No. 22-5808

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILLIP TRUESDELL, et al.,

Appellants,

v.

ERIC FRIEDLANDER, et al.,

Appellees.

On Appeal from the United States District
for the Eastern District of Kentucky
Honorable Gregory F. Van Tatenhove, Judge
3:19-cv-00066

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Legacy Medical Transport LLC states that it has no parent corporation and no publicly held corporation owns any stock in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This case raises significant questions regarding the proper application of the Interstate Commerce Clause and the Constitution's protections for the right to earn a living, and it arises in the context of a law that vastly limits Kentuckian's access to ambulances amid an acknowledged shortage of services in the Commonwealth. Oral argument will give these issues the attention they warrant, allow the advocates to assist the Court in understanding the record established at the district court, and aid the Court in careful consideration of this case.

JURISDICTIONAL STATEMENT

This lawsuit, filed in the United States District Court for the Eastern District of Kentucky, arises under 42 U.S.C. § 1983. Second Am. Compl., Doc. 63, PageID # 650. The district court had federal-question jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201–2202. *Id.* The district court granted summary judgment to Defendants and Intervenor-Defendant, Order on MSJ, Doc. 120, PageID # 5655, and the court's final, appealable order gave this Court jurisdiction under 28 U.S.C. § 1291.

This appeal is timely because final judgment was entered on September 9, 2022, Judgment, Doc. 121, PageID # 5677, and Appellants appealed on September 12, 2022, within the 30 days allowed by Fed. R. App. P. 4(a)(1)(A). Notice of Appeal, Doc. 122, PageID # 5678.

STATEMENT OF THE ISSUES

1. Whether Kentucky's protest procedure and need requirement for ambulances, KRS §§ 216B.061, 216B.08; 900 KAR 6:070 § 2(2), 6:090 § 3, which allow incumbent ambulance businesses to veto potential competitors, discriminate against interstate commerce?
2. Whether Kentucky's protest procedure and need requirement for ambulance businesses unduly burden interstate commerce in violation of the *Pike* balancing test?
3. Whether Appellants stated a claim under the Privileges or Immunities Clause of the Fourteenth Amendment?

INTRODUCTION

Phillip Truesdell and Legacy Medical Transport are an entrepreneur and his family-owned non-emergency ambulance service, both based in Ohio. Legacy specializes in taking people to and from doctor's appointments when their medical condition prevents them from

hopping in a car or taxi and requires transportation by ambulance instead. The business is headquartered in the small town of Aberdeen, Ohio—just a stone's throw away from the Kentucky border. Legacy regularly receives calls to make trips to, from, and within Kentucky. But when Truesdell applied for a Certificate to operate there, he was denied due to a law that allows incumbent ambulance companies to exclude new competition. This "competitor's veto" imposes significant burdens on interstate commerce for purposes of outright economic protectionism.

When a person applies for a Certificate to operate an ambulance business in Kentucky, the Cabinet for Health and Family Services[1] gives notice of the application to all incumbent providers, who can then protest the application. 900 KAR 6:070 § 2(2), 6:090 § 3. A protest triggers a hearing akin to a full-blown trial that costs upwards of tens of thousands of dollars and requires applicants to somehow prove their business is "needed." The evidence demonstrates that unprotested applications are almost uniformly approved and protested applications are almost uniformly denied. Only twice in the past thirteen years has an applicant

[1] Appellees are Cabinet officials who are sued in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908), but are referred to collectively as the "Cabinet."

surmounted a protest, and even then, only under dramatic facts. In one case, the applicant demonstrated that people in Kentucky had died waiting for an ambulance. In the other, the protestor was under investigation for healthcare fraud and faced potential jail time, so his objections were ignored.

Because the protest privilege and need requirement amount to a veto, incumbents frequently leverage their protest to extract legally binding agreements from applicants not to compete. If applicants agree to limit their proposed service and thus their anticompetitive threat, the incumbent will withdraw its protest and the application will be granted. As one Federal judge ruled when invalidating a Certificate requirement for movers of household goods, the scheme is nothing more than a competitor's veto over the constitutionally protected right to enter a trade. *Bruner v. Zawacki*, 997 F.Supp.2d 691, 700 (E.D. Ky. 2014). And as several others have held, it violates the Interstate Commerce Clause, which bars discriminatory or burdensome state laws that interfere with trade among states. *See Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993) (invalidating Certificate law under dormant Commerce Clause); *Walgreen Co. v. Rullan*, 405 F.3d 50,

60 (1st Cir. 2005) (same); *Harper v. Pub. Serv. Comm'n of W. Va.*, 427 F.Supp.2d 707 (S.D. W. Va. 2006) (same); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 274 (1932) (analogizing Certificate laws to "the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business").

On cross-motions for summary judgment, the Cabinet and an intervening ambulance business offered just one rationale: they contend that the program protects 911 providers from having to compete for lucrative non-emergency services, thereby saving taxpayer money where 911 services are locally subsidized and making sure emergency services don't disappear. That argument has been rejected by the Supreme Court and bears no relationship to how the program works. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). According to the Court, excluding providers from the market to protect local, tax-subsidized businesses from competition discriminates against interstate commerce in violation of the Interstate Commerce Clause. *Id.* To the extent a state wants to prop up tax-subsidized businesses, it must simply

raise taxes or use other neutral and less burdensome means of doing so. *Id.* at 392.

This argument also lacks any connection to how the Certificate program operates. The challenged provisions don't offer a veto to 911 providers, let alone tax-subsidized 911 providers; they offer a veto to *all* incumbents, including non-emergency ambulance businesses like the Intervenor in this case—who may then use the competitor's veto to subject 911 services to tens of thousands of dollars in start-up costs and unnecessary delay, extract a legally binding agreement from them not to compete, or exclude them from the market entirely. Contrary to Appellees' attempts to characterize the Certificate law as aimed at protecting vulnerable tax-subsidized 911 providers (a justification omitted in Appellees' interrogatory responses and only invented later in litigation), the veto is simply cronyism writ large. And the force of this argument is significantly undercut by the fact that First Care, a *non-emergency* ambulance business that operates in Kentucky, intervened in this case to protect its veto privilege. Nevertheless, the district court accepted this tax-saving rationale. Binding precedent requires reversal. *C & A Carbone*, 511 U.S. at 393.

Even under the more lenient *Pike* balancing test, Legacy[2] should have prevailed. The Certificate scheme creates tremendous burdens on interstate commerce. Out-of-state applicants like Legacy who seek to provide ambulance services within Kentucky (or between Kentucky and other states) suffer higher start-up costs and significant delay, if not total exclusion. Over the past thirteen years, all but one out-of-state Class I ambulance applicant were protested. Of those protested, all but one were denied. The only out-of-state applicant to secure a Certificate in the face of a protest showed people had died waiting for an ambulance due to long wait times, and only did so after suffering through an expensive and time-consuming hearing. What's more, Certificate programs like Kentucky's are associated with reduced access to care, higher out-of-pocket costs for consumers, and decreased quality of services.

The benefits, by contrast, are purely speculative. The Cabinet and Intervenor contend that protecting incumbents from competition lowers tax subsidies in localities that subsidize emergency services and prevents 911 services from disappearing. Not only is that asserted benefit impermissible, it's a post hoc justification that bears no relationship to

[2] Appellants are referred to collectively as "Legacy."

the challenged scheme (and in many ways is subverted by it). Because the protest procedure and need requirement unduly burden interstate commerce, it violates *Pike*. *See Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993); *Walgreen Co. v. Rullan*, 405 F.3d 50, 60 (1st Cir. 2005); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 274 (1932); *Bruner v. Zawacki*, 997 F.Supp.2d 691, 700 (E.D. Ky. 2014).

Legacy respectfully requests that this Court reverse.

STATEMENT OF THE CASE

In 2017, Phillip Truesdell spotted an ambulance with a for sale sign on its window. Looking for a way to start a business that would keep his family employed and close to home, he purchased the ambulance and founded a medical transportation company in Aberdeen, Ohio, just a mile from the Kentucky border. Truesdell Decl., Doc. 107-13, PageID # 5079–80; Truesdell Depo., Doc. 107-1, PageID # 3128–30 ("Well, the power plant was shutting down, and I wanted to get my kids into something where they didn't have to travel. I want to see my grandbabies raised at home."). He named his business "Legacy," both as a nod to his accomplishments as a "boy from Lewis County raised poor as dirt with a

ninth-grade education," and the legacy he sought to leave for his children and "grandbabies." *Id.*, PageID # 3134.

Legacy primarily provides non-emergency transport for people who must travel by ambulance from home or health facilities to medical appointments and back. Howe Depo., Doc. 107-2, PageID # 3208. Legacy does not currently respond to 911 calls, but does provide unscheduled, emergency trips for people who need immediate transport to urgent care or the hospital. *Id.* Legacy now operates six ambulances and has completed several thousand runs since the Truesdell family bought its first ambulance five years ago.[3] Truesdell Decl., Doc. 107-13, PageID # 5080.

While Legacy complies with all Ohio laws and can operate legally in Ohio, it has been denied that same opportunity just over the river in Kentucky because it lacks a Certificate of Need. Under Kentucky law, anyone who wants to provide transportation by ambulance within Kentucky or even to make certain trips between Kentucky and other

[3] Legacy is "truly a family business." Truesdell Depo., Doc. 107-1, PageID # 3130–31. Phillip's daughter Hannah Howe works as administrator and his son works as a mechanic. *Id.* PageID # 3126. When asked about the various roles Phillip plays at Legacy, one of his answers was, "Dad." *Id.* PageID # 3125.

states must first obtain a Certificate. KRS §§ 216B.061, 216B.015(13); 202 KAR 7:501 § 6. Legacy applied for a Certificate to operate a Class I ambulance in 2018, but after incumbent businesses protested, Legacy was denied the following year. Truesdell Decl., Doc. 107-13, PageID # 5081. Legacy brought this civil rights lawsuit for prospective declaratory and injunctive relief so that it may apply again free of the unconstitutional protest procedure and need requirement. *Id.*; Second Am. Compl., Doc. 63, PageID # 660.

To start the Certificate process, an aspiring business owner must submit an application and pay a $1,000 fee. 900 KAR 6:020. The Cabinet then gives notice to existing Certificate holders via its newsletter. 900 KAR 6:065. Incumbent businesses may protest, which sends the applicant to a hearing where he or she must prove that a new business is "needed." KRS §§ 216B.040(2)(a)(2), 216B.085. If there's no protest, there's no hearing. Cutshall Depo., Doc. 107-5, PageID # 3598.

A protest triggers tens of thousands of dollars in increased costs and potentially years of delay. Sullivan Depo., Doc. 107-4, PageID # 3309; Carlton Depo., Doc. 107-6, PageID # 3636. Hearings are akin to a full-blown trial: applicants must respond to the protesting business's

discovery requests, submit briefs, make opening and closing statements, present exhibits, call and examine witnesses under oath, make objections, and offer documentary evidence to prove a "need" for their services. *Id.* at PageID # 3623–24, 3626. Parties regularly hire counsel to navigate the hearing and pay outside consultants fees ranging from $7,000 to $50,000. Sullivan Depo., Doc. 107-4, PageID # 3302–09. Applicants also typically secure letters of support or draft reports purporting to show their business is needed. *Id.*; Cutshall Depo., Doc. 107-5, PageID #3605.

Hearings can take as little as a few hours or as long as several weeks. *Id.* at PageID # 3595. It can take the Cabinet years to finally approve or deny a protested application. Carlton Depo., Doc. 107-6, PageID #3621–22. Though any "affected party" can protest, incumbent businesses are the only ones that ever do so. *See, e.g.*, Boden Decl., Doc. 107-12, PageID # 4332; Carlton Depo., Doc. 107-6, PageID # 3633–34.

In practice, the protest procedure and need requirement amount to a competitor's veto over market entry, allowing incumbents to either extract legally binding anticompetitive agreements from potential competitors or to exclude them from the market entirely. From

January 1, 2009, through January 1, 2022, there were 33 applications for new Class I ambulance services that received a final order from the Cabinet. Just six were not protested, and all six unprotested applications were granted. Boden Decl. Ex. B, Doc. 107-12, PageID # 4350–4435.

Twenty-seven applications, or 82% of all applicants, were protested, and their outcomes tell an entirely different story. Boden Decl. Ex. C, Doc. 107-12, PageID #4436–4830. In 17 of the 27 protested cases, the protestor withdrew the protest (often in exchange for a legally binding agreement that the applicant would limit their territory or otherwise present less of a competitive threat), and in all but one case, the application was then approved.[4] *Id.*

Where the protestor sustained its protest, the Cabinet denied the applicant in all but *two cases*. Boden Decl., Ex. D, Doc. 107-12, PageID # 4831–5044. Portsmouth Emergency Ambulance Service was able to gain approval in the face of a protest after showing that the family of a 4-year-old was forced to take their seizing child to a hospital because ambulance wait times were so long and other Kentucky residents had

[4] In every case where the applicant acceded to the protesting business's anticompetitive demands, the application was granted.

died waiting for an ambulance. Boden Decl. Ex. E, Doc. 107-12, PageID # 5054–56. Watts-Caney Fire and Rescue gained approval only because the protesting company had returned an employee to work while he was being criminally investigated for abusing a patient, was charged with Medicare and Medicaid fraud, and its owners faced potential prison time, and his objections were therefore ignored. *Id.* This program is nothing but a competitor's veto. Or, as a leading expert on Certificate programs put it at deposition, it's akin to allowing the "foxes [to] guard the henhouse." Mitchell Depo., Doc. 107-8, PageID # 3921–22.

The veto process is separate from licensure. If an applicant manages to secure a Certificate, it must then satisfy various health and safety requirements by obtaining a license from the Kentucky Board of Emergency Medical Services. 202 KAR 7:501. Legacy does not challenge the licensing requirement and intends to comply with all licensure criteria if it is given the chance to apply. Legacy Depo., Doc. 107-7, PageID # 3778.

On July 15, 2022, the parties submitted cross-motions for summary judgment. Mtns. for Summ. Judg., Docs. 105, 107, PageID # 1991, 3086. After putting forward various health and safety theories throughout

litigation, Defs. Discovery Responses, Doc. 107-12, PageID # 4335–36, 4339, 4343–44, 4447, the Cabinet and Intervenor (a non-emergency ambulance business that holds a Certificate to operate in Kentucky) abandoned those arguments and changed tactics. They argued that the veto privilege allows 911 providers, who are sometimes tax-subsidized, to keep more lucrative non-emergency transport services for themselves. This inflates their profits and reduces the need for taxpayer subsidies, thereby ensuring they stay in business. Legacy argued in response that this justification was explicitly barred by Supreme Court precedent. Pls. Opp. to MSJ, Doc. 110, PageID # 5560. On September 9, 2022, the district court accepted the tax-saving argument and granted summary judgment to the Cabinet and Intervenor. Order on MSJ, Doc. 120, PageID # 5655. It did not mention the adverse precedent. This timely appeal followed.

STANDARD OF REVIEW

This Court reviews rulings on cross-motions for summary judgment de novo. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). The Court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

The Court likewise reviews a ruling on a motion to dismiss under Rule 12(b)(6) de novo. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). Under 12(b)(6), a complaint should not be dismissed for failure to state a claim "if it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

SUMMARY OF THE ARGUMENT

The district court ignored binding precedent. The only rationale that the Cabinet and Intervenor offered for allowing incumbent ambulance businesses to veto their own competition is channeling non-emergency trips to 911 providers, thereby saving taxpayer money in those areas where 911 services are tax-subsidized and ensuring access to such locally subsidized services. Such a rationale is foreclosed by Supreme Court precedent, which holds that neither keeping tax subsidies low nor preserving access to local services can justify stifling the interstate flow of goods and services. *See C & A Carbone, Inc.*, 511 U.S. at 393. Any such endeavor inherently discriminates against interstate commerce and is subject to a nearly *per se* rule of invalidity. *Id.* The district court did not address this precedent.

Even under the more lenient *Pike* balancing test—which applies to laws that equally burden in-state and out-of-state commerce—the challenged provisions fail. They create substantial burdens on out-of-state businesses that wish to conduct trips in Kentucky and all businesses that wish to conduct trips between Kentucky and other states in the form of a competitor's veto. Incumbents are permitted to trigger discovery, a trial-like hearing, years of delay, and tens of thousands of dollars in increased costs—or to exclude new competitors entirely. This suppresses the interstate market for Class I Kentucky ambulance services. Between January 1, 2009, and January 1, 2022, all but one of the out-of-state businesses that applied were protested, and of those protested, all but one were denied. The only out-of-state business that managed to overcome a protest showed Kentuckians were dying waiting for ambulances. Boden Decl. Ex. E, Doc. 107-12, PageID # 5054–56.

As the Cabinet admits, Kentucky is suffering from an ambulance shortage. Mather Depo., Doc. 107-3, PageID #3243; Sullivan Depo., Doc. 107-4, PageID # 3343. Yet the challenged provisions allow incumbents to prevent out-of-state businesses like Legacy from entering the market and offering care. Not surprisingly, Certificate programs like Kentucky's are

associated with diminished access to health care services, higher out-of-pocket spending for consumers, and decreased quality of care. Mitchell Report, Doc. 107-4, 3469–3530. The burdens are therefore not only economic; the Certificate program harms public health.

There are no putative local benefits. The Cabinet and Intervenor contend that the competitor's veto props up locally subsidized 911 providers by stifling competition for more lucrative non-emergency trips. Putting aside that this does not qualify as a putative local benefit, *C & A Carbone, Inc.*, 511 U.S. at 393, the law is not directed to that end. It allows any incumbent—including non-emergency businesses—to protest any applicant and protects that incumbent against competition. Incumbents have even used the protest procedure and need requirement *against* 911 services and forced them into foregoing "lucrative" non-emergency services. *See, e.g.*, Harrods Creek Approval, Doc. 107-12, PageID # 4561, 4565, 4568, 4575; Jeffersontown Fire & EMS Approval, Doc. 107-12, PageID # 4507, 4509, 4531; Wooten Volunteer Fire & Rescue Approval, Doc. 107-12, PageID # 4611–13, 4615–17.[5] Notably, the

[5] This has happened at least 8 times over the last 13 years, including the cases of Harrods Creek, Jeffersontown, Wooten, Buechel, Eastwood, Fern Creek, Okolona, and Highview. *Id.* PageID # 4351-5078.

Intervenor in this case is a non-emergency transport business, not a tax-subsidized 911 service.

The Cabinet has not once cited an applicant's effect on taxes when denying a Certificate or suggested that tax money for 911 services would run out absent a denial. Orders, Doc. 107-12, PageID # 4351–5078. The protest procedure and need requirement are simply not directed toward their purported end and, in fact, can be used contrary to that end. Any benefits are therefore speculative, if not imaginary. *See, e.g.*, *Medigen of Kentucky, Inc.*, 985 F.2d at 167 (Certificate program for medical waste haulers unduly burdened interstate commerce because it limited access and likely increased prices); *see also Harper v. Pub. Serv. Comm'n of W. Va.*, 427 F.Supp.2d 707 (S.D. W. Va. 2006) (invalidating Certificate program under Commerce Clause); *Rullan*, 405 F.3d at 60 (Certificate requirement for pharmacies violated Commerce Clause because it permitted local interests to stifle competition and bore no relationship to promoting service in underserved area); *cf. New State Ice Co. v. Liebmann*, 285 U.S. at 274 (Certificate program for sellers of ice was economic protectionism that violated the Fourteenth Amendment); *Bruner v. Zawacki*, 997 F.Supp.2d at 700 (Certificate program for moving

companies was a competitor's veto that violated the Fourteenth Amendment).

The district court recognized that any evidence the Cabinet and Intervenor had with regard to tax-savings was flawed. Order on MSJ, Doc. 120, PageID # 5670 n.4. Nevertheless, it concluded that Legacy failed to show the program had *no* impact on taxes. *Id.* It then characterized all of Legacy's evidence as merely demonstrating a burden on Legacy itself rather than the interstate market as a whole. *Id.* at PageID # 5667. Weighing this weak benefit with essentially no burden, the court concluded the veto did not unduly burden interstate commerce. That reasoning mistakes what qualifies as a putative local benefit under *Pike* and ignores valid evidence of burdens on interstate commerce. Thus, the district court's opinion must be overturned even under *Pike*.

Whatever the constitutionality of the protest procedure and need requirement as a whole, the district court also failed to recognize that the Certificate program is *per se* unconstitutional to the extent it applies to interstate trips between Kentucky and other states. Not only does the program directly regulate interstate commerce in violation of *Buck v. Kuykendall*, 267 U.S. 307 (1925), it has the impermissible effect of

discriminating against out-of-state health facilities. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Last, Legacy appeals the dismissal of its Privileges or Immunities Clause Claim under the Fourteenth Amendment. Order on MTD, Doc. 94, PageID # 925. While that claim is currently precluded by the *Slaughterhouse Cases*, 83 U.S. 36, 77–79 (1872), the weight of academic opinion supports the conclusion that the case was wrongly decided. Legacy therefore raises the issue here for further appeal.

ARGUMENT

I. *C & A CARBONE* REQUIRES REVERSAL

The only rationale that the Cabinet and Intervenor offered for the competitor's veto is foreclosed by Supreme Court precedent. According to the Cabinet and Intervenor, non-emergency ambulance companies like Legacy (and ostensibly Intervenor-Defendant itself, who also solely performs non-911 runs) take lucrative non-emergency trips from 911 providers, who are sometimes locally subsidized with taxes. The protest procedure and need requirement therefore limit competition for non-

emergency runs, inflating 911 providers' profits and saving taxpayer money.[6]

The Supreme Court has rejected this very argument. In *C & A Carbone*, 511 U.S. 383, the city of Clarkstown wished to secure a local waste transfer station for its residents. To this end, it engaged a private business to build and operate the station. *Id.* at 386–87. If that business received less than the minimum level of expected profits, the city agreed to pay the deficit. *Id.* To avoid having to ask taxpayers to subsidize the company, the city passed a requirement that all non-recyclable waste within the town be processed through the transfer station. *Id.* A competing transfer station in the City sued, arguing that the law

[6] The Cabinet and Intervenor never explained the connection between saving taxpayer money and ensuring access to 911 services. Legacy's best reading of the argument is that the Cabinet speculates that if locally subsidized 911 providers lose enough money, there might not be enough taxpayer funds to cover the losses and the services will go extinct altogether. But neither the Cabinet nor the Intervenor have provided any evidence of this ever happening, and this argument makes little sense given that 911 services exist in many places (including many Kentucky cities) *without* any tax subsidy, let alone without a Certificate scheme. Certificate programs for ambulances exist in just 7 states, and yet 911 services are alive and well in all 50 states, including the 43 states without an ambulance CON program.

impermissibly burdened interstate commerce. The Supreme Court agreed. *Id.* at 387–88.

First, the Court ruled that the law was interstate in reach because it affected waste from other states that was imported into the city for processing. *Id.* at 389. Moreover, the law prevented anyone apart from a local provider from processing waste, thereby "depriv[ing] out-of-state businesses of access to a local market." *Id.*

Second, the Court ruled that the law was discriminatory because it channeled business to a favored provider. *Id.* at 391. It was "no less discriminatory because in-state or in-town processors [were] also . . . prohibit[ed]." *Id.* "The essential vice in laws of this sort is that they bar the import of the [relevant] service." *Id.* at 392. The law was therefore subject to "rigorous scrutiny," under which the government must show "it has no other means to advance a legitimate local interest." *Id.* at 392; *cf. Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (law requiring milk to be pasteurized within five miles of the City was discriminatory even if it applied equally to in-state and out-of-state producers).

Third, the Court ruled that ensuring the "town-sponsored facility will be profitable" and guaranteeing its "long-term survival" was not a

valid rationale for burdening interstate commerce. *C & A Carbone*, 511 U.S. at 395. If the town was worried about the facility's survival, it could resort to non-discriminatory means, like subsidizing the processing center through general taxes or municipal bonds, but it could not burden interstate commerce or exclude interstate providers from the market. The law therefore failed dormant Commerce Clause scrutiny. *See also Marietta Mem'l Hosp. v. W. Va. Health Care Auth.*, No. 2:16-cv-08603, 2016 WL 7363052, at *4 (S.D. W. Va. Dec. 19, 2016) ("favoring a state's own citizens is not a sufficient purpose, nor is advancing the state's economy while harming the economies of other states").

Under *C & A Carbone*, 511 U.S. at 393, the protest procedure and need review requirement must fall. First, they are interstate in reach because they apply to interstate trips between Kentucky and other states and because they exclude out-of-state providers from the Kentucky market. Second, they are discriminatory because they exclude out-of-state providers for the sole purpose of inflating the profits of favored, locally subsidized 911 providers. They are no less discriminatory merely because they burden both in-state and out-of-state providers. Third, keeping tax subsidies low or ensuring the viability of a locally subsidized

business cannot justify excluding competition from out of state. Kentucky can use non-discriminatory means, like raising Medicaid rates for 911 trips or increasing taxes to cover any deficits suffered by locally subsidized 911 providers, but it cannot burden interstate trips or exclude out-of-state competition.

The fact that the Cabinet and Intervenor omitted this tax-saving rationale from their discovery responses draws into question its authenticity. Defs. Discovery Responses, Doc. 107-12, PageID # 4335–36, 4339, 4343–44, 4447 (answers to interrogatories questioning the program's rationale). That speciousness is compounded by the fact that the justification lacks any connection to the protest procedure and need requirement's operation. Under Kentucky's scheme, *any* incumbent can protest *any* new business. This leads to the absurd result that even tax-subsidized 911 services—who supposedly require protection from competition—must undergo the onerous protest procedure and need requirement when starting up. Worse, non-emergency ambulance businesses can protest them. In fact, non-emergency ambulance businesses *have* protested prospective 911 providers—subjecting them to an expensive hearing and higher start-up fees and ostensibly increasing

any required tax subsidy. Non-emergency businesses have even been able to prevent 911 services from competing for non-emergency trips. *See, e.g.*, Harrods Creek Approval, Doc. 107-12, PageID # 4561, 4565, 4568, 4575; Jeffersontown Fire & EMS Approval, Doc. 107-12, PageID # 4507, 4509, 4531; Wooten Volunteer Fire & Rescue Approval, Doc. 107-12, PageID # 4611–13, 4615–17. In none of these cases did the Cabinet express concern that limiting prospective services to just 911 calls would threaten their viability or increase tax subsidies in the proposed service area. The Certificate program doesn't protect the profits of locally subsidized 911 companies; it protects the profits of any incumbent who chooses to exercise its veto privilege, sometimes at the expense of 911 providers. The ill fit between the means and asserted ends suggests this tax-saving rationale is a post hoc justification for obvious economic protectionism.[7]

[7] Moreover, companies can evade the program's supposed protections for 911 providers altogether by simply buying an existing company. That's exactly what the Intervenor in this case did after its application was protested and denied; it purchased another business and began operating under that company's Certificate. Young Depo. Doc. 111-1, PageID # 5572. It was not required to try again to demonstrate a need for its services to the Cabinet, or to again undergo the protest procedures that led to its denial. *Id.* PageID # 5574–75. It was free, as all purchasers are, to expand its business with no restrictions on volume—eating into 911 providers' profits at will. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S.

Because the district court failed to address binding precedent that precludes the Certificate program's rationales, the decision below must be overturned.

II. EVEN UNDER *PIKE*, THE COMPETITOR'S VETO MUST FALL

A. The burdens on interstate commerce outweigh any putative local benefits

Even under *Pike*, the protest procedure and need requirement fail because their burdens on interstate commerce outweigh any putative local benefits. 397 U.S. at 142 (State laws unduly burden interstate commerce when the burdens are "clearly excessive in relation to the putative local benefits."). The Certificate program affects interstate commerce in two ways: first, it burdens (and often outright excludes) out-of-state ambulance businesses who seek to do business in Kentucky. Between January 1, 2009, and January 1, 2022, all but one Class I out-of-state applicant was protested, and of those protested, all but one was denied. Orders, Doc. 107-12, PageID # 4351–5078. Protests lead to hearings that cost tens of thousands of dollars. *See* Statement of the Case,

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429, 444–45 (1978) (invalidating state law under dormant Commerce Clause where the state's justification was "undercut by [a] maze of exemptions").

supra. The only out-of-state business that managed to overcome a protest suffered through one such hearing and was able to prove that people in Kentucky were dying waiting for ambulances. Portsmouth Approval, Doc.107-12, PageID # 5055. The result is fewer out-of-state businesses to alleviate Kentucky's ongoing shortage. Second, the program burdens (and often outright excludes) providers who wish to conduct trips between Kentucky and other states. 202 KAR 7:501 § 6.

The district court noted that some applicants are, in fact, able to secure a Certificate. Order on MSJ, Doc. 120, PageID # 5671. But this has only been the case where (1) an incumbent did not perceive them as a threat, and therefore chose not to exercise its veto privilege, (2) an incumbent extracted a legally binding agreement from the applicant to limit its competitive threat or otherwise withdrew its protest, or (3) the applicant was able to prove that somebody died waiting for an ambulance or the protestor committed fraud through a need review hearing.

The competitor's veto therefore suppresses the interstate market for Kentucky ambulance services and drives down the number of businesses who may provide trips between Kentucky and other states. Legacy testified that multiple businesses and fire chiefs in Kentucky

have asked for assistance, but it was barred from helping. Legacy Depo., Doc. 107-7, PageID # 3690–3704. Legacy has also had to turn down many requests for service from Kentucky residents and facilities. *Id.* PageID # 3713; Truesdell Depo., Doc.107-1, PageID # 3155.

In addition to the burden the Certificate program imposes on interstate commerce, research shows that there is a human cost. Because they drive down competition, Certificate laws are associated with lower access to care, higher out-of-pocket costs, and lower quality services. Legacy's expert Dr. Matthew Mitchell, a leading scholar on Certificate laws, summarized 85 peer-reviewed multivariable regression analyses on the effect of need review laws across diverse medical fields across the country. Mitchell Report. Doc. 107-4, PageID # 3469–3530. He found that of those studies, 30 evaluated the effect of need review on access. *Id.* at PageID # 3491–92. Twenty-eight of the 30 studies found that need review is associated with lower access to care and two found mixed results. *Id.* Not one found better access. Dr. Mitchell summarized the research as follows:

> According to these findings, the average patient in a CON state has access to 30 percent fewer hospitals; 14 percent fewer ambulatory surgery centers (ASCs); 30 percent fewer *rural* hospitals; 13 percent fewer *rural* ASCs; 25 percent fewer

> open-heart surgery programs; 46 percent fewer facilities offering coronary artery bypass grafts (CABG); 20 percent fewer psychiatric care facilities; fewer hospitals offering revascularization; fewer dialysis clinics; fewer hospitals per cancer incident; fewer neonatal intensive care units (NICU); and fewer alcohol and drug abuse facilities. Patients in CON review states have access to fewer medical imaging devices and fewer hospital beds. They were also more likely to encounter bed shortages during COVID. Patients in these states face longer wait times, must typically drive further to obtain care, and are more likely to leave their states to obtain care.

The same goes for the effect of Certificate programs on consumers' out-of-pocket spending. Dr. Mitchell found that of the 13 peer-reviewed studies that evaluated the effect of need review on patient spending per service, 7 found Certificates are associated with higher spending per service and 6 found no effect. *Id.* at PageID # 3486–88. Not one found that Certificates reduce spending, and most concluded they had the opposite effect. Of the 18 studies that evaluated the effect of need review on total consumer out-of-pocket spending, 11 found need review is associated with higher spending and 7 found mixed, negligible, or statistically insignificant effects. *Id.* at PageID #3489. Again, not one found that need review lowers total spending.

Certificate programs also reduce the quality of care. Of the 30 reports Dr. Mitchell reviewed related to the effect of Certificate programs

on quality, 3.5 times as many studies find that need requirements *harm* quality than find that they enhance quality, and the latter only applied to highly technical medical fields, like percutaneous transluminal coronary angioplasties, where repetition of a highly skilled procedure leads to better outcomes. *Id.* at PageID # 3500.[8]

Dr. Mitchell's conclusions are borne out by the facts here. The Cabinet admits Kentucky is suffering from an ambulance shortage from which people are dying.[9] Mather Depo., Doc. 107-3, PageID #3243;

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[8] The protest procedure and need requirement are counterproductive to improving quality on their face, since they require hearing officers to *deny* applicants notwithstanding their qualifications if a hearing officer deems them not needed. Cutshall Depo., Doc. 107-5, PageID # 3602 (Q: Would you agree that the certificate process allows ambulance businesses to be denied even if they're qualified? A: I suppose it would.").

[9]Al Cross, *Short staffing of Kentucky ambulance services leads to deaths*, Kentucky Health News (Nov. 3, 2021), https://ci.uky.edu/kentuckyhealthnews/2021/11/03/short-staffing-of-kentucky-ambulance-services-leads-to-deaths/; *How Long until an ambulance gets to you? Kentucky services struggle with staffing*, Lexington Herald-Leader (Oct. 29, 2021), https://insurancenewsnet.com/oarticle/how-long-until-an-ambulance-gets-to-you-kentucky-services-struggle-with-staffing-lexington-herald-leader; Kelly Dean, *Edmonson County EMS facing critical staffing shortages*, WBKO News (Oct. 25, 2022), https://www.wbko.com/2021/10/25/edmonson-county-ems-facing-critical-staffing-shortages/; Alexis Matthews, *EMS agencies in Louisville feeling strain of staff shortages, high call volume*, WLKY (Nov. 9, 2022), https://www.wlky.com/article/louisville-paramedics-feeling-strain-of-staff-shortages/38203575.

Sullivan Depo., Doc. 107-4, PageID # 3343. And yet it is administering a program that allows incumbents to keep qualified out-of-state businesses like Legacy from coming in and helping.

These burdens are not outweighed by any putative local benefits. The only benefit asserted by the Cabinet and Intervenor—saving taxpayer money and therefore ensuring the viability of favored, state-supported services—is an illegitimate one. *See C & A Carbone, Inc.*, 511 U.S. at 393. But even if Kentucky could burden interstate commerce for this purpose, the Cabinet's and Intervenor's evidence is entirely speculative. The district court recognized that the only evidence the Cabinet and Intervenor offered, which purported to show Legacy's specific impact on taxes, was flawed. Order on MSJ, Doc. 120, PageID # 5670 n.4. And on its face, the veto has nothing to do with propping up 911 providers or saving tax money. As far as Legacy can tell, not one ambulance application has been denied on the basis that it would affect local taxes. And the Cabinet has acceded to non-emergency ambulance businesses' demands that new 911 providers *forego* these supposedly lucrative non-emergency trips. *See, e.g.*, Harrods Creek Approval, Doc. 107-12, PageID # 4561, 4565, 4568, 4575; Jeffersontown Fire & EMS

Approval, Doc. 107-12, PageID # 4507, 4509, 4531; Wooten Volunteer Fire & Rescue Approval, Doc. 107-12, PageID # 4611-13, 4615–17.

The only evidence in this case demonstrates the obvious: restricting supply through need review laws like Kentucky's tends to drive down access, not improve it. Mitchell Report. Doc. 107-4, PageID #3491–92. The Cabinet's and Intervenor's theory is highly dubious given that Kentucky is one of just seven states that imposes a form of need review on ambulances, and yet, there is no evidence that 911 services in other states are disappearing.

Importantly, "the extent of the burden that will be tolerated" under *Pike* "depend[s] . . . on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. There are several less burdensome and less anticompetitive means of achieving the Cabinet's purported goals than an anticompetitive protest procedure and need requirement that amount to a competitor's veto. The Cabinet could require non-emergency ambulance companies to handle some percentage of 911 calls as a condition of obtaining a Certificate. It could solely apply the protest procedure and need requirement to businesses that want to provide non-emergency care or reserve the protest privilege to 911

businesses. Most obviously, if low Medicaid reimbursement rates are causing locally subsidized 911 services to lose money, the state could raise Medicaid rates. The protest procedure and need requirement don't do any of these things. They allow *any* incumbent to protest and exclude *any* potential competitor for purely anticompetitive reasons. The failure to consider less burdensome alternatives is yet another reason the challenged provisions fail *Pike*.

Several courts have found that Certificate programs like Kentucky's violate the dormant Commerce Clause. In *Medigen of Kentucky, Inc.*, 985 F.2d at 167, the Fourth Circuit invalidated a need review law for transporters of medical waste under *Pike*. While the government claimed (like the Cabinet and Intervenor claim here) that the need requirement ensured reliable service throughout the state at reasonable prices, the Court ruled that the law *limited* the number of providers, and therefore the availability of such services. *Id.* Further, the need requirement was wholly unrelated to price; in fact, in the absence of price regulation, such a restriction would likely *increase* prices. *Id.* If the state was concerned with access and price, several other provisions furthered those goals, like the requirement that transporters offer their

services to all waste generators, thereby prohibiting cherry-picking. *Id.* State price regulations directly regulated prices, rather than the state's indirect scheme to control prices through need review. *Id.* And while the state claimed that "ruinous" competition would occur in the absence of need review, the court found no basis in the record for such speculation. *Id.*; *see also Harper v. Pub. Serv. Comm'n of W. Va.*, 427 F.Supp.2d 707 (S.D. W. Va. 2006) (invalidating Certificate requirement under Commerce Clause).

In *Rullan*, 405 F.3d at 60, the First Circuit invalidated Puerto Rico's need review law for pharmacies. The court found that in practice, the government deferred to largely local interests, who were permitted to protest new businesses "simply because [they] fear[ed] additional competition." *Id.* at 56. Although the government urged that the law encouraged pharmacies to operate in all parts of the Commonwealth, the First Circuit found that refusing to grant a pharmacy permission to operate in one area did not necessarily encourage the applicant to relocate to an underserved area. Need review therefore "cannot reasonably be thought to advance" ensuring access in underserved areas. *Id.* at 60; *cf. New State Ice Co.*, 285 U.S. at 274 (striking down need review

law for ice manufacturers under the Fourteenth Amendment); *Bruner*, 997 F.Supp.2d at 700 (holding that Kentucky's Certificate program for moving companies served no other goal than allowing incumbents to block competition).

The district court sidestepped each of these cases in favor of a single case from the Fourth Circuit, *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016). But there are several important differences between this case and *Colon Health*, including the fact that Virginia's rationale for the Certificate program in that case—encouraging businesses to provide more indigent care, charity care, and rural care—actually played a role in need review. The Fourth Circuit found that applicants were indeed evaluated based on the amount of indigent, charity, or rural care they provided. Moreover, the state asserted a rationale that is inapplicable to basic level ambulance services: channeling services to providers of highly technical medical services to practice their trade and improve their skill. Most importantly, the plaintiffs in *Colon Health* never made the contention that the program acted as a simple competitor's veto. Kentucky's Certificate program, which bears no relationship to its purported ends and allows incumbents

to dictate the acceptable amount of competition, is therefore far more like *Medigen* and *Rullan* than *Colon Health*.

Because the veto procedure creates demonstrable burdens without any demonstrable benefit, and because any purported benefit could be "promoted as well with a lesser impact on interstate activities," *Pike*, 397 U.S. at 142, it violates the dormant Commerce Clause.

B. The District Court applied *Pike* incorrectly

The district court ruled that the protest procedure and need requirement satisfy the *Pike* balancing test because Legacy "failed to identify burdens on interstate commerce." Order on MSJ, Doc. 120, PageID # 5666. It reasoned first that Legacy had not shown any discrimination against interstate commerce, and second that it failed to show any burdens on the interstate market as a whole. The district court therefore concluded that any burdens, if they existed at all, did not "clearly exceed the putative local benefits" of reducing tax subsidies and ensuring access to 911 services. That analysis was flawed. Even laws that apply with equal force to in-state and out-of-state businesses can unduly burden interstate commerce, and so the district court's conclusion that the law was non-discriminatory was irrelevant. Moreover, Legacy's

evidence focused almost entirely on the Certificate program's burdens on the market as a whole, rather than itself. Those burdens clearly exceed the veto's purely speculative (and impermissible) benefits.

1. A plaintiff need not show a law is discriminatory to succeed under *Pike*

The district court ruled that Legacy failed to show any burdens on interstate commerce because they did not show that the law was discriminatory against out-of-state businesses. Order on MSJ, Doc. 120, PageID # 5666. That conclusion is both false and irrelevant. A plaintiff need not show that a law is discriminatory to prevail on a dormant Commerce Clause claim. *Raymond Motor Transp., Inc.*, 434 U.S. at 443 (rejecting the suggestion that "some element of discrimination against interstate commerce" is required under *Pike*). Indeed, the entire premise of the *Pike* balancing test is that the plaintiff has *failed* to show that the law is discriminatory in purpose or effect, and thus the law is subject to a more lenient balancing test rather than the demanding standard applicable to discriminatory laws. In *Pike* itself, there was no allegation of discriminatory purpose or effect and the challenged order applied

equally to in-state and out-of-state businesses.[10] In sum, the district court's conclusion that Legacy failed to show discrimination should have been irrelevant to the *Pike* analysis.

2. Legacy demonstrated significant burdens on interstate commerce

The protest procedure and need requirement impose significant burdens on those wishing to participate in interstate commerce: tens of thousands of dollars in increased costs associated with satisfying need review; months, if not years, of delay; being coerced into signing an anticompetitive agreement; or, often, total exclusion from the market. Between January 1, 2009 – January 1, 2022, 82% of Class I ambulance applications were protested by incumbents, and all but two protested applications were either coerced into an anticompetitive agreement or excluded from the market entirely. Looking at out-of-state applicants specifically, all but one of the out-of-state applicants were protested, and

[10] Nevertheless, Legacy did demonstrate that the law was discriminatory. The Cabinet's and Intervenor's justification for the scheme (protecting tax-subsidized 911 providers from competition) is inherently discriminatory, since it seeks to preference local providers and excludes out-of-state businesses from participating in the market. *See C & A Carbone, Inc.*, 511 U.S. at 391.

all but one of the protested applicants were denied. Research shows these laws are associated with lower access, higher out-of-pocket spending, and lower quality, and indeed Kentucky is in the middle of an ambulance shortage during which people have died waiting for medical transportation. The veto prevents qualified out-of-state applicants like Legacy from coming in and filling the void.

Despite these undisputed facts, the district court ruled that Legacy did not show any cognizable burdens on the interstate market as a whole and only focused on the burdens to itself. Order on MSJ, Doc. 120, PageID # 5667. That's contradicted by the record. Legacy provided evidence that the protest procedure and need requirement impose significant burdens on all businesses that want to provide trips between Kentucky and other states, as well as businesses that wish to conduct trips in Kentucky, including out-of-state businesses. This evidence was not unique to Legacy's experience; it largely concerned the experience of *other* businesses. And it was drawn from the history of Class I ambulance applications over a 13-year period, depositions of administrative law judges who testified to their experiences ruling on Certificate applications, and Appellees' own expert.

Even if Legacy had only provided evidence unique to its own experience, courts have repeatedly considered evidence of a law's burden on the plaintiff when considering its impact on commerce as a whole. In *Pike* itself, a cantaloupe grower alleged that an Arizona law prohibiting transportation of uncrated cantaloupes would force it to lose its current crop and would compel it to build facilities in Arizona that would take many months to construct and cost approximately $200,000. 397 U.S. at 146. The Court noted that the challenged provisions did "not impose such rigidity on an entire industry," but "it d[id] impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources." *Id.*

Similarly, in *Raymond Motor Transp.*, 434 U.S. 429, the Court repeatedly pointed to the burdens that were specific to the plaintiff. For example, it found that the challenged regulations "slow[ed] the movement of goods in interstate commerce by forcing *appellants* to haul doubles across the State separately, to haul doubles around the State altogether, or to incur . . . delays," and "prevent[ed] *appellants* from accepting" certain jobs. *Id.* at 445 (emphasis added).

The district court was wrong to conclude that Legacy relied solely on evidence unique to its own experience. But nevertheless, any evidence unique to Legacy was relevant to the *Pike* analysis.

III. THE CHALLENGED PROVISIONS VIOLATE THE DORMANT COMMERCE CLAUSE TO THE EXTENT THEY DIRECTLY REGULATE INTERSTATE COMMERCE

Kentucky's Certificate requirement is also *per se* unconstitutional to the extent it applies to trips between Kentucky and other states. Kentucky permits out-of-state businesses to make *some* interstate trips without a Certificate, including transporting a patient into Kentucky, transporting a patient through Kentucky, responding to a mutual aid request by a Kentucky licensed provider under various circumstances, or providing non-emergency transport from a Kentucky health facility back to a patient's state of residence. 202 KAR 7:501 § 6. This leaves out several interstate trips that Legacy would like to make, including transporting Kentucky residents to an out-of-state health facility or doctor's appointment (despite that the same ambulance could legally take the patient *back* to Kentucky from that very appointment), and transporting Kentucky residents who temporarily reside in an out-of-state facility back to that facility from an appointment in Kentucky

(despite that the ambulance could legally take the patient *to* the appointment). Legacy receives requests for these trips but cannot make them. Legacy Depo., Doc 107-7, PageID # 3713. And while it may be technically true that Legacy is allowed to complete the *first* leg of a round trip to Kentucky, it's of little solace in the real world. By and large, consumers do not want to book separate trips, with different companies, for each leg. Most would prefer the ease of booking both legs with the same company, and that is something Kentucky law forbids Legacy from doing.

In *Buck v. Kuykendall*, 267 U.S. 307, the Supreme Court held that a Certificate requirement for interstate trips by common carriers violated the Commerce Clause. The Court reasoned that the law did not merely burden interstate commerce indirectly. Instead, it directly obstructed interstate commerce and prohibited competition for interstate services. *Id.* at 316. Its primary purpose was "not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." *Id.* at 315. It did not determine a "manner of use, but the persons by whom the highways may be used." *Id.* It concluded that any such requirement for an interstate trip was *per se* unconstitutional.

There's good reason for this conclusion. *Pike* is meant to apply to cases wherein legitimate uses of states' police power has "incidental" effects on interstate commerce. But where a state directly regulates interstate trips, its actions are less related to own its police powers than to Congress's commerce power. Second, courts have been especially skeptical of laws that are more concerned with protecting the reputation or profits of incumbents than implementing public health or safety standards. *See, e.g.*, *id.* (invalidating law where the "primary purpose [was] not regulation with a view to safety or to conservation of the highways, but the prohibition of competition"); *Pike*, 397 U.S. at 143 (invalidating law aimed at "enhanc[ing] the reputation of growers within the State"); *Raymond Motor Transp.*, 434 U.S. 429, 444 (invalidating truck regulation where challenger showed its practice did "not pose an appreciable threat to motorists.").

Since *Buck*, the Court has repeatedly struck down Certificate requirements that apply to purely interstate travel. *See, e.g.*, *Bush & Sons Co. v. Maloy*, 267 U.S. 317, 325 (1925) (certificate requirement for interstate carrying of freight "invaded a field reserved by the Commerce Clause for federal regulation"); *cf. Lloyd A. Fry Roofing Co. v. Wood*, 344

U.S. 157 (1952) (state permitted to require certificate that required mere registration). And it has more recently affirmed that "[t]he Commerce Clause . . . permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited." *Edgar v. MITE Corp.*, 457 U.S. 624, 641–42 (1982); *Sprout v. S. Bend, Ind.*, 277 U.S. 163, 171 (1928) ("The privilege of engaging in [interstate] commerce is one which a state cannot deny.").

Several lower courts have likewise struck down Certificate requirements that apply directly to interstate travel. *See, e.g.*, *Blease v. Safety Transit Co.*, 50 F.2d 852, 855 (4th Cir. 1931) (the question of whether a state can require a Certificate to operate in interstate commerce "has been so repeatedly answered in the negative as not to justify further discussion"); *Gulf Coast Motor Freight Lines v. United States*, 35 F.Supp. 136, 137 (S.D. Tex. 1940) (imposing certificate requirement on interstate commerce is "beyond the constitutional power of the state"); *Matson Navigation Co. v. Hawaii Pub. Utilities Comm'n*, 742 F.Supp. 1468 (D. Haw. 1990) ("it would be wholly improper for the state to require a certificate . . . for shipments [that] are purely interstate"); *Port of Seattle v. Washington Utilities & Transp. Comm'n*,

597 P.2d 383, 390 (Wash. 1979) (same); *United States v. Union Pac. R. Co.*, 20 F.Supp. 665, 667 (D. Idaho 1937) (same); *Magnuson v. Kelly*, 35 F.2d 867, 869 (E.D. Ky. 1927) (same). To the extent that the certificate requirements apply to solely interstate trips, they are *per se* unconstitutional.

The district court distinguished *Buck* and its progeny on the basis that, under Kentucky's scheme, *some* interstate trips are permitted. Ord. on MSJ, Doc. 120, PageID # 5674. It therefore reasoned that Kentucky's program was more "carefully crafted" than the scheme in *Buck*. *Id.* That's irrelevant. What makes Certificate programs invalid under *Buck* and other cases is that they directly regulate interstate trips. It makes no difference whether a state only directly regulates *some* interstate trips.

The application of the Certificate requirement to interstate trips is also unconstitutional because it has the effect of discriminating against out-of-state health facilities. Legacy and other out-of-state businesses can take patients from outside the state to Kentucky health facilities without a Certificate, but those same providers can only take patients from Kentucky to health facilities in other states if they secure a

Certificate. 202 KAR 7:501 § 6. The law therefore has the obvious effect of channeling interstate commerce to Kentucky healthcare facilities.

When a law discriminates against out-of-state commerce in design or in effect, the state must show that it serves a legitimate local purpose that cannot be met by non-discriminatory means. *Oregon Waste Sys., Inc v. Dep't of Env't Quality of the State of Or.*, 511 U.S. 93, 101 (1994). As argued above, the law serves no legitimate purpose, and in any event, there are plenty of neutral means the state could implement, like raising reimbursement rates, or requiring that ambulances provide both 911 and non-emergency care.

The district court ruled that Legacy lacked "factual or legal support" for this claim and therefore made a "half-hearted" argument. Order on MSJ, Doc. 120, PageID # 5674 n.8. But this self-evident fact requires no factual support. It is a purely legal argument that is apparent from the law's face. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 576 (1997) (invalidating law that expressly distinguished between entities that serve a principally interstate clientele and those that primarily serve an intrastate market). The law,

by its own terms, favors trips to local providers. It therefore faces a "virtually *per se* rule of invalidity," which it cannot overcome.

IV. THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECTS THE RIGHT TO EARN A LIVING

In addition to its Interstate Commerce Clause claims, Legacy alleged that the protest procedure and need requirement violate its right to earn a living under the Privileges or Immunities Clause of the Fourteenth Amendment. Second Am. Complaint, Doc. 63, PageID # 665. The district court dismissed that claim under Rule 12(b)(6), reasoning that it is precluded by the *Slaughterhouse Cases*, 83 U.S. 36, 77–79 (1872). Order on MTD, Doc. 94, PageID # 939. While that case controls here, Legacy believes it was incorrectly decided and thus argues here that dismissal was inappropriate to preserve the issue for further appeal.

In the *Slaughterhouse Cases*, a group of butchers challenged a law that granted a monopoly to a local slaughterhouse. *Id.* at 65. They argued that the law deprived them of their right to earn a living in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. In a 5–4 decision, Justice Miller upheld the law on the basis that the Clause protected only those rights that inhere in federal citizenship. *Id* at 77–79. As Justice Stephen Field observed in dissent, those rights were

already protected from state infringement by the Supremacy Clause prior to the passage of the Fourteenth Amendment. *Id.* at 97. The majority thus rendered the Privileges or Immunities Clause a "vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage." *Id.*

Even at the time, legislators present at the framing of the Fourteenth Amendment and legal commentators criticized Justice Miller's opinion. *See* Randy E. Barnett & Evan Bernick, *The Original Meaning of the Fourteenth Amendment* 206 (2021). A growing body of legal opinions further suggest that the *Slaughterhouse Cases* were wrongly decided. Several Supreme Court Justices have expressed doubt about the Court's treatment of the clause. *See, e.g.*, *Timbs v. Indiana*, 139 S.Ct. 682, 691 (2019) (separate concurring opinions of Gorsuch, J., and Thomas, J.); *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010) (Thomas, J., concurring); *Saenz v. Roe*, 526 U.S. 489, 522, n.1 (1999) (Thomas, J., dissenting); Transcript, Kavanaugh Supreme Court Hearing (CNN aired Sept. 5, 2018) (observing that the Ninth Amendment, the Privileges or Immunities Clause, and substantive due process all "protect[] certain unenumerated rights so long as the rights are . . . rooted

in history and tradition").[11] And several legal scholars urge reconsideration of the *Slaughterhouse Cases*. *See, e.g.*, Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause,* 43 Harv. J.L. & Pub. Pol'y 1 (2020); Randy E. Barnett & Evan Bernick, *The Original Meaning of the Fourteenth Amendment* (2021); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L & Liberty 115 (2010); Am. Br. of Constitutional Law Professors in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), 2009 WL 4099504 (U.S. Nov. 23, 2009).

The history and language of the Privileges or Immunities Clause support the conclusion that the *Slaughterhouse Cases* depart from the Clause's original public meaning. The Fourteenth Amendment was enacted in response to recalcitrance of former slave states, who continued to deprive formerly enslaved people of their civil rights in the form of the Black Codes and other state laws even after their defeat in the Civil War and passage of the Thirteenth Amendment. *See* Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, *supra.* The

[11] *Available at* http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html.

authors intended to end state infringements on liberty by providing protection at the federal level.

One of Congress's chief concerns was protecting those rights enshrined in the Civil Rights Act of 1866, which had been vetoed by President Andrew Johnson on the basis that it exceeded Congress's power under the Thirteenth Amendment. Though Congress was able to surmount the veto with a supermajority vote, legislators remained concerned about the law's constitutionality. They therefore sought to constitutionalize the Act, which was overwhelmingly concerned with providing Black citizens with economic rights, like the right to contract and to hold property, and securing them from state violations. Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 228 (2003).

A broad interpretation of the Privileges or Immunities Clause is further bolstered by the use of the terms "privileges" and "immunities," which were widely understood as synonymous with fundamental civil and natural rights. James Madison, for example, spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people." 1 Annals of Congress 453, 458 (1789). Those same two terms were also used in the Privileges *and* Immunities Clause of Article IV,

which according to Supreme Court Justice Bushrod Washington, protected:

> the enjoyment of life and liberty . . . and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . [and] to take, hold and dispose of property, either real or personal . . . and many others[.]

Corfield v. Coryell, 6 F.Cas. 546, 552 (C.C.E.D. Pa. 1823).

Senator Jacob Howard confirmed this understanding of the words "privileges" or "immunities" when he introduced the Fourteenth Amendment as its sponsor in Congress. In a speech articulating the Amendment's meaning, he said that while the full scope of the terms "cannot be fully defined in their entire extent and precise nature," they included at the very least those unenumerated rights protected by Article IV's Privileges and Immunities Clause and the first eight Amendments. Cong. Globe, 39th Cong., 1st Sess., 2764–67 (May 23, 1866). Representative John Bingham, who authored the Clause, confirmed that among those unenumerated rights is "the liberty . . . to work in an honest calling and contribute by your toil in some sort to yourself [and] to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42nd Cong. 1st Sess., App. 86 (Mar. 31 1871).

That is exactly the right Legacy seeks to vindicate in this case. *See* Truesdell Depo., Doc. 107-1, PageID # 3164 ("[W]e're a small family business and we deserve to work like anybody else.").

Legacy acknowledges that only the Supreme Court can overrule the *Slaughterhouse Cases*. It therefore raises the issue here to preserve it for further appeal.

CONCLUSION

Appellants respectfully request that this Court reverse and grant summary judgment in their favor.

DATED: November 1, 2022.

Respectfully submitted,

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ANASTASIA P. BODEN

ADDENDUM

DESIGNATION OF RELEVANT DOCUMENTS

Docket Entry	Document Name	PageID#
63	Second Amended Complaint	648-668
94	Memorandum Opinion and Order Granting in Part & Denying in Part Defendant's Motion to Dismiss	925-939
107-1	Deposition of Phillip Truesdell	3113-3173
107-2	Deposition of Hannah Howe	3174-3210
107-3	Deposition of Adam Mather	3211-3278
107-4	Deposition of Daniel Sullivan	3279-3388
107-4	Expert Report of Matthew Mitchell, Ph.D.	3469-3530
107-5	Deposition of Sean Cutshall	3582-3607
107-6	Deposition of Kris Carlton	3608-3639
107-7	Deposition of Legacy	3640-3780
107-8	Deposition of Dr. Matthew Mitchell	3781-3924
107-12	Declaration of Anastasia Boden in Support of Plaintiff's MSJ	4330-4333

107-12	Defendants' Answers to Plaintiff's First Set of Interrogatories	4334-4341
107-12	Intervenor-Defendant's First Supplemental Answers to Plaintiffs' First Set of Interrogatories	4342-4348
107-12	Opinions and Orders on Class I CON Applications	4351-5078
110-1	Excerpts from Deposition of Dennis Young, Part 1	5572-5576
115-1	Excerpts from Deposition of Dennis Young, Part 2	5621-5627
120	Memorandum Opinion & Order on Parties' MSJs	5655-5676
121	Judgment	5677

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