No. 17-

In the Supreme Court of the United States

SOUTHERN CALIFORNIA EDISON COMPANY,

Petitioner,

v.

THE STATE OF NEVADA DEPARTMENT OF TAXATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEVADA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation*, this Court held that a taxpayer is entitled to meaningful post-deprivation relief when it has paid taxes found to discriminate against interstate commerce in violation of the dormant Commerce Clause. 496 U.S. 18, 31 (1990). In *General Motors Corp. v. Tracy*, this Court elaborated that the "notion of discrimination" with which the dormant Commerce Clause is concerned "assumes a comparison of substantially similar entities." 519 U.S. 278, 298 (1997). Twenty years later, the lower courts are sharply divided over what a taxpayer must prove to show that a state law discriminates against interstate commerce in a way that favors one "substantially similar" entity over the other and therefore entitles the disfavored party to a remedy.

The question presented is:

Whether proof that a tax scheme violates the dormant Commerce Clause by favoring in-state interests over out-of-state interests, and thereby advantages some competitors over others within the same market, is sufficient to entitle the disfavored competitors to a remedy?

RULE 29.6 STATEMENT

Southern California Edison Company is a subsidiary of Edison International, a publicly-held company. No other company owns 10 percent or more of Southern California Edison Company's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Southern California Edison Company respectfully petitions this Court for a writ of certiorari to review the judgment of the Nevada Supreme Court in this case.

OPINIONS BELOW

The opinion of the Nevada Supreme Court (App. 1a-18a) is reported at 398 P.3d 896. The opinion of the First Judicial District Court of the State of Nevada In and For Carson City (*id.* at 19a-39a) is not reported.

JURISDICTION

The Nevada Supreme Court entered judgment on July 27, 2017. App. 1a. On October 10, 2017, Justice Kennedy granted petitioner's request for an extension to November 21, 2017 to file a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides, in relevant part, that "The Congress shall have Power . . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

INTRODUCTION

The Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later

among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). This Court has long recognized that the resulting Commerce Clause was not merely an affirmative authorization of power to Congress, but also "a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). Pursuant to that limitation, "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imps. Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (alterations in original) (citations omitted).

In this case, it is *undisputed* that Nevada did just that, imposing a six- or seven-fold higher tax on the purchase, use, or consumption in Nevada of mineral resources extracted outside the State than it imposed when those same mineral resources were extracted inside the State. Because that taxing scheme facially discriminates against interstate commerce, both sides agree—and the Nevada Supreme Court assumed—that Nevada's differential treatment of the proceeds of in- and out-of-state mines violates the dormant Commerce Clause.

Petitioner Southern California Edison Company (SCE), which produced power for many years using coal mined outside of Nevada, paid tens of millions of dollars of additional taxes annually pursuant to that taxing scheme, which all now agree was unconstitutional. The sole question in this case is whether a party in SCE's position is entitled to a remedy for that unconstitutional discrimination. This Court's decisions establish certain threshold guideposts for answering that question, but the

lower courts have divided on how to apply those rules—with some courts, like the Nevada Supreme Court below, denying the victims of discrimination a remedy, and other courts providing substantial relief.

Ordinarily, of course, a wrong begets a remedy. And, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation*, this Court held that a taxpayer that has paid taxes found to violate the dormant Commerce Clause is entitled to meaningful post-deprivation relief—such as a refund of the difference between the discriminatory tax paid by the taxpayer and the lesser tax paid by those favored by the scheme. 496 U.S. 18, 31 (1990).

In *General Motors Corp. v. Tracy*, the Court elaborated that the "notion of discrimination" that the dormant Commerce Clause protects against assumes "a comparison of substantially similar entities." 519 U.S. 278, 298 (1997). The lower courts are divided, however, over what renders taxpayers "substantially similar" for these purposes. At least five courts have held that "[e]ntities are 'substantially similar' or 'similarly situated' for Commerce Clause purposes when they compete against one another in the same market." *Smith v. New Hampshire Dep't of Revenue Admin.*, 813 A.2d 372, 377 (N.H. 2002). Other courts have held that "competing in the same market is *not* sufficient to conclude that entities are similarly situated" for purposes of the dormant Commerce Clause. *National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009) (emphasis added). Those courts have held that a disfavored entity is not entitled to a remedy

unless it proves, in addition, that it is in structure and operation the mirror image of favored competitors. *See, e.g., id* (requiring the businesses to be identically structured); *DIRECTV, LLC v. Department of Revenue*, 25 N.E.3d 258, 271 (Mass.) (requiring the businesses to be identically regulated), *cert. denied*, 136 S. Ct. 401 (2015).

This case crystalizes that conflict of authority. As the Nevada Supreme Court acknowledged, SCE presented evidence that it was disadvantaged as a competitor in the wholesale power market because Nevada taxed mineral resources extracted outside the State (such as the coal on which SCE relied to generate electricity at its Nevada power plant) at a higher rate than mineral resources extracted within the State (such as the geothermal steam on which some of its competitors relied). App. 11a-12a. Even though it acknowledged SCE's evidence that "all energy producers compete against each other regardless of the fuel source used," the Nevada Supreme Court held that SCE was not similarly situated for Commerce Clause purposes to its lower-taxed competitors in the wholesale power market because they relied on different "inputs" (oil, gas, and geothermal steam, rather than coal) to generate their energy, and that SCE thus was not entitled to any relief for an acknowledged violation of the Commerce Clause. *Id.* at 12a-13a. Numerous other jurisdictions would have adjudged SCE's competitors similarly situated and ordered a remedy.

This conflict of authority exposes those who have paid unconstitutional taxes to diametrically opposed outcomes depending on where within the country they are located. The Court should grant review to

resolve that conflict and effectuate the important interests served by the Commerce Clause.

STATEMENT OF THE CASE

A. The Commercial Electricity Market

Over 99% of the electricity commercially produced in the United States is generated through electromagnetic induction, a process by which magnets are passed over a coil of wire in order to induce an electric current to flow. JANV920.[1] Most of that electricity is produced by manufacturing or harnessing steam to propel a turbine, which rotates either the magnets or the wire so as to generate the electric current. *Id.* The steam used to produce commercial electricity is generated from a variety of energy sources, such as by burning fossil fuels like coal, natural gas, or oil; boiling water in a nuclear reactor; or tapping underground geothermal sources. *Id.* Other sources of energy—such as wind power, falling water, or flowing tides—generate the force necessary to spin a turbine without the intermediate step of generating steam. *Id.*

Commercial electricity producers employ one or more of these different resources to generate electricity on a large scale. *Id.* at 920-22. Whether a power plant relies on coal, natural gas, nuclear power, geothermal, wind, or another source of energy, it typically will follow the same basic process—electromagnetic induction—to create the same homogeneous end product—electricity. *Id.* at 921-22. Producers will then sell power either directly to end users or within the wholesale

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[1] JANVxx refers to the Joint Appendix filed in the Supreme Court of Nevada.

electricity market to others who sell to end users. *Id.*

Consumer demand for electricity varies depending on the time of day, the season, and myriad other considerations. As demand fluctuates, wholesale power system operators will deploy or "dispatch" electricity from different plants, generally proceeding in order from lowest cost to highest cost, to meet overall consumer needs in an economically efficient manner. *Id.* at 923. The lower the cost at which a particular power plant can generate electricity, the higher its operational priority within the power system. *Id.*

To maximize the use of and returns generated by their power plants, producers compete with each other to supply electricity at the lowest possible operational cost. *See id.* The relative cost of acquiring and employing different resources to produce electricity therefore plays a critical role in determining a particular power plant's and producer's competitiveness within the market. *See id.*

B. Nevada's Unconstitutional Taxing Scheme

Nevada Revised Statute § 372.185 imposes a use tax on "the storage, use or other consumption in [Nevada] of tangible personal property purchased from any retailer" in an out-of-state transaction "that would have been a taxable sale if it had occurred within [Nevada]." Nevada Revised Statute § 372.270, however, exempts from that use tax "the gross receipts from the sale of, and the storage, use or other consumption in [Nevada] of, the proceeds of mines which are subject to taxes levied pursuant to

chapter 362 of [the Nevada Revenue Statutes]." Chapter 362, in turn, establishes a net proceeds tax applicable to all "minerals" extracted in Nevada, including coal, oil, natural gas, and geothermal steam. *See* Nev. Rev. Stat. §§ 362.010(2), 362.100(2)(b)-(c). As a result, Nevada law imposes a use tax exclusively on coal and other sources of energy extracted *outside* of Nevada—including coal, oil, natural gas, and geothermal steam—while exempting from that tax those same sources of energy when extracted *inside* Nevada, which are subject only to the State's net proceeds tax.

Petitioner presented undisputed evidence at trial that the effective rate of the net proceeds tax applicable to mining operations inside Nevada was roughly one percent, while the effective rate of the use tax applicable to resources extracted outside Nevada and subsequently brought into the State was six or seven percent. *See* App. 6a-7a. The net effect of that discrepancy was to discriminate against interstate commerce, by favoring those who used resources extracted in-state over those who used resources extracted out-of-state.

In *Sierra Pacific Power Co. v. State of Nevada Department of Taxation* (No. CV09-3554), a Nevada district court held that Nevada's differential taxation of domestic and out-of-state minerals "facially discriminates against interstate commerce" in violation of the dormant Commerce Clause. JANV342. On appeal to the Nevada Supreme Court, the Nevada State Department of Taxation—respondent here—conceded that "'[t]he District Court acted properly in finding the exemption in [Nevada Rev. Stat.] 372.270 facially discriminatory and therefore invalid." *Id.* at 213 n.3 (quoting

Respondent's Answering Br. 4, *Sierra Pac. Power Co. v. State of Nevada Dep't of Taxation & Clark Cty.*, No. 61193 (Nev. Sup. Ct. Jan. 28, 2013)); *see also Sierra Pac. Power Co. v. State of Nevada Dep't of Taxation*, 338 P.3d 1244, 1245 (Nev. 2014) (hereinafter *Sierra Pacific*) ("The district court found, and the parties do not dispute on appeal, that [Nevada Revised Statute] 372.270's tax exemption for locally mined minerals violates the dormant Commerce Clause of the United States Constitution . . . .").

C. The Impact Of Nevada's Unconstitutional Scheme On Competition

Nevada lies within the Western Interconnected Grid, a large, integrated power grid comprising all or portions of 14 Western States, along with British Columbia, Alberta, and northern Baja California, Mexico. JANV921. Within that area, local electricity grids are interconnected to form larger networks for reliability and commercial purposes. Pursuant to those pervasive connections, electricity consumers within the Western Interconnected Grid consume power generated both inside and outside Nevada, using resources mined both inside and outside the State. *See id.* at 868, 919-21.

During the time period relevant to this case, much of the electricity generated in Nevada was produced using resources from outside the State. For instance, even though "there [were] no known coal deposits in Nevada of sufficient size to feed a commercial electrical power plant," JANV969, a substantial amount of the electricity generated by Nevada power plants was fueled by coal, *see, e.g.*, *id.* at 926. That coal was subject to Nevada's use tax,

Nev. Rev. Stat. § 372.185, increasing the overall costs at those power plants and diminishing their competitiveness.

Other electricity generated in Nevada was fueled by resources mined within the State. According to the Nevada Commission on Mineral Resources, during 1998-2000, oil, natural gas, and geothermal energy "was or could have been used for the production of electricity." JANV971. In particular, a significant amount of geothermal energy extracted in Nevada between 1998 and 2000 was "used for the commercial production of electricity." *Id.* at 972.[2] Fourteen power plants (operating at ten Nevada sites) sold $93 million in electricity generated from geothermal sources, reflecting over 1,630,000 megawatt-hours of gross production, in 1998 alone. *Id.* at 868. But unlike out-of-state coal, in-state geothermal sources employed to produce electricity were *exempt* from Nevada's use tax, Nev. Rev. Stat. § 372.270, and subject instead only to Nevada's lesser net proceeds tax. *See, e.g.*, JANV746, 775.

As the Nevada Bureau of Mines and Geology has recognized, the overall cost at which electricity may be generated from one resource (like geothermal steam) impacts the competitiveness of electricity generated from other resources (like coal). *See id.* at 834 ("Relatively low prices for coal and an end of price subsidies have discouraged development of known geothermal resources and exploration for new resources."). Because the use tax imposed on out-of-state minerals used to produce electricity in Nevada

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[2] Oil and natural gas extracted in Nevada may also have been used by Nevada power plants between 1998-2000, but on a "small scale." JANV971-72.

vastly exceeded the net proceeds tax imposed on in-state resources employed to produce electricity in Nevada, power plants generating electricity from geothermal steam harnessed within Nevada enjoyed a competitive economic advantage over power plants reliant on out-of-state coal.

D. This Litigation

SCE is an electric utility company serving 14 million customers in Nevada, Arizona, and California. During all times relevant to this case, it owned a majority interest in, and was the operator of, the Mohave Generation Station ("Mohave"), a coal-fired power plant in Clark County, Nevada. JANV215. Mohave purchased coal exclusively from Peabody Western Coal Company, which mined the coal in Arizona. That coal was transported from Arizona to Nevada, where it was used to generate electricity.

For the tax period of March 1998 through December 2000, SCE paid $23,896,668 in use tax for the coal it used at Mohave.[3] *Id.* SCE timely filed a claim for a refund from the Nevada Department of Taxation (the "Department"), claiming that the State's imposition of a use tax on the purchase, use, or consumption of resources extracted outside the State, while charging a much lower net proceeds tax on resources extracted in the State, discriminated against interstate commerce in violation of the

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[3] SCE also filed timely claims for a refund of tax paid for periods between January 2001 through and including December 2005. The parties have agreed that, to the extent the ultimate judgment in this case is based on conclusions applicable to those claims, the final judgment in this case shall be dispositive of those claims as well.

dormant Commerce Clause. *Id.* at 345. The Department denied the claim. *See id.*

On appeal, the Nevada Tax Commission (the "Commission"), operating in a closed session, initially granted SCE's request for a refund. *Id.* at 345-50. The district court affirmed that decision, but the Nevada Supreme Court reversed, finding that the Nevada Tax Commission had violated Nevada's Open Meeting Law. *Chanos v. Nevada Tax Comm'n*, 181 P.3d 675, 683 (Nev. 2008); *see also* App. 3a n.4. When the Commission re-heard SCE's request in an open session, it reversed course and denied the refund without citing any new facts or law. *See* JANV1071-73.

SCE then filed an independent action in district court, seeking a refund of use taxes it paid between March 1998 and December 2000.[4] After conducting a bench trial, but before entering its final decision, the district court stayed the matter pending the Nevada Supreme Court's decision in *Sierra Pacific*, which presented certain overlapping issues. App. 3a-4a. Two weeks after the Nevada Supreme Court decided *Sierra Pacific*, the district court issued its opinion. The district court found, and the

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[4] The district court initially dismissed this action on grounds that the proper method for challenging the Commission's denial was through a petition for judicial review rather than trial de novo, but the Nevada Supreme Court overturned that decision on a writ of mandamus, ruling that the Department was "judicially estopped from asserting that a petition for judicial review is the sole remedy because it specifically told [SCE] that trial de novo would be available if [SCE] was unhappy with the Commission's decision." App. 3a n.5 (quoting *Southern Cal. Edison v. First Judicial Dist. Court*, 255 P.3d 231, 233 (Nev. 2011)).

Department did not dispute, that Nevada Revised Statute § 372.270 (the provision exempting from the use tax various resources only when extracted inside Nevada) unconstitutionally discriminated against interstate commerce in violation of the dormant Commerce Clause. *Id.* at 4a.

Nonetheless, relying on *Sierra Pacific*, the district court held that SCE could not obtain a refund because it failed to prove that any similarly situated competitors received the tax exemption. *Id.* at 13a. The court found SCE had "not been taxed differently than any other similarly situated taxpayer *on the use of coal* in the state of Nevada." *Id.* at 25a (emphasis added); *see also id.* at 28a ("There is no evidence in the record that SCE's market competitors have claimed an exemption from the payment of Sales and Use tax pursuant to [Nevada Revised Statute §] 372.270 *on the purchase of coal*." (emphasis added)). On that basis, it concluded that SCE did not suffer any competitive injury from Nevada's unconstitutional scheme. App. 31a-32a.

SCE appealed to the Nevada Supreme Court. As it had before the district court, SCE pointed to evidence that Mohave competed with other Nevada power plants that generated electricity from a variety of resources (including geothermal steam) extracted in Nevada, whereas SCE used a source of energy (coal) extracted outside Nevada. SCE also cited evidence that Nevada Revised Statute § 372.270 resulted in over $217 million in exemptions from the use tax in 1999 alone, including for sources of energy extracted in Nevada. *See* JANV615. Noting that electricity providers that relied on sources of energy extracted in Nevada were

advantaged relative to it, SCE argued that the district court erred in holding that it was not entitled to a refund.

On July 27, 2017, the en banc Nevada Supreme Court nonetheless affirmed. App. 1a, 18a. The court recognized that, under *McKesson*, 496 U.S. at 31, due process requires courts to provide "meaningful backward-looking relief" to correct taxes paid pursuant to an unconstitutional scheme that violates the dormant Commerce Clause. App. 10a. It observed, however, that under its recent decision in *Sierra* Pacific, "[f]or a dormant Commerce Clause violation to exist, the claimed discrimination must create a competitive advantage between . . . 'substantially similar entities.'" *Id.* at 11a (alteration in original) (quoting *Sierra Pac.*, 338 P.3d at 1249). And it held that SCE failed to meet that test.

According to the Nevada Supreme Court, SCE failed to establish the existence of any "substantially similar entities that gained a competitive advantage" because it did not prove that SCE competed against any electricity producers that used *coal* mined in-state. *Id.* at 2a, 10a-12a. The court acknowledged SCE's argument that Nevada Revised Statute § 372.270 favored power plants that used *other* sources of energy extracted in Nevada (like geothermal steam) over power plants, like Mohave, that relied on sources of energy extracted outside Nevada. *Id.* at 12a. The court also did not contest SCE's showing that "geothermal, oil, and natural gas power plants provide the same homogeneous commoditized *output* as coal power plants—electrical energy," nor that "all energy producers compete against each other regardless of the fuel source

used." *Id.* (emphasis added). But it nonetheless held that SCE could not rely on its competition with tax-favored power plants that used other "inputs" (*i.e.* natural gas, oil, or geothermal heat), rather than coal, to generate energy. *See id.* at 12a-13a.

The Nevada Supreme Court acknowledged that this approach "may be . . . inconsistent" with the Alabama Supreme Court's decision in *Ex parte Surtees*, 6 So. 3d 1157, 1163 (Ala. 2008), which held that a "favored competitor" need not be the "mirror image" of the taxpayer seeking a refund in order for due process to require a remedy. App. 9a n.8. But the Nevada Supreme Court rejected the Alabama Supreme Court's approach, explaining that it "believe[d] that *McKesson* . . . contemplate[s] true economic competition"—a showing that it believed could be satisfied only by pointing to a "coal-using competitor [who] was favored." *Id.* at 10a n.8, 12a.

REASONS FOR GRANTING THE WRIT

The lower courts are divided over when a taxpayer that has established discrimination in violation of the Commerce Clause is entitled to a remedy for that discrimination. That question is important and warrants this Court's review.

I. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF OTHER COURTS

A. The Nevada Supreme Court's Decision Widens A Significant Divide Among The Lower Courts

A substantial and recurring conflict exists among the lower courts over the circumstances in which a

taxpayer is entitled to the meaningful post-deprivation relief envisioned by *McKesson*.

1. Although the Commerce Clause is framed as a positive grant of power to Congress, this Court has "consistently held [the Clause] to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). James Madison, for one, considered this aspect of the Commerce Clause to be "the more important" one, explaining that the provision was primarily intended "as a negative and preventive provision against injustice among the States themselves, rather than as a power used for the positive purposes of the General Government." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting 3 Max Farrand, *The Records of the Federal Convention of 1787* at 478 (1911)).

The dormant Commerce Clause addresses "a central concern of the Framers." *Wynne*, 135 S. Ct. at 1794 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)). "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in the judgment). Under the Articles of Confederation, "each State was free to adopt measures fostering its own local interests without regard to possible prejudice against nonresidents," leading to a "'conflict of commercial regulations, destructive to the harmony of the

States.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons*, 22 U.S. at 224). That "drift toward . . . commercial warfare between states" quickly came "'to threaten at once the peace and safety of the Union.'" *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949) (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 260 (1833)). Remedying and preventing recurrence of that state of affairs was a principal aim—and "the immediate cause"—of the Constitutional Convention. *Gibbons*, 22 U.S. at 224 (Johnson, J., concurring in the judgment); *see also H.P. Hood & Sons, Inc.*, 336 U.S. at 534.

In light of the vital national interests served by the dormant Commerce Clause, this Court has been vigilant to enforce its "fundamental command . . . that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Associated Indus. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). The Court has thus not hesitated to strike down state tax schemes contravening the "cardinal rule" that "[no] State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (alterations in original) (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977)).

2. "[A] ruling that a tax is unconstitutionally discriminatory under the Commerce Clause places substantial obligations on the States to provide relief . . . ." *American Trucking Ass'n v. Smith*, 496

U.S. 167, 181 (1990). The lower courts are sharply divided, however, with respect to what renders a disfavored taxpayer sufficiently "similarly situated" to entities favored by a tax to render the tax one that discriminates against interstate commerce and requires a remedy. This conflict has manifested itself not only in determining when a taxpayer is entitled to a remedy for discrimination in violation of the Commerce Clause, but also (in some instances) in determining whether a taxpayer has established a cognizable injury under the Commerce Clause to begin with.

a. A tax may be found to discriminate against interstate commerce in one of several ways: first, as here, the tax may discriminate against interstate commerce on its face, *see, e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 575; alternatively, a tax may be facially neutral, but nevertheless further a discriminatory purpose or advance a discriminatory effect, *see, e.g.*, *Bacchus*, 468 U.S. at 271.

Even when a tax facially discriminates against interstate commerce, a taxpayer is entitled to post-deprivation relief only if it can show that it was disfavored relative to similarly situated entities. *See, e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 585 n.17. As this Court explained in *McKesson*, only a party "placed . . . at a relative disadvantage in the marketplace vis-à-vis competitors" is entitled to a "'clear and certain remedy' for the deprivation of tax moneys in an unconstitutional manner." 496 U.S. at 48, 51 (citation omitted). That limitation accords with the "dormant Commerce Clause's fundamental objective of preserving a national market for *competition* undisturbed by preferential advantages

conferred by a State upon its residents." *Tracy*, 519 U.S. at 299 (emphasis added); *see also West Lynn Creamery*, 512 U.S. at 192-93 ("Th[e] 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state *competitors*." (emphasis added) (citation omitted)).

By contrast, a taxpayer that fails to demonstrate that it engages in at least "some competition" with the class favored by the state taxing scheme is not sufficiently similarly situated to those favored by the tax to establish a cognizable injury that would demand a remedy. *Bacchus*, 468 U.S. at 271; *cf. Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1143 (2015) (analogizing to dormant Commerce Clause and noting that a rail carrier and motor carriers with which it competes can be considered similarly situated).

In this case, SCE presented evidence that (1) all electricity producers generate the same homogenous product for the same market; (2) "all energy producers compete against each other" regardless of whether they rely on coal, oil, gas, or geothermal steam to produce electricity; and (3) other electricity producers using minerals mined in Nevada (like geothermal steam) were favored by the state's taxing scheme. App. 12a. But the Nevada Supreme Court held that evidence insufficient to demonstrate SCE was "similarly situated" to other entities favored by Nevada's discriminatory tax. Taking the view that for Commerce Clause purposes competitive markets must be "narrowly drawn," *id.* (quoting *Sierra Pac.*, 338 P.3d at 1249 n.7), the court held that it would be inappropriate to group coal-fired plants with plants

relying on different inputs, such as natural gas, nuclear, wind, hydroelectric, and geothermal, *id.* Under this holding, SCE could establish the existence of a similarly situated entity favored by Nevada's tax only by identifying a mirror-image competitor that generated electricity using the exact same production method and fuel: coal.

The Nevada Supreme Court observed that the Supreme Court of Alabama's decision in *Ex parte Surtees* "may be . . . inconsistent" with this approach—and it is. *See id* at 9a n.8 (citing *Ex parte Surtees*, 6 So.3d 1157, 1163 (Ala. 2008). In *Ex parte Surtees*, the court considered the remedy due a New Jersey corporation (Vulcan Lands) which had paid a franchise tax that discriminated against foreign corporations in violation of the dormant Commerce Clause. *See* 6 So. 3d at 1158-59; *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 162, 169-71 (1999) (striking down Alabama's franchise tax as unconstitutional). Alabama asserted that Vulcan Lands could not recover because it was merely "a holding company . . . formed for . . . administrative efficiency," and had offered "no specific evidence of a domestic competitor" against which it was disfavored. *Ex parte Surtees*, 6 So. 3d at 1160 (emphasis omitted) (quoting trial court). Although the trial court credited that argument, the Alabama Court of Civil Appeals and the Alabama Supreme Court rejected it.

The Alabama Supreme Court held that *McKesson* does not require a taxpayer to identify a "mirror image" competitor that benefits from the unconstitutional tax. The court recognized that there is "no indication" that *McKesson* "was using the term 'competitors' in [a] talismanic sense." *Id.* at

1163. Rather, the court found it sufficient that the taxpayer establish a "category or class" that would benefit from the discriminatory tax "counterposed to the class to which the litigant-taxpayer belonged." *Id.* The Nevada Supreme Court, by contrast, rejected as insufficient SCE's proof that it actually competed with producers of electricity (the ultimate output sold to consumers) who, because they use as inputs resources extracted in Nevada, receive more favorable treatment under Nevada Revised Statute § 372.270.

The Nevada Supreme Court's decision in this case also conflicts squarely with the Supreme Court of Hawaii's decision in *In re Tax Appeal of Hawaiian Flour Mills, Inc.*, 868 P.2d 419 (Haw. 1994). In that case, Hawaiian Flour Mills, Inc. ("HFM") sought a refund for payment of a use tax on imported foods that did not apply to domestic foods. *Id.* at 423. The Hawaii Director of Taxation admitted that Hawaii's statute as written was facially unconstitutional. *Id.* at 425. The Director took the position, however, that this exemption did not entitle HFM to a remedy for the taxes it paid on its processed foods, asserting that Hawaii in practice provided the exemption only to "local *fresh* foods," and that processed foods and fresh foods are different products that do not compete. *Id.* at 424 (emphasis added). Relying on *Bacchus*, HFM argued that it would be entitled to a remedy so long as it could prove "that there was at least 'some competition' between its processed foods and exempt local foods." *Id.* at 428.

Under the Nevada Supreme Court's decision in this case, HFM would not have obtained a refund because no competitor using in-state processed foods—the specific "input" at issue—received

favorable treatment. The Hawaii Supreme Court rejected that approach, however, agreeing with HFM that if there was at least "some competition" between businesses selling processed foods and those selling exempt local fresh foods, the taxpayer was entitled to a refund or other remedy, *id.* at 428-29—even though processed foods and fresh foods are different inputs, in the parlance of the Nevada Supreme Court's decision.

b. The question of whether entities are "similarly situated" for purposes of the Commerce Clause can also impact whether there is a violation of the Commerce Clause to begin with. And here, too, the lower courts are divided on when two entities that compete in the same market are "similarly situated."

In cases where a state tax does not discriminate against interstate commerce *on its face*, courts examine whether the tax nonetheless violates the dormant Commerce Clause because it is animated by a discriminatory purpose or has a discriminatory effect on similarly situated in-state and out-of-state interests.[5] *See, e.g.*, *Camps Newfound/Owatonna*,

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[5] When a regulation does not facially discriminate against interstate commerce, a finding that two disparately treated entities are similarly-situated does not—without more—establish a violation of the dormant Commerce Clause. Rather, courts must go on to consider whether the disparate treatment is intended to favor or in fact favors in-state interests over out-of-state interests. *See, e.g.*, *Florida Dep't of Revenue v. DirecTV, Inc.*, 215 So. 3d 46, 51-54 (Fla. 2017) (holding that cable and satellite competitors are "similarly situated" for dormant Commerce Clause purposes, but finding no constitutional violation because a tax that favored one over the other did not favor in-state interests over out-of-state

520 U.S. at 582 n.16 ("[D]isparate treatment constitutes discrimination only if the objects of the disparate treatment are . . . similarly situated." (citation omitted)); *Tracy*, 519 U.S. at 298 n.12 (Discrimination under the dormant Commerce Clause involves "disparate treatment o[f] *similarly situated* in-state and out-of-state interests." (emphasis added)).

Most courts that have addressed the issue have concluded that entities are "similarly situated" for this purpose so long as they compete within the same market. *See, e.g.*, *Florida Dep't of Revenue v. DirecTV, Inc.*, 215 So. 3d 46, 51-52 (Fla. 2017) (holding that products are "similarly situated for the purpose of the dormant Commerce Clause" because "both compete in the same market for the same customers"); *In re Appeals of CIG Field Servs. Co.*, 112 P.3d 138, 146 (Kan. 2005) (entities are "similarly situated" when, *inter alia*, they "serve the same market"); *Smith v. New Hampshire Dep't of Revenue Admin.*, 813 A.2d 372, 377 (N.H. 2002) ("Entities are 'substantially similar' or 'similarly situated' for Commerce Clause purposes when they compete against one another in the same market."); *Jordan v. Dep't of Motor Vehicles*, 75 Cal. App. 4th 449, 462 (1999) ("For [products] to constitute different products that are not similarly situated for commerce clause purposes, they must have different markets and not compete with each other.").

Other courts, however, hold that proof that entities compete in the same market is *not* sufficient to establish that they are similarly situated. *See,*

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interests), *petition for cert. filed* (U.S. Sept. 8, 2017) (No. 17-379).

e.g., *National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009) ("[C]ompeting in the same market is not sufficient to conclude that entities are similarly situated . . . .")[6]; *DIRECTV, LLC v. Department of Revenue*, 25 N.E.3d 258, 265 n.10 (Mass.) (same), *cert denied*, 136 S. Ct. 401 (2015); *DIRECTV, Inc. v. Roberts*, 477 S.W.3d 293, 306 (Tenn. Ct. App.) ("[E]ven where . . . entities are competitors, it does not necessarily follow that the entities are similarly situated."), *cert denied*, 136 S. Ct. 401 (2015). In these jurisdictions, courts consider a variety of additional ad hoc factors to determine whether competitors are sufficiently similarly situated for purposes of dormant Commerce Clause analysis. *See, e.g.*, *Roberts*, 477 S.W.3d at 307 (finding "difference in regulatory treatment" rendered competitors in same market not similarly situated for purposes of dormant Commerce Clause analysis); *LensCrafters*, 567 F.3d at 527 (holding factors including "a business entity's structure" and the state's justification for its law impact whether parties are similarly situated).

Because different jurisdictions apply inconsistent standards to this determination, courts routinely reach inconsistent results—even on identical facts—when deciding whether entities are sufficiently similarly situated to make favorable tax treatment of one over the other cognizable discrimination under

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[6] Although *LensCrafters* is not a tax case, the inquiry outside the tax context is identical: whether a state regulation can be said to "have a discriminatory effect" because it discriminates between similarly situated out-of-state and in-state businesses. 567 F.3d at 525.

the dormant Commerce Clause. *Compare, e.g.*, *Florida Dep't of Revenue*, 215 So. 3d at 52 ("[S]atellite and cable [are] similarly situated for the purpose of the dormant Commerce Clause."), *with Roberts*, 477 S.W.3d at 295 ("[W]e find that satellite providers and cable providers are not similarly situated for purposes of the Commerce Clause."); *DIRECTV, LLC v. Department of Revenue*, 25 N.E.3d at 266 (same).

c. The question of what factors must be considered in determining whether disfavored and favored taxpayers are "similarly situated" for purposes of the Commerce Clause thus divides the lower courts both in deciding whether a facially valid tax violates the dormant Commerce Clause by purpose or effect and in deciding whether victims of a facially unconstitutional law are entitled to relief for a violation. This conflict warrants the Court's review.

B. Certiorari Is Warranted To Address The Conflict Between The Decisions Of Several Lower Courts And Those Of This Court

Certiorari is also warranted because the decision below—and others like it—are incompatible with decisions of this Court. *See* Sup. Ct. R. 10(c). The Nevada Supreme Court's decision is premised on the view that competitors are not similarly situated for purpose of the dormant Commerce Clause, even when they sell *the same product in the same market*, unless the precise input they use to generate that product is identical. That conclusion is irreconcilable with *Bacchus* and *McKesson*, and the broader dormant Commerce Clause principles they implement.

The Nevada Supreme Court—like several others—has misread this Court's decisions to impose an inappropriately "narrow[]" test for gauging when a taxpayer is disfavored compared to other "similarly situated" entities, resulting in discrimination under the dormant Commerce Clause that entitles a taxpayer to a remedy. App. 11a (quoting *Sierra Pac.*, 338 P.3d at 1249 n.7). This petition presents an opportunity to resolve that confusion by reaffirming that a taxpayer "placed . . . at a relative disadvantage in the marketplace vis-à-vis competitors" is entitled to a clear and certain remedy for its payment of a tax found to violate the dormant Commerce Clause. *McKesson*, 496 U.S. at 48.

1. In *Bacchus*, this Court considered the constitutionality of a Hawaii tax that imposed a 20% excise tax on sales of liquor at wholesale, but exempted two locally produced alcoholic beverages—okolehao, a brandy distilled from the ti plant, an indigenous shrub of Hawaii; and fruit wine (namely pineapple wine). 468 U.S. at 265. The State argued that "okolehao and pineapple wine do not compete with the other products sold by the wholesalers." *Id.* at 268. This Court rejected that view, holding the tax had a "discriminatory effect" on wholesalers "as long as there is *some competition*" between the local products favored by Hawaii's tax and the taxpayer's disfavored beverages. *Id.* at 271 (emphasis added). This Court concluded that it did, because "drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit." *Id.* at 269. Although the favored local beverages and the

disfavored beverages were different products (e.g. pineapple wine vs. bourbon or red wine), produced from different "inputs" (e.g. the ti plant and pineapples for the local beverages vs. grapes, barley, grain, and corn for the imports), this Court concluded that Hawaii's tax had both the "purpose and effect of discriminating" against the taxpayer and in favor of its competitors. *Id.* at 273.

Similarly, in *McKesson*, this Court unanimously held that a Florida alcoholic beverage wholesaler was entitled to a meaningful post-deprivation remedy because it was disfavored by a Florida taxing scheme that gave favorable treatment to alcoholic beverages that were (1) manufactured from certain citrus fruits and other agricultural products commonly grown in Florida and (2) bottled in Florida. 496 U.S. at 23. Even though alcoholic beverages made from oranges and grapefruit were not identical to, nor made from the same inputs as the taxpayer's beverages, parties disfavored by the tax were in competition with those who were not, and therefore entitled to a remedy. *Id.* at 36-43 & n.25.

SCE was even more clearly similarly situated to competitors who were favored by Nevada's taxing scheme. It is undisputed that SCE produced and sold the *same* homogeneous product (electricity) within the *same* market as other producers exempted from Nevada's use tax. However similarly situated are pineapple and citrus wine on the one hand, and Chateau Beaucastel and India Pale Ale on the other, the electricity that SCE generated from tax-disfavored out-of-state coal was *identical* to the electricity its competitors generated from tax-favored in-state geothermal energy.

2. The Nevada Supreme Court—like other courts—went astray because it misunderstood *Tracy*'s holding that "any notion of discrimination [under the Commerce Clause] assumes a comparison of substantially similar entities." App. 11a (quoting *Tracy*, 519 U.S. at 298-99). Because it wrongly believed that *Tracy* requires proof that a challenged tax scheme discriminates in favor of mirror-image competitors, the Nevada Supreme Court reached the improbable conclusion that electricity producers that sold the same homogenous product within the same market were not sufficiently similarly situated that favoring one competitively injured the other. *See also Roberts*, 477 S.W.3d at 295 (finding cable and satellite not substantially similar, even though they directly compete and consumers view them as "similar and substitutable").

But *Tracy* imposed no such mirror-image requirement. It simply reiterated that entities were not similarly situated "in the *absence* of actual or prospective competition between the supposedly favored and disfavored entities in a single market." 519 U.S. at 300 (emphasis added); *see also id.* (discussing case in which this Court found that freezer ship and domestic cold storage facilities subject to different tax rates "served separate markets, did not compete with one another, and *thus* could not properly be compared for Commerce Clause" (emphasis added)). Far from departing from the principles articulated in *Bacchus*, and reiterated in *McKesson*, the *Tracy* Court found that "*Bacchus* applie[d] with equal force" to the case before it. *Id.* at 287.

The Nevada Supreme Court's decision—and like decisions of other lower courts—not only misreads

Tracy, but misapprehends the first principles underlying this Court's dormant Commerce Clause jurisprudence. The fundamental right advanced by the dormant Commerce Clause is the equal treatment of in-state and out-of-state commercial interests. When a state's decision to favor in-state business "'raises the relative cost of doing business'" for disfavored out-of-state competitors, it upsets the "equivalence" guaranteed by the Constitution. *McKesson*, 496 U.S. at 42 n.25 (citation omitted). Any deprivation of property pursuant to such a discriminatory scheme is one for which due process requires a clear and certain remedy. *Id.* at 31-32; *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (citation omitted)). Thus, when the imposition of a discriminatory tax advantages one competitor over another within the same market, it is sufficient to impose the very injury that the dormant Commerce Clause is intended to prevent, and to require the meaningful relief envisioned by *McKesson*. This Court should grant certiorari to make that clear.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTION PRESENTED

As this Court has previously acknowledged, its case-by-case approach to the dormant Commerce Clause "has left 'much room for controversy and confusion and little in the way of precise guides to the States.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (quoting *Boston Stock Exch.*, 429 U.S. at 329). This petition offers a timely

opportunity to address and resolve a source of substantial confusion in the lower courts concerning the availability of a remedy for violations of the dormant Commerce Clause. Because that question is important and this case presents an excellent vehicle to resolve it, this Court should grant the petition.

1. Because "state statutes that clearly discriminate against interstate commerce are routinely struck down," *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988), the question of whether and in what circumstances a remedy is due is particularly deserving of this Court's attention. Resolving that question is important not only in its own right, to ensure that parties subjected to an unconstitutional deprivation of property are afforded recompense, but because the clear and certain availability of an appropriate remedy will deter States from enacting such unconstitutional legislation in the first place.

Owing to the importance of the dormant Commerce Clause, and to the frequency with which state regulation would offend it if left undisturbed by this Court, this Court has granted certiorari to decide questions implicating the Clause in nearly two dozen cases over the last 20 years. While many of those cases have required "a case-by-case analysis" that has left "little in the way of precise guides to the States," *Westinghouse Elec. Corp.*, 466 U.S. at 403 (citation omitted), this case affords a more fundamental opportunity to address a source of substantial and ongoing confusion in the lower courts, as well as to resolve any lingering confusion in the relationship among *Bacchus*, *McKesson*, and *Tracy*.

This case, moreover, exhibits precisely the sort of economic protectionism that the Framers sought to prevent. By taxing power plants using out-of-state mineral resources more heavily than those using in-state mineral resources, Nevada has tilted the playing field towards the latter—making it more profitable for electricity producers to fuel power plants using domestic resources rather than resources imported from other states. If the courts leave those injured by this sort of rank protectionism without a remedy, it will encourage other States to retaliate with protectionist schemes of their own. That retaliatory tit-for-tat is precisely what the Framers sought to forestall. This Court's attention is merited to discourage such blatant interference with interstate commerce.

2. Certiorari is also warranted in light of the important public interest in ensuring that litigants subjected to unconstitutional taxation are afforded a meaningful remedy. As this Court recognized in *McKesson*, taxpayers routinely lack any meaningful pre-deprivation opportunity to contest the imposition of a tax—no matter how apparent its facial invalidity. As a result, taxpayers are often relegated to post-deprivation remedies, forced to pay taxes imposed in violation of the Constitution and seek remedies only after the fact.

As this case illustrates, the intervening deprivation is often substantial, and the process of recoupment neither fast, nor without significant cost. SCE paid tens of millions of dollars to Nevada under a taxing framework that all now concede is unconstitutional. Yet it has spent over 15 years attempting to recoup those funds. For many taxpayers, even a fraction of that time and expense

is out of the question, rendering any theoretically available remedy out of reach in practice. The current confusion in the lower courts, and resulting uncertainty about the availability of relief, further discourages taxpayers from seeking refunds, while encouraging States to persist with constitutionally dubious taxes, safe in the knowledge that the revenue generated will vastly outweigh the cost of uncertain refunds payable many years later. This Court's intervention would advance the public's fundamental interest in ensuring meaningful post-deprivation remedies and deterring unconstitutional taxation.

3. For several reasons, this case represents an ideal vehicle to resolve the important question presented.

First, there is no dispute that Nevada's discriminatory taxation of in-state and out-of-state minerals is unconstitutional. *See Sierra Pac.*, 338 P.3d at 1246. This Court therefore need not confront any threshold question about whether Nevada's taxing scheme violated the dormant Commerce Clause.

Second, whether SCE suffered a cognizable competitive harm is dispositive of whether it is entitled to meaningful backward-looking relief. *See* App. 10a-11a (acknowledging that if a "substantially similar" competitor was advantaged by Nevada's taxing scheme, SCE would be entitled to a remedy (citation omitted)).

Third, the question is cleanly presented. As the Nevada Supreme Court acknowledged, SCE demonstrated below that "geothermal, oil, and natural gas power plants provide the same

homogeneous commoditized output as coal power plants—electrical energy," and that "all energy producers compete against each other regardless of the fuel source used." App. 12a; *see also, e.g.*, JANV918-67 (Expert Report of Dr. John L. Jurewitz); *id.* at 834 (Nevada Bureau of Mines and Geology report acknowledging competitive relationship between coal and geothermal energy). The Nevada Supreme Court dismissed that evidence because it believed that competitive markets should be "narrowly drawn" and that it was therefore inappropriate to "group coal electrical producers with natural gas, nuclear, wind, hydroelectric, solar, and geothermal [producers]" *even if* they competed to produce the same product (electricity) for the same market. App. 11a-12a. This case thus clearly and directly presents the question of whether the differential tax treatment of competitors within the same market establishes injury entitling the disfavored taxpayer to a remedy. For the foregoing reasons, this Court's review is warranted to resolve that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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