Court already addressed the standing issue and found that Legacy had standing to bring this lawsuit. *Id.* at 2, 7.

After review, the Court finds that Legacy has standing to bring this suit for several reasons. First, the Court already found that Legacy had standing as

to the dormant Commerce Clause claim, and while standing is an ongoing inquiry, Secretary Friedlander has failed to point to any new evidence that the Court's prior finding was in error. [R. 57 at 7–8.] In addition, as to the redressability prong specifically, the Court previously held that a favorable decision to Legacy in this case would redress the injury because, if the Court granted the relief requested, Legacy could reapply for a Certificate of Need without being subject to the protest procedure and need requirement. *Id.*; *see also Freeman v. Corzine*, 629 F.3d 146, 156 (3d Cir. 2010) (finding standing satisfied in dormant Commerce Clause context because the regulation at issue directly affected the Plaintiffs' ability to participate in commerce).

This entire case is about Legacy's desire to operate ground ambulance services in Kentucky. It therefore strains credulity that Legacy would not intend to meet Kentucky's other CON requirements if given the opportunity. And contrary to Secretary Friedlander's claim, Legacy has stated that it would comply with all applicable licensure requirements to operate in Kentucky. [R. 103-1 at 139.]

A favorable decision in this case would remove multiple barriers to Legacy's entry into the ground ambulance market in Kentucky, and it is well established the redressability prong can be satisfied without removing all barriers to entry. *See Vill. of Arlington Heights*, 429 U.S. at 261–62, 97 S.Ct. 555 (finding that removal of one barrier sufficient to establish standing); *Sierra Club*, 899 F.3d at 285 (“The removal of even one

obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability."); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 (2d Cir. 2017) (finding redressability prong satisfied even if ultimate outcome plaintiffs seeking did not occur because outcome was substantially likely); *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir. 2012) ("To carry its burden of redressability, [plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitely demonstrate that a victory would completely remedy the harm."); *Bruner*, 997 F. Supp. 2d at 697 ("A favorable decision by this Court would redress the injury, not because the Plaintiffs would automatically be granted a Certificate, but because the unconstitutional obstacle would be removed from their path to operate a moving company in the Commonwealth."). Therefore, the Court finds that Legacy has standing and will proceed to the dormant Commerce Clause claim.

B

The Sixth Circuit has described dormant Commerce Clause analysis as a two-step inquiry. "The first inquiry requires a court to determine whether 'a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests.'" *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)); see also *Garber v.*

Menendez, 888 F.3d 839, 843 (6th Cir. 2018) (finding “laws that discriminate explicitly against interstate commerce” or “have an impermissibly protectionist purpose or effect” will almost always be found to be invalid). However, if a law or regulation regulates evenhandedly and only has “indirect effects on interstate commerce,” courts move on to the second inquiry, “which requires the application of the balancing test set forth in *Pike v. Bruce Church, Inc.*” *Id.* (citing 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

Under *Pike*, a “statute is valid unless the burdens on interstate commerce are ‘clearly excessive in relation to the putative local benefits.’” *E. Ky. Res. v. Fiscal Court of Magoffin Cnty.*, 127 F.3d 532, 540 (6th Cir. 1997) (quoting *Pike*, 397 U.S. at 142, 90 S.Ct. 844). “The party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits.” *Id.* at 545. The putative benefits of a challenged law are evaluated under the rational basis test. *Boggs*, 622 F.3d at 650 (finding rule constitutional under *Pike* because “there is a rational basis to believe that the Rule’s benefit outweighs any burden that it imposes”); *see also Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 156 (4th Cir. 2016) (“In identifying the ‘putative local benefits’ to be weighed against incidental burdens on interstate commerce, we therefore apply a rational basis standard of review.”) (citation omitted).

Pike balancing is “a difficult exercise, often requiring courts to make subjective judgments not unlike ‘deciding whether three apples are better than six

tangerines.” *Garber*, 888 F.3d at 845 (quoting *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 360, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (Scalia, J., concurring)); see also *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (Scalia, J., Concurring) (“[The *Pike*] inquiry is ill suited to the judicial function and should be undertaken rarely if at all.”); *Hazel*, 813 F.3d at 155 (finding *Pike* “is often too soggy to properly cabin the judicial inquiry or effectively prevent the district court from assuming a super-legislative role”). The *Pike* standard is permissive, and the Sixth Circuit “has not invalidated a law under *Pike* balancing in three decades.” *Garber*, 888 F.3d at 845.

Here, Kentucky’s CON law does not discriminate against interstate commerce explicitly or have an impermissible protectionist purpose or effect. [See, e.g., R. 57 at 9 (citing [R. 17 at ¶¶ 59–68]); R. 105-1 at 11 (“it is undisputed that Kentucky’s CON law does not discriminate against interstate commerce in purpose or effect”); R. 107 at 8 (“Because the program regulates interstate and intrastate commerce evenhandedly, it is subject to the *Pike* balancing test”).] Businesses desiring to provide ground ambulance services in Kentucky must secure a Certificate of Need whether they are a Kentucky business or an out-of-state business. See *Garber*, 888 F.3d at 843 (finding Ohio law that “draws no distinctions based on residency” does not constitute explicit discrimination). Because the protest procedure and need requirement at issue in this case treat “similarly situated in-state and out-of-state entities the

same,” the Court will evaluate the parties’ claims under the *Pike* test. *Id.*

1

Secretary Friedlander first argues that Legacy has failed to demonstrate Kentucky’s CON law burdens interstate commerce. [R. 105-1 at 14.] The Sixth Circuit has instructed that the *Pike* inquiry should focus on whether a regulation burdens the national market, and Secretary Friedlander argues that Legacy has failed to establish that Kentucky’s CON law has burdened the national ambulance market. *Id.* (citing *Tenn. Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 451 (6th Cir. 2009)). This is particularly true given that other out-of-state ambulance providers, such as Intervenor Defendant First Care Ohio, LLC, “have gone through the CON and licensure process to operate in Kentucky.” *Id.*

Next, Secretary Friedlander argues that the primary putative local benefit to Kentucky’s CON law as it currently stands is that “it helps ensure access to 911-response ambulance services for Kentucky residents, particularly residents of rural counties such as the ones at issue here.” [R. 105-1 at 15.] In addition, Secretary Friedlander argues that the law “protects local taxpayers” by preventing ambulance providers from “scoop[ing] up the profitable ambulance transports while leaving the unprofitable 911-response transports to the taxpayer-subsidized agencies.” *Id.*

Secretary Friedlander notes that ambulance services are different from other industries because they “have no control over how much of the payment they receive for their services.” *Id.* Secretary Friedlander notes that 55% of ground ambulance transports performed are for Medicare beneficiaries, 15% are for Medicaid beneficiaries, 25% are reimbursed by third-party payors like Anthem or Humana, and 5% are performed by private pay individuals without insurance. *Id.* at 15–16. Medicare and Medicaid set their own non-negotiable reimbursement rates, “most ambulance companies have no real negotiating power with these third-party payors,” and ambulance companies can generally only collect about “1-2% of their gross charges from private-pay transports.” *Id.*

Given these realities, Secretary Friedlander argues that the CON program “incentivizes ambulance provide[r]s that are willing to serve underserved and disadvantaged areas of the Commonwealth” because “ambulance providers often cross-subsidize the losses they sustain by performing 911-response transports with the profits they can sometimes make from non-emergency transports.” *Id.* The concern is that if an agency like Legacy is allowed to “do the profitable runs while leaving the unprofitable runs to the existing agencies,” Kentuckians will suffer. *Id.* at 20. Therefore, Secretary Friedlander argues, the General Assembly “acted entirely rationally in requiring ambulance companies to show a need for their services in the CON program.” *Id.* at 17.

Conversely, Legacy argues that the protest procedure and need requirement of the CON program burden interstate commerce by driving up the cost (or excluding entirely) out-of-state businesses and burdening interstate travel. [R. 107 at 8.] Legacy points to the burdens of the protest procedure, arguing that it “drive[s] up the time, effort, and cost of securing a license” and acts “as a competitor’s veto over market entry.” *Id.* at 11. Legacy argues that from January 1, 2009, through January 1, 2022, only two ground ambulance provider applicants were able to surmount a protest, and often protestors only withdraw their protest “after securing a legally binding agreement from the applicant to service a smaller area.” *Id.* at 11–12. Legacy argues that the protest procedure burdens “interstate commerce in the form of fewer ambulance services to choose from.” *Id.* at 12.

Legacy likewise argues that the need requirement imposes significant costs on applicants and drives “down the number of businesses who provide trips between Kentucky and other states.” *Id.* at 14. Furthermore, Legacy argues, Secretary Friedlander lacks evidence that the protest procedure or need requirement improve access to ambulance services, lower costs, or improve quality. *Id.* at 16–21. Legacy also argues that “excluding ‘unnecessary’ providers does not constitute a putative local benefit,” and that Secretary Friedlander’s experts failed to demonstrate any putative local benefit to Kentucky’s CON law. *Id.* at 21.

While the Court declines to wade into a theoretical economic debate about the wisdom of CON laws

generally, the Court finds that Legacy has not demonstrated that the need requirement and protest procedure of Kentucky’s CON law, as applied to ground ambulance services, is invalid under *Pike*. See *CTS Corp.*, 481 U.S. at 92, 107 S.Ct. 1637 (finding “[t]he Constitution does not require the States to subscribe to any particular economic theory,” and courts should not “second-guess the empirical judgments of lawmakers concerning the utility of legislation”).

First, although Legacy is an Ohio business seeking to operate its ground ambulance service in Kentucky, Legacy has failed to identify burdens on interstate commerce because of Kentucky’s protest procedure and need requirement. After all, these procedures, and the CON requirements generally, apply to Kentucky and out-of-state businesses equally.³ Legacy has pointed to no evidence that out-of-state applicants are more often protested than in-state applicants, that out-of-state applicants fail to satisfy the need requirement more often than in-state applicants, or that the CON process in general is more burdensome to out-of-state applicants than in-state applicants. The mere fact that Legacy’s CON application was protested and Legacy was unable to satisfy the need requirement does not automatically mean that Kentucky’s CON requirement violates the dormant Commerce Clause.

³ Between January 1, 1995, and February 28, 2022, 56% of CON applications were approved from out-of-state businesses seeking to establish ground ambulance services in Kentucky, and 55% of applications filed by in-state businesses were approved. [R. 105-1 at 5–6; R. 109 at 2–3.]

To the extent Legacy argues it has been specifically harmed by the CON law's protest procedure and need requirement, that is not a problem that can be ameliorated under the dormant Commerce Clause. This is because "[t]he dormant Commerce Clause protects *interstate commerce*, not individual firms or the structure of particular markets." *Bredesen*, 556 F.3d at 451 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978)) ("We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."). Furthermore, Legacy has failed to demonstrate, or even argue, that the protest procedure and need requirement of Kentucky's CON law burdens the national ground ambulance market, which is the relevant inquiry in the dormant Commerce Clause context. *Id.* at 451 (upholding regulation after finding that "the scrap dealers have not shown that Memphis's regulation burdens the national scrap metal market").

However, even if Legacy had demonstrated that Kentucky's protest procedure and need requirement burdened interstate commerce, this burden would not clearly exceed the putative local benefits. Secretary Friedlander advances several legitimate interests in support of Kentucky's CON program. Primarily, the CON law "helps ensure access to 911-response ambulance services for Kentucky residents, particularly residents of rural counties." [R. 105-1 at 15.] As discussed

supra, the ground ambulance market is unique, given the need to couple revenue from non-emergency transports with 911-response services and tax subsidies to perform effectively. If outside companies are permitted to perform non-emergency transports without having to shoulder the burden of 911-response transports, this could lead to either a reduction in 911-response transports or the need for additional tax revenue to support emergency medical services. [R. 105-1 at 17.] As stated by Secretary Friedlander’s expert Daniel J. Sullivan, a health planning expert with decades of experience with Kentucky’s CON law and CON laws across the country:

expanding the number of ambulance providers does not necessarily result in better outcomes or shorter response times. Many rural areas have an insufficient population to support multiple providers. As competition for a small pool of patients increases, the financial viability of providers is challenged. The result can be reductions in service levels, i.e., number of ambulances serving a county, or the closure of local ambulance services.

[R. 105-3 at 15.] Secretary Friedlander’s expert Guillermo Fuentes, the former Deputy Chief of Montreal EMS and has consulted for EMS systems across the United States and internationally for decades, determined that if Legacy performed non-emergency services in just two of the countries they are requesting, “annually LEGACY would remove between \$107,290 or \$357,633 of revenue annually, should both Bracken and Fleming be unable to adjust staffing for 911

readiness, they would require additional annual tax payor funding between \$163,313 to \$413,656 or reduce service levels.”⁴ [R. 105-4 at 33.]

Legacy’s arguments to the contrary are unavailing. Legacy relies on the expert report of Dr. Matthew Mitchell, who argues that CON laws fail to improve access to ambulance services, lower costs, or improve quality. [R. 107 at 16–20.] However, Dr. Mitchell does not have expertise or knowledge about many of the core aspects of this case. Secretary Friedlander’s experts both had decades of experience consulting on CON issues in the ground ambulance arena specifically and relied on Kentucky-specific data. Dr. Mitchell, on the other hand, admitted that he lacked knowledge about ground ambulance finances and services, had not reviewed ground ambulance services data in Kentucky, has never reviewed the financials of any Kentucky ground ambulance services, and was unfamiliar with how Medicare, Medicaid and commercial insurance reimbursement rates worked. [R. 105-1 at

⁴ Legacy argues that it would likely operate in Mason County more often than Bracken and Fleming, and the expert report did not adequately take this into account when projecting the impact on state tax subsidies. [R. 115 at 8.] Furthermore, Legacy argues that the report does not account for the fact that Legacy might make trips that no other providers in the area are currently making. *Id.* at 9. While the Court agrees with Legacy that the impact in Bracken and Fleming counties may not be quite as severe as the report states, Legacy has failed to demonstrate that there would be no impact. Ultimately, however, even if the tax increase issue is completely removed from consideration, the Court finds that Secretary Friedlander has proffered other local benefits that sufficiently satisfy the *Pike* standard.

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17–18 (citing R. 105-7 at 30–31, 33, 36, 47).] His thesis was essentially that CON regimes generally fail to improve access and quality of care except in highly technical fields. [R. 107 at 7.]

Dr. Mitchell only reviewed one white paper that addressed ground ambulance services in Kentucky, and he admitted that he would not be comfortable submitting that article for peer review without substantive changes. [*Id.* at 18 (citing R. 105-7 at 124–125).] The white paper indicated that “Kentuckians had access to 24% fewer ambulances than the average of the comparator states and faced longer wait times.” [R. 107 at 17.] The paper also pointed to a survey in which 41% of Kentucky mayors said their city needed more ambulances or EMS services. *Id.* However, the author of the paper admitted that he was not an expert in healthcare and did not consider himself to be an expert on the issue of certificates of need. [R. 108-1 at 26–27.] In addition, the author admitted that his comparator data was incomplete, and he only looked at ambulance response times in one of Kentucky’s 120 counties in assessing the Commonwealth’s wait times. [R. 108-1 at 76–77.] Furthermore, the mayor survey only interviewed twenty unidentified mayors. *Id.* at 172–73. This paper does not provide the kind of support necessary to overturn a law under *Pike*.⁵

⁵ Legacy has argued that there is an ambulance shortage in Kentucky. [*See, e.g.*, R. 107 at 12.] Secretary Friedlander’s expert Mr. Sullivan did acknowledge that “in certain parts of Kentucky there are problems with ambulance response times.” [R. 107-4 at 65.] However, Legacy does not identify where in Kentucky the

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Legacy also points to *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), and *Medigen of Kentucky, Inc. v. Public Serv. Comm'n of W. Virginia*, 985 F.2d 164, 167 (4th Cir. 1993) as demonstrating that Kentucky's CON law is unconstitutional under the dormant Commerce Clause.⁶ However, the Court finds that these cases are inapposite. In *Walgreen*, the First Circuit invalidated a requirement that all businesses wishing to operate a pharmacy in Puerto Rico must first obtain a certificate of need. *Rullan*, 405 F.3d at 55. However, the certificate of need requirement exempted upon passage all existing pharmacies, of which 92% were locally owned. *Id.* These existing pharmacies were "permitted to wield substantial influence in the enforcement of the certificate requirement against proposed new pharmacies" and out-of-Commonwealth pharmacies were opposed significantly more often than local pharmacies. *Id.* The same is not true here.

As noted *supra*, between January 1, 1995, and February 28, 2022, 56% of CON applications were approved from out-of-state businesses seeking to

ambulance shortage is most acute, address whether each of the counties in which Legacy desires to operate has an ambulance shortage, or provide any factual support for the proposition that removal of the need requirement and protest procedure but leaving the rest of Kentucky's CON law intact would properly alleviate the shortage.

⁶ Legacy also cites approvingly to *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014). While the court in *Bruner* did invalidate a CON law for moving companies specifically, the case was decided on Due Process and Equal Protection grounds and did not implicate the dormant Commerce Clause.

establish ground ambulance services in Kentucky, and 55% of applications filed by in-state businesses were approved. [R. 105-1 at 5–6; R. 109 at 2–3.] Contrast this with *Walgreen* in which ninety percent of local applicants “forced to endure the hearing process” were granted certificates compared to only fifty-eight percent of out-of-Commonwealth applicants. 405 F.3d at 56. Furthermore, ground ambulance services are different from pharmacies. Although “[p]harmacies seek to operate in areas where they can turn a profit,” *id.* at 60, ground ambulance services must balance providing profitable services with emergency services that are “often the most expensive to perform and result in the lowest reimbursement.” [R. 105-1 at 8.]

Medigen is also distinguishable. In 1989 Medigen began hauling infectious medical waste out of West Virginia without the required certificate. 985 F.2d at 165. The Commission only granted certificates to “prospective transporters of infectious medical waste [if] current service is inadequate.” *Id.* at 166. One of Medigen’s competitors complained, and Medigen was threatened with criminal prosecution if it continued to operate in West Virginia without a certificate. *Id.* at 165. Medigen filed suit, and the district court found that West Virginia’s certification requirement was a direct regulation of interstate commerce, and the Fourth Circuit affirmed after applying the *Pike* test. *Id.* at 168.

As with *Walgreen*, the Court finds the particular facts and circumstances of *Medigen* distinguishable from this case. Once again, hauling medical waste is different from providing medical services, particularly

given that ground ambulance services must balance providing profitable services with emergency services. A more appropriate comparison with this case is *Colon Health Centers of America v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

In *Colon Health*, the Fourth Circuit analyzed Virginia’s certificate of need requirement for medical service providers. 813 F.3d at 160. Virginia’s certificate of need program required that “an applicant show a sufficient public need for its proposed venture in the relevant geographic area.” *Id.* at 149. Virginia asserted that the certificate of need was necessary to help “prevent the redundant accretion of medical facilities, protect the economic viability of existing providers, promote indigent care, and assist cost-effective health care spending.” *Id.* After applying *Pike* balancing, the Fourth Circuit found Virginia’s CON program did not violate the dormant Commerce Clause and affirmed the district courts’ grant of summary judgment to Virginia.

Here, like *Colon Health*, Secretary Friedlander has proffered legitimate reasons for Kentucky’s CON program, and for the protest procedure and need requirement specifically. Secretary Friedlander is concerned that if a business like Legacy is permitted to “do the profitable runs while leaving the unprofitable runs to the existing agencies” without satisfying the need requirement, Kentuckians will suffer. [R. 105-1 at 20.] *Colon Health* addressed this concern in the full-service hospital context:

Appellants' expert agreed in his deposition that full-service hospitals have "long been in the practice of cross-subsidizing unprofitable services with the profits from those that are profitable." J.A. 392. It is perhaps no accident that the CON applicants in this case sought to open standalone gastroenterology and radiology facilities, not new community health centers. Concerns that such practices could drain needed revenue from more comprehensive general hospitals providing necessary though unprofitable services are not irrational.

813 F.3d at 157. Relatedly, and similar to the facts presented in *Colon Health*, Kentucky's CON law aims to incentivize ambulance providers to serve underserved and disadvantaged areas of the Commonwealth by providing both emergency and non-emergency services. *Id.* As for the protest procedure, Legacy has failed to demonstrate that the procedure unfairly burdens interstate commerce given that it applies equally to in-state and out-of-state businesses.

Although Legacy may disagree with the policy choices the Kentucky General Assembly made, Legacy has not demonstrated that Kentucky's CON law violates the dormant Commerce Clause. Although Kentucky could consider other alternatives to Kentucky's CON program, such as raising Medicaid rates or requiring non-emergency ambulance businesses to also handle a percentage of emergency transports [R. 110 at 13–14], this does not mean that the Kentucky General Assembly acted irrationally. "Because there is a

rational basis to believe that the [law's] benefit outweighs any burden that it imposes, the [law] is constitutional under *Pike*.” *Boggs*, 622 F.3d at 650.

2

Legacy also argues that Kentucky’s CON requirement is *per se* unconstitutional as applied to “interstate trips between Kentucky and other states.” *Id.* at 23 (citing *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925)). This is true, Legacy argues, because these trips “constitute a direct regulation of interstate commerce” and have the effect of favoring “local health facilities at the expense of out-of-state health facilities.” *Id.* The Court is unpersuaded by Legacy’s argument.

In *Buck v. Kuykendall*, Mr. Buck was a common carrier who was seeking to become a transporter for hire between Seattle, Washington, and Portland, Oregon. 267 U.S. at 313, 45 S.Ct. 324. Mr. Buck obtained the “license prescribed by its laws” from Oregon, but Washington refused to grant him the necessary “certificate of public convenience and necessity.” *Id.* Mr. Buck appealed, and the Supreme Court ultimately found that Washington’s certificate of public need and necessity, which was used to determine “the persons by whom the highways may be used,” was improper. *Id.* at 316, 45 S.Ct. 324.

Here, Kentucky is not preventing ground ambulance services from operating in Kentucky at all without a CON. In fact, out-of-state ground ambulance

agencies without a CON are treated more favorably than in-state ground ambulance agencies. Without a CON, an out-of-state ground ambulance business, may “(1) transport a patient from another state to a location in Kentucky; (2) transport a resident of another state from a location in Kentucky back to the patient’s home; and (3) drive through Kentucky when taking a patient from another state to a location in another state.” [R. 105-1 at 5 (citing 202 KAR 7:501, Sec. 6); R. 109 at 2.] In-state agencies, however, are required to have a CON and Kentucky license to make such trips within Kentucky.

A Certificate of Need is only required to conduct intrastate transports within Kentucky and for interstate transports of Kentucky residents if the transport originates in Kentucky. *Id.* This type of restriction is not uncommon. In fact, at least nineteen other states restrict new entrants into ground ambulance services areas, including seven other states that also require a Certificate of Need.⁷ [R. 105-1 at 10; R. 107 at 7.] The

⁷ The states that restrict new entrants into ground ambulance services areas include the following: Arizona (A.R.S. 36-2233), Arkansas (007 28 CARR 001), California (Cal Health & Safety Code § 1797.224), Connecticut (Conn. Gen. Stat. § 19a-180), Florida (Fla. Stat. § 401.25), Hawaii (HAR 11-72), Illinois (77 Ill. Adm. Code 515.300), Louisiana (La. R.S. § 33:4791), Massachusetts (105 CMR 170.249), Nevada (Nev. Rev. Stat. Ann. § 474.590), New Mexico (N.M. Stat. Ann. § 65-2A-8), New York (NY CLS Pub Health § 3005), North Carolina (N.C. Gen. Statute § 153A-250), Ohio (ORC Ann. 505.44), Oklahoma (O.A.C. § 310:641-3-10), Oregon (ORS § 682.062), Texas (Tex. Health & Safety Code § 774.003), Utah (Utah Code Ann. § 26-8a-402), and

Court finds that *Buck* is distinguishable from this case because Kentucky’s CON law was more carefully crafted than the regulation at issue in *Buck* and applies to Kentucky and out-of-state businesses equally.⁸

To the extent Legacy relies on *Buck* for the proposition that Kentucky’s CON law constitutes a “direct regulation of interstate commerce,” that doctrine “appears to have been repudiated.” *Bredesen*, 556 F.3d at 449 (quoting *CSX v. City of Plymouth*, 283 F.3d 812, 818 (6th Cir. 2002)). And under *Pike*, for the reasons discussed *supra*, Legacy has not demonstrated that any alleged burdens on interstate commerce are clearly excessive in relation to the putative local benefits. In attempting to examine the potential burdens on interstate commerce, Legacy has failed to provide even the most basic information such as: (1) how many ambulance transports of Kentucky residents from a location in Kentucky to another state occur annually; (2) how many ground ambulances currently perform

Washington (Rev. Code Wash. (ARCW) § 18.73.130). [R. 105-3 at 16.]

⁸ To the extent Legacy also argues in one paragraph that the CON requirements are “*per se* unconstitutional because they have the effect of discriminating against out-of-state facilities,” the Court finds that Legacy failed to support this argument with any factual or legal support. “The Court is not obligated to develop the Plaintiffs’ half-hearted arguments.” *Norton v. Beasley*, 564 F. Supp. 3d 547, 581 n.19 (E.D. Ky. 2021) (citing *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.”)).

these kinds of transports; or (3) how Kentucky compares to other states with similar (or different) requirements. For all these reasons, Legacy's argument fails.

III

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

1. Secretary Friedlander's Motion for Summary Judgment on the issue of subject-matter jurisdiction [**R. 98**] is **DENIED**;
 2. Secretary Friedlander's Joint Motion for Summary Judgment on the dormant Commerce Clause issue [**R. 105**] is **GRANTED**;
 3. Legacy's Motion for Summary Judgment [**R. 107**] is **DENIED**; and
 4. Judgment shall be entered contemporaneously herewith.
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2023 WL 6932070

Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

Phillip TRUESDELL; Legacy Medical
Transport, LLC, Plaintiffs-Appellants,

v.

Eric FRIEDLANDER, in His Official Capacity as
Secretary of the Kentucky Cabinet for Health and
Family Services; Adam Mather, in His Official
Capacity as Inspector General for the Kentucky
Cabinet for Health and Family Services; Carrie
Banahan, in Her Official Capacity as Deputy
Secretary of the Kentucky Cabinet for Health and
Family Services, Defendants-Appellees, First Care
Ohio, LLC, fka Patient Transport Services, Inc.,
Intervenor-Defendant-Appellee.

No. 22-5808

|
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BEFORE: GRIFFIN, BUSH, and MURPHY, Circuit
Judges.

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ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.
