No. 15-25

In the Supreme Court of the United States

SIERRA PACIFIC POWER COMPANY and NEVADA POWER COMPANY, each doing business as NV ENERGY,
Petitioners,

v.

STATE OF NEVADA *ex rel.* DEPARTMENT OF TAXATION and CLARK COUNTY, NEVADA,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Nevada has no commercial coal mines. But it has a "use" tax, under which NV Energy paid almost $26 million on coal brought into Nevada to make electricity. By Nevada statute, coal used from in-state mines—had they existed—would have been exempted from this tax. The parties agree that this exemption facially violated the dormant Commerce Clause.

But NV Energy wants its money back—all $26 million—because it claims that the entire tax "scheme" is invalid, not just the exemption, and that due process requires a refund. This Court in *McKesson* held that there are many ways to remedy payments made under a commercially discriminatory tax. But the remedy is always measured by the party's actual unequal treatment as against competitors, in dollar amount. NV Energy *concedes* that no competitor benefited from the exemption. The question presented is:

Did the Nevada Supreme Court err in denying NV Energy a refund of millions in taxes paid under a lawful tax with an exemption which facially discriminates in violation of the dormant Commerce Clause, when the taxpayer admits that it suffered no competitive disadvantage?

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Benjamin Franklin's aphorism that nothing is certain except death and taxes is less certain in Nevada, a state that has survived for 150 years without an income tax. But even Nevada succumbed to the need for a "use" tax, a near-universal form of excise on consumption of tangible personal property. NV Energy paid this use tax on coal that it imported for electricity—an endeavor to which Franklin could tip his beaver hat.

In 1955, Nevada enacted a use tax that exempted Nevada-mined minerals, coal among them. Pet. App. 8a. This exemption may have reflected characteristic Silver State optimism, for as the state Bureau of Mines and Geology reports, "no viable commercial deposits of coal have been found in Nevada."[1] "Numerous unsuccessful attempts have been made to mine Nevada coal," the Bureau adds, "but the deposits have proven to be too small and impure."[2] Nevertheless, a state trial court invalidated the exemption on grounds that the exemption discriminated—on paper, not practice—against external commerce. Pet. App. 33a-34a. That ruling was not appealed. *Id.* at 2a.

This was, again, the *exemption*. The tax itself, by contrast, was not challenged. *Id.* at 26a; 35a. NV Energy's drumbeat references to an "unconstitutional tax," *see, e.g.*, Pet. at i, 11, 23, should not obscure that

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[1] *Oil & Gas Resources*, NEV. BUREAU OF MINES AND GEOLOGY (last accessed Nov. 10, 2015).

[2] *Id.* The total absence of commercial Nevada coal production is in the factual record. *See, e.g.*, Pet. App. 17a, 44a.

the reference is to the amount claimed for refund, not the statute under which it was paid.[3] Now, NV Energy seeks to recover everything paid under a *lawful* tax because the *exemption* was unlawful—no matter that the exemption never actually exempted a thing. It's as if Nevada taxed all fruit but exempted the Nevada-born pineapple—as sweet as it is mythical. Dole may get the exemption struck. But Dole may not get a refund on all fruit tax simply because the exemption *could* have benefited a hypothetical grower. That's a windfall. And that's this case.

STATEMENT

In 2007, NV Energy sought a refund of use taxes[4] paid on coal purchased out-of-state for use in Nevada. NV Energy claimed that because another statute[5] exempted coal produced in Nevada from this tax, the "interplay" of the tax and exemption was facially invalid under the dormant Commerce Clause. Pet. App. 26a.

The Department of Taxation denied the refund. *Id.* at 59a. This disposition was affirmed by an Administrative Law Judge, *id.* at 56a, and the Nevada Tax Commission, *id.* at 40a. The state district court, on review, struck the exemption as facially discriminatory under the dormant Commerce Clause; but it also found

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[3] The Nevada Supreme Court has upheld this tax against a dormant Commerce Clause challenge. *Great Am. Airways v. Nev. State Tax Comm'n*, 705 P.2d 654, 656 (Nev. 1985).

[4] Nev. Rev. Stat. § 372.185.

[5] Nev. Rev. Stat. § 372.270.

that, absent a competitor who benefited from the exemption, NV Energy was due no refund. *Id.* at 36a-37a. The Nevada Supreme Court affirmed on the refund question. *Id.* at 9a-13a. To "merit a monetary remedy," the court said, NV Energy "must actually have a competitor who benefited" from the invalid exemption. *Id.* at 12a. Since no such competitor exists, the court held, NV Energy suffered no "disadvantage," and no refund was due. *Id.*

REASONS FOR DENYING THE PETITION

I. NV Energy concedes that no competitors benefited from the exemption, and therefore no monetary relief is due.

No conflict exists between the Nevada Supreme Court's decision and what Petitioner calls this Court's "tax remedy jurisprudence." Pet. 22.

NV Energy's Petition turns on *McKesson*, this Court's leading decision on what remedy the Due Process Clause requires after a tax is invalidated under the dormant Commerce Clause. *McKesson* held that if a State assesses a tax later found discriminatory, the State must "rectify any unconstitutional deprivation." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 31 (1990). "Competitive disadvantage" is the measure of unlawful deprivation. *Id.* at 48. If a State chooses to refund, the claimant gets the "difference" between the tax it paid and the tax it *would* have paid had it enjoyed the rate competitors got. *Id.* at 40. *McKesson* says again: due process extends "only" to refunding the "excess taxes collected." *Id.* at 49 n.33. If no "difference" or "excess" exists—if

there was no unequal exaction—there is no unconstitutional deprivation.

A peculiarity of dormant-commerce jurisprudence is that laws which on their face discriminate against out-of-state commerce are generally *per se* invalid, without need to show monetary harm. *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). For this reason, the coal exemption was struck. But as the existence of a separate line of tax-remedy cases proves, remedy is another question altogether. NV Energy obtained relief—the exemption's invalidation—but it also seeks a full refund. *See, e.g.*, Pet. App. 11-12. The problem for NV Energy is that *McKesson* says that a refund can be required only to remedy actual disadvantage vis-à-vis rivals.[6]

This follows from the dormant Commerce Clause's purpose: to block attempts to tilt commercial laws to home-state advantage. This Court says that the clause requires tax "equality for the purposes of competition and the flow of commerce."[7] Another decision says that

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[6] NV Energy faults the Nevada Supreme Court for citing decisions that "were not 'remedy' cases and have no relevance." Pet. App. 17 n.1. Petitioner's own citation to non-remedy cases does not demonstrate the strictest regard for consistency, but even those cases, too, have actual disadvantage as a fact. In *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), for instance, the Court referred repeatedly to a Connecticut law's "practical effect" in impeding out-of-state beer commerce. *Id.* at 336-38, 342.

[7] *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

the clause disables States from using taxes to "place[] interstate commerce at a disadvantage."[8] *Wynne* last year reaffirmed that a State cannot impose a tax that "discriminates … by providing a direct commercial advantage to local business."[9] But even as the Court finds various ways to define the clause's end, what remains fixed is the language of competitive even-handedness: the cases speak of the "equality … of competition," of no "disadvantage" to foreign commerce and no "advantage to local business." In fact, this jurisprudence makes no sense without at least two competitors, one given a leg up. "[A]ny notion of discrimination," this Court wrote, "assumes a comparison." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997); *see also Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 273 (1984) ("A discrimination claim, by its nature, requires a comparison .... "). Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99. Without competition there is no competitive disadvantage—and no deprivation of property without due process.

In this case, NV Energy was not disadvantaged. It isn't that disadvantage was minimal or attenuated or hard to quantify with precision; it was non-existent. No entity existed to enjoy the unlawful tax exemption. NV

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[8] *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 243 (1987).

[9] *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (citing *Nw. States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959)).

Energy concedes this, twice, in its Petition. Petitioner writes that "there were no benefiting taxpayers [*i.e.*, local coal producers or users] against which the retroactive assessment of taxes could be imposed." Pet. 29. Petitioner also writes that it bought coal outside Nevada since "Nevada does not have any coal deposits with the quality and quantity to support commercial operations." Pet. 5 (citing Pet. App. 17a).[10] The trial court found that the exemption had to go because it was facially invalid, *i.e.*, invalid *despite* the court's recognition that competitive injury remained theoretical. Yet the court also held, as *McKesson* teaches, that remedy is another question, one concerned with actual competitive harm. Suppose that a sales tax is laid on all publications in Nevada but exempts illuminated manuscripts—not one of which was ever sold in Nevada. The exemption may be facially invalid, yes, and stripped from the law.[11] But once excised, the publication tax still stands, uniform as always in its application across the publishing industry. The invalid part does not suddenly entitle every publisher in America to a refund on all sales tax it paid.

Petitioner cites not a single case in which the Court, having invalidated a tax law under the dormant Commerce Clause, held that a taxpayer was entitled to

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[10] *See also id.* at 68a ("None of the coal purchased for use in [Petitioner's] plants comes from mines in Nevada."); *id.* at 69a (same).

[11] *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998) (First Amendment bars Florida from exempting newspapers, but not magazines, from its sales tax).

monetary relief in the absence of competitive harm to the taxpayer. Only real, palpable harm causes injury remedied by real, palpable money. However else NV Energy may have been "harmed" by paying a tax, Pet. 10-11, it experienced no *competitive harm*, and therefore no harm remediable under the dormant Commerce Clause or Due Process Clause.

Dormant-commerce tax remedy cases require competitive disadvantage, starting with *McKesson*.

- In *McKesson*, a Florida law preferred drinks manufactured from Florida-grown citrus and crops. The Court declared that this "in fact" treated petitioner worse than rivals who used local products. 496 U.S. at 43; *see also id.* at 42 n.25 (noting it was "'undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under the [tax] are in direct competition with manufacturers and distributors of alcoholic beverages which do not'") (citation and alteration marks omitted). This "competitive disadvantage" was what "rendered the deprivation unlawful." *Id.* at 48. The Court's possible remedies were all factually predicated on real competitive disadvantage. Florida's choices, said the Court, were to

  > [1] refund[] to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions **that its competitors actually received**…[or to] [2] assess and collect back taxes from petitioner's **competitors who benefited from the rate reductions**…[or to

> choose] [3] a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on **favored competitors**.

Id. at 40-41 (citations omitted; emphasis added).

- In *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 179 (1990), this Court remanded for relief under *McKesson*—after the Arkansas Supreme Court invalidated a tax that "effectively costs other truckers more per mile than it costs those based in Arkansas." *Am. Trucking Ass'ns, Inc. v. Gray*, 746 S.W.2d 377, 378 (Ark. 1988).

- In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 532-33 (1991), the Court remanded for relief under *McKesson* after a Georgia law taxed imported alcohol at double the rate of alcohol made with Georgia products—which the Georgia high court called "simple economic protectionism," (citing *James B. Beam Distilling Co. v. State*, 382 S.E.2d 95, 96 (Ga. 1989)).

- In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 337 (1992), the Court remanded for relief under *McKesson* after recognizing the actual "differential treatment" caused by a waste-disposal tax imposed solely on waste generated outside Alabama.

- In *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333, (1996), this Court remanded for relief under *McKesson* after noting that North Carolina's Secretary of Revenue "practically conced[ed]" that a tax favoring domestic corporations discriminated.

Those cases featured real dollar-and-cent detriment. This case, by contrast, has no winner and loser, because no one benefitted from the exemption. The rule that refunds require actual harm is recognized implicitly in post-*McKesson* cases. *Fulton* said that due process "requires only that the resultant tax *actually assessed* … reflect a scheme that does not discriminate." 516 U.S. at 346-47 (citing *McKesson,* 496 U.S. at 41) (quotation marks and brackets omitted; emphasis added). In *Associated Industries of Missouri v. Lohman*, the Court observed that due process "demand[s] only that … the State must *ultimately collect* a tax … that in no respect impermissibly discriminates." 511 U.S. 641, 656 (1994) (citing *McKesson*, 496 U.S. at 44, n.27) (quotation marks omitted; emphasis added). The tax on NV Energy created no competitive injury as "actually" assessed and "ultimately" collected.

In sum, monetary remedy in dormant-commerce tax cases is measured by extent of competitive harm: *McKesson* says the obligation to refund applies to the "difference" between the higher tax assessed and the lower tax that *should* have been assessed, 496 U.S. at 40; *McKesson* says refunds cover "excess taxes collected," *id.* at 49 n.33. NV Energy paid money under a *lawful* tax—and no one paid any less under the exemption. Put another way, NV Energy was in no different a competitive position than it would have been if the exemption had never been part of Nevada law. Uneven playing fields do no harm when only one team takes the field.[12]

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[12] Curiously, NV Energy demands not the *difference* between what it paid and what a theoretical exemption-beneficiary would have paid, but all $26 million. Yet *McKesson* says that the Due Process

II. There is no conflict with the Alabama Supreme Court over *McKesson*.

NV Energy imagines a conflict between the Nevada and Alabama Supreme Courts. There is none.

In Alabama, a New Jersey corporation was assessed franchise taxes that violated the dormant Commerce Clause. The trial court accepted the Alabama revenue department's argument that before a corporation can get a refund, it must first "identify a specific domestic corporation that is its *virtual mirror image*." *Ex parte Surtees*, 6 So. 3d 1157, 1163 (Ala. 2008). The intermediate court of appeals reversed and the Alabama Supreme Court easily affirmed—in a holding that was, in fact, quite limited. The trial court was reversed because it "denied a refund *solely on the basis of the 'mirror-image rule.'*" *Id.* at 1163 (emphasis added). That ruling, alone, was discarded. *Surtees* certainly did not (as NV Energy claims) "explicitly reject[] the notion" that under *McKesson* a taxpayer must "prove the existence of a benefited domestic competitor" to get a refund. Pet. 9-10.

Surtees saw nothing in *McKesson*'s references to "competitors" to suggest that eligibility for refunds was "confine[d]" to corporations able to "actually name" domestic entities that "mirrored them in corporate structure and operation." *Id.* at 1163. The *Surtees* claimant suffered real differential injury, too: the average Alabama corporation paid a fifth of the

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Clause requires a refund of the "excess taxes collected," not *all* taxes collected. 496 U.S. at 49 n.33. The injury lies in the unequal *disparity* in taxes paid, not in the tax itself.

franchise tax it would have paid had it been treated like a foreign corporation. *Id.* at 1164 (citing *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999); *see also id.* at 163, 169 (noting the Alabama franchise tax's competitive harm "in practice")).

The Nevada and Alabama Supreme Court decisions are consistent. Neither adopts a "mirror-image" rule; both require competitive harm to justify a refund. Yet NV Energy insists that the Nevada court required it to "prove the existence" of a rival beneficiary. Pet. 33. What the court actually said was that, 100 competitors or none, NV Energy "failed to show" that any of them "gained a competitive advantage" over it. Pet. App. 12a. The court concluded:

> NV Energy did not pay any higher tax than did its competitors—all paid the same tax.... In essence, NV Energy would have this court grant it a refund of tax dollars it rightfully paid [under the tax] because [the exemption] would have unconstitutionally exempted a *hypothetical* competitor.

Id. 12a-13a (citations omitted; emphasis added).

The court simply observed that *McKesson* identifies unfair advantage and actual disparity as the yardstick to measure refunds in dormant-commerce tax cases. Actual competitive injury wasn't a question in *McKesson* or *Surtees*; it was a fact. As *Surtees*, 6 So. 3d at 1163, states, "there was no issue in *McKesson* regarding the existence of favored competitors," since competition was an "undisputed" fact (citing *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1008 (Fla. 1988)). *McKesson* makes no

sense if the complaining liquor merchants there hadn't paid a cent more than their competitors. A refund there, as here, is impossible to calculate without a differential. More to the point, it is zero.

The Nevada decision even indicated that, *had* it reached the question of competitor likeness, it would follow the "substantially similar" test in *General Motors*, 519 U.S. at 298, *see* Pet. App. 13a n.7, not some "mirror-image" rule. *Surtees* suggested that the inquiry is into "sufficiently similar" entities. 6 So. 3d at 1163. So Nevada and Alabama seem, in fact, to have kin interpretations of the rule.

Ultimately, NV Energy's "windfall" rule is no less extreme than the "mirror-image" rule rejected in *Surtees*—it's just at the opposite pole of the spectrum. At one end is a rule that imposes on plaintiffs the practically impossible task of identifying a literally identical competitor for a refund; at the other end is a rule that requires a refund when there are literally no competitors. Neither of those is the rule from *McKesson*. There might be hard cases under *McKesson*, but this is not one of them—not when NV Energy has repeatedly acknowledged that no competitor benefited from Nevada's tax exemption.

CONCLUSION

McKesson declares that a tax deprives a party of property without due process and may entitle the payer to a refund when it causes "competitive disadvantage." 496 U.S. at 43. NV Energy concedes—as it must—that because Nevada has no in-state coal, no competitor was actually benefited. This was, at most, a close call, a near-miss, a gargoyle teetering on the skyscraper's

edge. No harm, no foul—a saying so well known, a legal conclusion so obvious, that it never even made *Poor Richard's Almanack*.

Respectfully submitted,

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