

1 Plaintiff-Appellant VIZIO, Inc. filed a complaint against
2 Defendant-Appellee Robert Klee, in his capacity as the Commissioner
3 of the State of Connecticut Department of Energy and Environmental
4 Protection, asserting that a Connecticut law imposing recycling fees
5 on electronics manufacturers violates the United States Constitution.
6 The United States District Court for the District of Connecticut (Victor
7 A. Bolden, *Judge*) granted Defendant-Appellee's Rule 12(b)(6) motion
8 to dismiss for failure to state a claim. On appeal, VIZIO advances only
9 its argument that the Connecticut law is unconstitutional under the
10 Commerce Clause.

11 We hold that VIZIO has failed to state a claim upon which relief
12 can be granted, and we therefore **AFFIRM** the December 29, 2016
13 judgment of the District Court.

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24 *Appellee*.

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27 RICHARD W. GOLDBERG, *Judge*:

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29 Plaintiff-Appellant VIZIO, Inc. is a manufacturer of televisions
30 sold nationwide, including in Connecticut. VIZIO challenges
31 Connecticut's statute and regulations creating and implementing its

1 electronic recycling program, Conn. Gen. Stat. §§ 22a-629 *et seq.*; Conn.
2 Agencies Regs. §§ 22a-630(d)-1, 22a-638-1 (collectively “Connecticut’s
3 E-Waste Law”), on the grounds that they effectively regulate
4 interstate commerce in violation of the Commerce Clause, U.S.
5 CONST. art. I, § 8, cl. 3.

6 Such a dormant Commerce Clause claim is analyzed through a
7 “well-worn path,” *see N.Y. Pet Welfare Ass’n, Inc. v. City of New York*,
8 850 F.3d 79, 89 (2d Cir. 2017), and because VIZIO has failed to
9 articulate entitlement to relief under this familiar rubric, its claim
10 must be dismissed.

11 BACKGROUND

12 On June 17, 2015, VIZIO initiated a lawsuit seeking to enjoin
13 Connecticut from enforcing its e-waste law. On appeal, we review
14 the constitutionality of that law under the Commerce Clause of the
15 U.S. Constitution, art. I, § 8, cl. 3.

16 I. Connecticut’s E-Waste Law

17 In July 2007, the Connecticut legislature passed “An Act
18 Concerning the Collection and Recycling of Covered Electronic
19 Devices,” Public Act No. 07-189, codified at Conn. Gen. Stat.
20 §§ 22a-629 *et seq.* The statute created a program under which certain
21 manufacturers conducting business in the state would be required to
22 register with Connecticut’s Department of Energy and Environmental
23 Protection (“DEEP”) and pay a fee associated with the cost of
24 recycling the products they manufacture. In general, the law was
25 designed so that “each manufacturer [would] participate in the state-
26 wide electronics recycling program . . . to implement and finance the
27 collection, transportation and recycling of covered electronic
28 devices” Conn. Gen. Stat. § 22a-631(a). As a manufacturer of
29 “non-[cathode ray tube]-based televisions,” Conn. Gen. Stat.

1 § 22a-629(5), for sale in Connecticut, Conn. Gen. Stat. § 22a-629(7),
2 VIZIO must contribute to the state's television recycling program. *See*
3 Conn. Gen. Stat. § 22a-631(a). VIZIO does not dispute that it is a
4 covered manufacturer under the law, nor does it contest
5 Connecticut's power to compel VIZIO to pay into the recycling
6 program. VIZIO does, however, challenge the means by which
7 Connecticut calculates its recycling fee.

8 The recycling program is operated by "covered electronic
9 recyclers" ("CERs"), private entities who register with the state. *See*
10 Conn. Gen. Stat. § 22a-629(6); *see also* Conn. Agencies Regs.
11 § 22a-638-1(b). Those CERs collect all "covered electronic devices" for
12 recycling and dispose of them. *See generally* Conn. Gen. Stat.
13 § 22a-631. The manufacturers, in turn, pay their assigned fees directly
14 to the CERs. Conn. Agencies Regs. § 22a-638-1(j).

15 The Connecticut legislature charged DEEP with enacting
16 regulations "to establish annual registration and reasonable fees for
17 administering the [recycling] program" Conn. Gen. Stat.
18 § 22a-630(d). The law mandated that those fees would be
19 "representative of the manufacturer's market share," calculated
20 "based on available *national* market share data." Conn. Gen. Stat.
21 § 22a-630(d) (emphasis added). DEEP's regulations, which took effect
22 in June 2010, determine each manufacturers' market share based on:

23 [I]nformation that approximates the total number of
24 units sold by all manufacturers for the previous year and
25 approximates the number of units sold that are
26 attributable to each manufacturer. This determination
27 shall be based upon nationally available market share
28 data, including, but not limited to, the number of units
29 shipped, retail sales data, consumer surveys, information

1 provided by the manufacturers, or other nationally
2 available market share data.

3 Conn. Agencies Regs. § 22a-638-1(g)(2). It is this national market
4 share approach that VIZIO claims to be violative of the dormant
5 Commerce Clause.

6 In its first amended complaint, VIZIO alleged that “the
7 practical effect of the E-Waste Law is to directly regulate VIZIO’s out-
8 of-state sales and to control VIZIO’s conduct outside of the state’s
9 boundaries.” In short, VIZIO maintains that Connecticut’s national
10 market share approach unduly regulates interstate commerce by
11 tying in-state fees to out-of-state transactions and by double charging
12 those out-of-state sales.

13 VIZIO asserts a host of costs associated with Connecticut’s E-
14 Waste Law, each of which VIZIO contends influences its out-of-state
15 pricing decisions by increasing the cost of doing business both in
16 Connecticut and nationwide. The result, VIZIO argues, is a
17 disproportionate share of the regulatory costs falling to producers like
18 VIZIO who manufacture products that are sold in- and out-of-state.
19 Additionally, VIZIO asserts that by considering a company’s national
20 sales, Connecticut double charges manufacturers for sales made
21 outside the state. All of this, VIZIO claims, infringes on the interstate
22 market for televisions “by reducing the narrow revenue margins that
23 VIZIO can capitalize upon to price and compete.”

24 According to VIZIO, the state’s calculation of fees under
25 Connecticut’s E-Waste Law is problematic and VIZIO’s specific
26 circumstances highlight the law’s burdensome effects. Because
27 VIZIO’s assigned national market share was higher than the
28 company’s actual share of the Connecticut market, VIZIO contends
29 that the fees it paid were correspondingly disproportionate. Under
30 the law, VIZIO claims to have been assessed market shares of 14.33%,

1 14.52%, and 16.088% in the years 2013 through 2015, respectively, and
2 has spent over \$2.5 million to comply with the law over those three
3 years. These costs have accrued despite VIZIO's insistence that
4 Connecticut's E-Waste Law principally funds the recycling of cathode
5 ray tube televisions, a product VIZIO has never manufactured.

6 Thus, VIZIO asserts that it is required to pay an outsized
7 recycling bill for televisions it did not produce, products which
8 burden the recycling program exponentially more than its own. And,
9 as a result, due to the law's reference to out-of-state sales, VIZIO
10 maintains that it is assessed a fee not in proportion with its true share
11 of the Connecticut market or the actual burdens VIZIO places on the
12 recycling program.

13 II. Lower Court Proceedings

14 On August 20, 2015, Connecticut moved to dismiss VIZIO's
15 complaint, arguing that VIZIO had failed to state a claim upon which
16 relief could be granted under Rule 12(b)(6) of the Federal Rules of
17 Civil Procedure. The district court dismissed VIZIO's complaint in its
18 entirety, including several counts unrelated to the Commerce Clause.
19 *VIZIO, Inc. v. Klee*, No. 3:15-CV-00929, 2016 WL 1305116, at *28 (D.
20 Conn. Mar. 31, 2016). Yet the court granted leave to amend to "add
21 factual allegations from which the Court could reasonably infer that
22 the National Market Share provision of the E-Waste Law has the
23 practical effect of directly controlling the interstate prices of its
24 televisions" so as to state a claim under the extraterritoriality theory
25 of dormant Commerce Clause jurisprudence. *Id.* at *15.

26 VIZIO filed its amended complaint on May 20, 2016,
27 supplementing its original pleadings with additional factual
28 allegations in an attempt to satisfy the pleading requirements of Rule
29 12(b)(6). Connecticut subsequently filed another motion to dismiss
30 and the court granted that motion in full, dismissing all of VIZIO's

1 remaining claims. *VIZIO, Inc. v. Klee*, 226 F. Supp. 3d 88, 105 (D. Conn.
2 2016).

3 VIZIO timely appealed. On appeal, VIZIO continues to
4 advance its position that Connecticut's E-Waste Law violates the
5 dormant Commerce Clause. Specifically, VIZIO argues that the law
6 directly controls interstate commerce in violation of the
7 extraterritoriality principle, amounts to an impermissible user fee,
8 and imposes impermissible burdens on interstate commerce in
9 relation to local benefits. Each of these arguments was properly
10 preserved and is ripe for review by this panel.

11 DISCUSSION

12 The Commerce Clause provides that Congress has the
13 exclusive power "[t]o regulate Commerce . . . among the several
14 States." U.S. CONST. art. I, § 8, cl. 3. This provision has long been read
15 to contain a negative corollary that "denies the States the power
16 unjustifiably to discriminate against or burden the interstate flow of
17 articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of*
18 *Or.*, 511 U.S. 93, 98 (1994). At issue in this case is that principle,
19 termed the "dormant Commerce Clause," and whether Connecticut
20 has violated its dictates.

21 "Analysis of state and local laws under the dormant Commerce
22 Clause treads a well-worn path. First, we determine whether the
23 challenged law 'discriminates against interstate commerce,' or
24 'regulates evenhandedly with only incidental effects on interstate
25 commerce.'" *N.Y. Pet Welfare Ass'n*, 850 F.3d at 89 (citation omitted).
26 State laws may discriminate in several ways, including in their effect.
27 *See Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 48 (2d Cir.
28 2007). However, if discrimination is not found and the law only
29 imposes incidental burdens on interstate commerce, we analyze the

1 law under the standard set out in *Pike v. Bruce Church, Inc.*, 397 U.S.
2 137, 142 (1970).

3 Here, VIZIO argues that Connecticut's E-Waste Law
4 discriminates against interstate commerce because the effect of the
5 law is to control prices beyond Connecticut's borders. VIZIO claims
6 that by assessing a recycling fee calculated by reference to a
7 manufacturer's national, rather than local, market share, Connecticut
8 impermissibly regulates interstate commerce. In so arguing, VIZIO
9 relies primarily on the principle that the "Commerce Clause . . .
10 precludes the application of a state statute to commerce that takes
11 place wholly outside of the State's borders." *Healy v. Beer Inst., Inc.*,
12 491 U.S. 324, 336 (1989) (first alteration in original) (quoting *Edgar v.*
13 *MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion)).
14 Alternatively, VIZIO contends that Connecticut's E-Waste Law is
15 improper because it imposes an unconstitutional user fee, *see*
16 *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405
17 U.S. 707, 711–12 (1972), and its negative impact on interstate
18 commerce outweighs the benefits conferred on the local economy, *see*
19 *Pike*, 397 U.S. at 142.

20 Yet VIZIO's claim must fail as it does not allege sufficient facts
21 to give rise to an entitlement to relief under the dormant Commerce
22 Clause. The thrust of VIZIO's argument is that Connecticut is
23 prohibited from referencing national market share when it assesses
24 recycling fees because doing so regulates—thereby placing a burden
25 on—interstate commerce. However, such a principle has not before
26 been acknowledged in our dormant Commerce Clause jurisprudence
27 and we decline to extend that doctrine here.

28 Accordingly, we affirm the dismissal by the district court.

1 I. Standard of Review

2 We review *de novo* the district court's dismissal for failure to
3 state a claim under Rule 12(b)(6). *See Sherman v. Town of Chester*, 752
4 F.3d 554, 560 (2d Cir. 2014). We regard as true all well-pleaded factual
5 allegations, draw all reasonable inferences in VIZIO's favor, and
6 assess the complaint to "determine whether [the allegations]
7 plausibly give rise to an entitlement to relief." *Selevan v. N.Y. Thruway*
8 *Auth.*, 584 F.3d 82, 88 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S.
9 662, 679 (2009)). Nevertheless, the burden remains with VIZIO to
10 demonstrate that Connecticut's E-Waste Law imposes an
11 impermissible burden on interstate commerce. *See USA Recycling, Inc.*
12 *v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995) (citing *Hughes v.*
13 *Oklahoma*, 441 U.S. 322, 336 (1979)). Thus, our review here focuses on
14 the dormant Commerce Clause and whether VIZIO's theory of
15 unconstitutionality fits within its contours.

16 II. Extraterritorial Effect

17 Because VIZIO alleges that Connecticut's E-Waste Law merely
18 influences national pricing decisions, rather than directly controls
19 out-of-state commerce, its extraterritorial theory was properly
20 dismissed. A state law has unconstitutional extraterritorial effect if
21 its "practical effect . . . is to control conduct beyond the boundaries of
22 the State." *Healy*, 491 U.S. at 336 (citing *Brown-Forman Distillers Corp.*
23 *v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). When assessing a
24 plaintiff's extraterritoriality theory, we focus squarely on whether the
25 state law has "the practical effect of *requiring* out-of-state commerce
26 to be conducted at the regulating state's direction." *SPGGC, LLC v.*
27 *Blumenthal*, 505 F.3d 183, 193 (2d Cir. 2007) (emphasis added) (quoting
28 *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003)); *see also*
29 *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir.)
30 (Gorsuch, J.) (referring to the extraterritoriality principle as "the most

1 dormant doctrine in dormant commerce clause jurisprudence”). In
2 that analysis, courts shall not only consider the effect of the
3 challenged law, but also “what effect would arise if not one, but many
4 or every State adopted similar legislation.” *Healy*, 491 U.S. at 336.

5 The practical effect of Connecticut’s E-Waste Law does not
6 “inescapably require” out-of-state conformance with its dictates such
7 that VIZIO cannot successfully argue that the law is
8 unconstitutionally extraterritorial in its effect. *Nat’l Elec. Mfrs. Ass’n*
9 *v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001). The law does not “mak[e]
10 specific reference to the terms of . . . pricing” and does not “attach[]
11 in-state consequences where the pricing terms violate[] the statute[].”
12 *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004).
13 Connecticut’s E-Waste Law does nothing to *control* interstate
14 commerce, but rather merely *considers* out-of-state activity in
15 imposing in-state charges. Indeed, VIZIO is not compelled to conduct
16 its business outside of Connecticut on the state’s proscribed terms.
17 Rather, VIZIO is free to arrange its business in one manner or another
18 without consideration of out-of-state compliance with Connecticut’s
19 E-Waste Law.

20 VIZIO argues that the state’s fee structure is pegged to VIZIO’s
21 national activities, which will inevitably affect its television prices
22 outside Connecticut. VIZIO attempts to characterize this as control,
23 arguing that Connecticut’s E-Waste Law, “individually and
24 collectively with other states’ e-waste laws, is establishing a piecemeal
25 pricing mechanism for interstate goods.” But this practical effect
26 amounts to no more than “upstream pricing impact” because the law
27 does not go “a step further[and] control[] in-state and out-of-state
28 pricing” *Spitzer*, 357 F.3d at 221. As such, Connecticut’s E-Waste
29 Law is merely one of “innumerable valid state laws affect[ing] pricing
30 decisions in other States.” *Healy*, 491 U.S. at 345 (Scalia, J., concurring
31 in part and concurring in the judgment) (cautioning against allowing

1 Commerce Clause jurisprudence to “degenerate into disputes over
2 degree of economic effect.”). VIZIO has not alleged that Connecticut
3 reaches out and directs VIZIO’s decision-making apparatus or that of
4 any other interstate commercial participant.

5 In a final effort to articulate an entitlement to relief, VIZIO tries
6 to tack onto its control argument the principles 1) that “a State may
7 not tax value earned outside its borders,” *Allied-Signal, Inc. v. Dir.,*
8 *Div. of Taxation*, 504 U.S. 768, 777, 112 S. Ct. 2251, 119 L. Ed. 2d 533
9 (1992), and 2) that a state law may not “subject interstate commerce
10 to the risk of a double tax burden to which intrastate commerce is not
11 exposed,” *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1795
12 (2015) (citation omitted). But the E-Waste Law does not impose a tax:
13 it requires electronics producers to pay fees to CERs, private recycling
14 facilities, “not to the government.” *Sam Francis Found. v. Christies, Inc.*,
15 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 795
16 (2016); *see also id.* (observing that “state-imposed taxes” are treated
17 differently than statutes that “regulate[] conduct among private
18 parties” under the dormant Commerce Clause). Moreover, neither
19 principle is part of the extraterritoriality doctrine, and for good
20 reason. As demonstrated above, Connecticut’s imposition of a fee
21 that accounts for national market share does not control interstate
22 commerce. VIZIO’s objection to the law is not that it taxes out-of-state
23 income, *Allied-Signal*, 504 U.S. at 777–78, or that it discourages
24 participation in the interstate market, *Wynne*, 135 S. Ct. at 1801–04.
25 Rather, VIZIO’s challenge remains directed at Connecticut’s ability to
26 use national market share as a proxy for measuring its in-state
27 activity. This is not discriminatory, *see id.* at 1804–05, nor is it control,

1 *see Healy*, 491 U.S. at 336.¹ Thus, VIZIO's attempt to refashion its
2 control argument as one about double taxation is unavailing.

3 VIZIO also insists that our holding in *Grand River Enterprises*
4 *Six Nations, Ltd. v. Pryor* compels us to allow VIZIO's suit to continue
5 to the discovery stage of litigation. *See* 425 F.3d 158, 173 (2d Cir. 2005).
6 We disagree. In *Grand River*, we allowed plaintiffs' extraterritoriality
7 claim to proceed under a national market share theory. *Id.* Unlike the
8 plaintiffs in *Grand River*, however, VIZIO has not made any of the
9 allegations that we suggested in *Grand River* could give rise to a viable
10 claim: "that the [E-Waste Law is] inconsistent with the legitimate
11 regulatory regimes of other states, that the [E-Waste Law] force[s]
12 out-of-state merchants to seek [Connecticut] regulatory approval
13 before undertaking an out-of-state transaction, or that any sort of
14 interstate regulatory gridlock would occur if many or every state
15 adopted similar legislation." *Id.* at 171 (quoting *Spitzer*, 357 F.3d at
16 221).² The *Grand River* plaintiffs were successful precisely because
17 they did so plead. *See id.* As a result, we are not bound by our
18 previous holding in *Grand River* and decline to treat VIZIO in a similar
19 fashion to those plaintiffs in that distinguishable case.³

¹ Indeed, state laws that could "result in the discriminatory double taxation of income earned out of state" are not unconstitutional if that risk of double taxation stems from "the interaction of two different but nondiscriminatory" tax systems. *Wynne*, 135 S. Ct. at 1801–02. VIZIO does not argue that the E-Waste Law is inherently discriminatory, just that it would result in double taxation if other states apportioned e-waste recycling fees based on in-state market share.

² VIZIO does, however, assert that Connecticut's E-Waste Law imposes "overlapping, inconsistent, and confusing obligations on VIZIO" which ultimately can lead to "additional cost[s]" in the form of "multiple e-waste fees for the same product or sale." This alleged impact does not amount to "effectively regulating the pricing mechanism for goods in interstate commerce." *Grand River*, 425 F.3d at 173 (internal quotation marks and brackets omitted) (quoting *Healy*, 491 U.S. at 340).

³ Moreover, the *Grand River* court qualified its ruling by stating that it "[took] no position as to the ultimate viability of the dormant commerce clause claim," but chose to keep that claim alive so as to remain "consistent with the district court's decision to reinstate the Sherman Act claim" *Grand River*, 425 F.3d at 173. And the Second Circuit later held that the *Grand River* claim was not viable because the challengers had shown only that the regulations could affect nation-wide prices, which was legally insufficient. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 67 (2d Cir. 2010). Yet that is all that VIZIO pleads here.

1 In sum, VIZIO has only argued that Connecticut's E-Waste Law
2 merely affects pricing decisions, not that it "directly controls
3 commerce occurring wholly outside the boundaries of a State"
4 *Healy*, 491 U.S. at 336. More is required to make out an
5 extraterritoriality claim. Because VIZIO's alleged "practical effect" is
6 insufficient and it has failed to identify an alternative recognized basis
7 under which its extraterritoriality claim can survive, we affirm the
8 district court's dismissal of VIZIO's claim for relief under the theory
9 of extraterritoriality.

10 III. Unconstitutional User Fee

11 VIZIO's suggestion that we apply the Supreme Court's "user
12 fee" analysis to these circumstances is also misguided. While the
13 imposition of a user fee may indicate that a dormant Commerce
14 Clause violation is afoot, *see Selevan*, 584 F.3d at 96–98, that analysis is
15 inapplicable here. Because Connecticut does not charge a fee for the
16 use of public property, VIZIO's proposed framework is inapposite
17 and VIZIO's claim for relief thereunder was rightfully dismissed by
18 the district court.

19 In *Evansville*, the Supreme Court announced a test in order to
20 examine contested tolls imposed for the use of state roads. 405 U.S.
21 at 716–17. That test deems permissible those user fees that are: 1)
22 "based on some fair approximation of use," 2) "not excessive in
23 relation to the benefits conferred," and 3) "not discriminat[ory]
24 against interstate commerce." *Nw. Airlines, Inc. v. County of Kent*, 510
25 U.S. 355, 369 (1994) (citing *Evansville*, 405 U.S. at 716–17). Importantly,
26 the *Evansville* rubric applies "only to 'charge[s] imposed by the State
27 for the use of *state-owned or state-provided* transportation or other
28 facilities and services.'" *Or. Waste Sys.*, 511 U.S. at 103 n.6 (emphasis
29 added) (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,
30 621 (1981)).

1 Notwithstanding VIZIO's arguments to the contrary,
2 Connecticut's E-Waste Law does not impose a user fee and, therefore,
3 the *Evansville* framework is ill-suited to scrutinize the state's tax.
4 Connecticut does not charge for the privilege of using public facilities
5 but instead merely imposes a fee on VIZIO in order to finance an
6 electronics recycling program. In fact, under Connecticut's E-Waste
7 Law manufacturers pay the recycling fees directly to the CERs,
8 privately owned facilities designated by the state as recyclers. *See*
9 Conn. Agencies Regs. §§ 22a-638-1(b), (j). Those private CERs then do
10 the work of actually recycling the goods. *See* Conn. Agencies Regs.
11 § 22a-638-1(c). The state's role lies only in the program's creation,
12 maintenance, and in assigning manufacturers a rate. As such,
13 Connecticut cannot be said, in this context, to run a "state-owned or
14 state-provided" program and we decline to analyze the
15 reasonableness of the fees using the *Evansville* test.

16 VIZIO encourages this court to view the *Oregon Waste Systems*
17 holding as *dicta*. Essentially, VIZIO claims that because the overall
18 disposition of that case did not rely upon the reasoning provided in
19 footnote 6, we can treat it as persuasive rather than binding. We
20 decline to do so for two reasons. First, the questioned holding is not
21 merely *dicta*, as demonstrated by that Court's treatment of the issue.
22 *See Or. Waste Sys.*, 511 U.S. at 114 (Rehnquist, C.J., dissenting) (noting
23 the importance of footnote 6 in the Court's conclusion); *see also*
24 *Commonwealth Edison*, 453 U.S. at 621 (describing the user-fees
25 doctrine as applying to fees "imposed by the State for the use of *state-*
26 *owned or state-provided* transportation or other facilities and services."
27 (emphasis added)). Second, even if we were persuaded to follow
28 VIZIO's line of reasoning, VIZIO has offered no reason why this
29 definition of "user fee" is either unreasonable or in need of revision.
30 Rather than offering an alternative, VIZIO merely states that we have
31 the option to decline to follow footnote 6.

1 In sum, we do not see a justification—nor has VIZIO offered
2 one—for why the *Evansville* test ought to be applied to a program such
3 as Connecticut’s. As a result, VIZIO has failed to state a claim for
4 relief and the district court was correct to dismiss this “user fee”
5 argument.

6 IV. Burden on Interstate Commerce

7 Having dispensed with VIZIO’s primary arguments as to the
8 discriminatory nature of Connecticut’s E-Waste Law, we now turn to
9 the task of balancing the competing national and local interests.
10 Because the law “regulates even-handedly to effectuate a legitimate
11 local public interest, and its effects on interstate commerce are only
12 incidental, it will be upheld unless the burden imposed on such
13 commerce is clearly excessive in relation to the putative local
14 benefits.” *Pike*, 397 U.S. at 142. Ultimately, however, this final
15 attempt to maintain VIZIO’s dormant Commerce Clause challenge
16 under the *Pike* framework must be stifled because VIZIO once again
17 fails to plead sufficient facts to give rise to an entitlement to relief.

18 The *Pike* test is often directed at differentiating “protectionist
19 measures” from those that “can fairly be viewed as . . . directed to
20 legitimate local concerns, with effects upon interstate commerce that
21 are only incidental.” *Philadelphia v. New Jersey*, 437 U.S. 617, 624,
22 (1978). In order to sufficiently allege that Connecticut’s E-Waste Law
23 is “protectionist” rather than dedicated to “legitimate local concerns,”
24 VIZIO must at least demonstrate that the “burden on interstate
25 commerce . . . is qualitatively or quantitatively different from that
26 imposed on intrastate commerce.” *Town of Southold*, 477 F.3d at 50
27 (quoting *Sorrell*, 272 F.3d at 109). What’s more, when faced with the
28 considerable public benefits presented by this law, VIZIO’s task
29 becomes even greater, as it “must overcome a ‘strong presumption of
30 validity.’” *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670

1 (1981) (quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524
2 (1959)).

3 While states are prohibited from discriminating against out-of-
4 state actors, they “may impose incidental burdens on interstate
5 commerce . . . to promote safety or general welfare.” *N.Y. State*
6 *Trawlers Ass’n v. Jorling*, 16 F.3d 1303, 1307 (2d Cir. 1994). Here, we
7 examine precisely that sort of law and conclude that “any arguable
8 burden does not exceed the public benefits of the [law].” *United*
9 *Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S.
10 330, 346 (2007).

11 The benefits provided by Connecticut’s E-Waste Law are
12 legion. Primarily, the law funds the state’s recycling efforts, a clear
13 benefit to the public at large. Secondarily, the market share approach
14 itself provides additional benefits in that it, among other things:
15 apportions costs amongst state market participants, reduces the
16 administrative strain other approaches may carry in identifying
17 producers, and guarantees that any “orphan” products—those for
18 which an original manufacturer is unidentifiable—will be recycled,
19 *see* Conn. Gen. Stat. § 22a-631(d). Analyzed against this backdrop,
20 VIZIO faces a high bar to sufficiently allege that Connecticut has
21 impermissibly implemented a program which benefits public health
22 and safety.⁴

23 On balance we do not find an impermissible burden. Burdens
24 supportive of an unconstitutional finding have been recognized in the
25 following situations: “regulations that have a disparate impact on in-
26 versus out-of-state entities, laws that regulate beyond the state’s

⁴ VIZIO responds that, even if the E-Waste Law as a whole protects public health and safety, the method by which it does so—specifically its “reliance on national-market share—is entirely unrelated to any” such benefit. That is of no importance. We ask only whether the means chosen is “a convenient and effective way” of accomplishing the ends sought. *United Haulers Ass’n*, 550 U.S. at 346.

1 borders, and laws that create regulatory inconsistencies between
2 states.” *N.Y. Pet Welfare Ass’n*, 850 F.3d at 91. VIZIO’s *Pike* argument
3 rests somewhat uncomfortably in those first and third categories.⁵

4 First addressing VIZIO’s claims of disparate impact, VIZIO has
5 not demonstrated that there are “burdens on interstate commerce that
6 exceed the burdens on intrastate commerce.” *USA Recycling*, 66 F.3d
7 at 1287 (quoting *Jorling*, 16 F.3d at 1308). Nor has VIZIO alleged the
8 actual—or potential—existence of any in-state manufacturer that is
9 less negatively affected by the national market approach.

10 In any event, the law does not contain any uneven burden
11 allocated on the basis of an actor’s residency and, as such, we do not
12 find a violation of the dormant Commerce Clause. Connecticut
13 considers a variety of factors when assigning manufacturers a market
14 share, *see* Conn. Agencies Regs. § 22a-638-1(g)(2), none of which
15 relates to residency. In other words, Connecticut’s E-Waste Law
16 “treat[s] all private companies exactly the same,” no matter from
17 which state they hail. *United Haulers Ass’n*, 550 U.S. at 342. Short of
18 finding that burdens are distributed unequally based on in-state
19 versus out-of-state distinctions, we are unable to find an
20 impermissible disparate impact. *See C & A Carbone, Inc. v. Town of*
21 *Clarkstown*, 511 U.S. 383, 390–92 (1994) (citing, *inter alia*, *Philadelphia*,
22 437 U.S. at 624; *Hughes*, 441 U.S. at 322)).

23 VIZIO does also claim that Connecticut’s E-Waste Law double-
24 charges recycling costs in different states, imposing fees in
25 Connecticut for out-of-state sales in states where VIZIO has already
26 contributed to recycling efforts. Inasmuch as that claim could be
27 construed as a “regulatory inconsistency,” it is not of the variety
28 deemed unconstitutional under the *Pike* standard. Whatever the ill

⁵ Any argument by VIZIO that Connecticut regulates beyond its borders has been disposed of by way of our extraterritoriality analysis. *See supra* Discussion Section II; *see also Sorrell*, 272 F.3d at 110 (analyzing one component of a plaintiff’s *Pike* claim under the *Healy* rubric).

1 effects VIZIO claims result from Connecticut's E-Waste Law, those
2 effects are only felt within the borders of that state. Regulatory
3 inconsistencies arise not from a regulation that takes effect entirely
4 inside a state's borders, but instead from those that "project[] one state
5 regulatory regime into the jurisdiction of another State." *Healy*, 491
6 U.S. at 337 (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–
7 89 (1987)). Neither Connecticut's consideration of out-of-state sales
8 as a basis for its e-waste fees nor any resultant allegedly "duplicative"
9 charges in multiple states constitute a regulatory inconsistency.
10 Rather, it is merely an inconvenience for VIZIO to pay a seemingly
11 larger e-waste bill. Connecticut has done nothing to create—or
12 increase the likelihood of—inconsistent obligations with which
13 VIZIO must comply in different states. *See Brown-Forman Distillers*,
14 476 U.S. at 583–84. As a result, we do not find that any alleged double
15 charge impermissibly burdens interstate commerce.

16 Ultimately, any arguable burden on interstate commerce is not
17 clearly excessive in comparison to the local benefits. Thus, VIZIO
18 cannot state a claim under *Pike*, 397 U.S. at 142, and VIZIO's complaint
19 was properly dismissed.

20 CONCLUSION

21 The viability of VIZIO's claim hinges on our recognizing a
22 claim under the dormant Commerce Clause not acknowledged by
23 any court. VIZIO has failed to convince us that its claim should
24 proceed under a variety of theories, old and new. In sum, we: 1)
25 decline to extend the extraterritoriality doctrine in such a way as to
26 prohibit laws that merely consider out-of-state activity, 2) do not
27 apply the user fee analysis to VIZIO's case, and 3) find no burden on
28 interstate commerce that is clearly excessive to the considerable
29 public benefits conferred by Connecticut's E-Waste Law. As a result,
30 VIZIO's suit cannot proceed.

1 VIZIO has failed to plead a cognizable basis for invalidating
2 Connecticut's E-Waste Law under the dormant Commerce Clause
3 and, accordingly, we uphold the decision of the district court to
4 dismiss VIZIO's complaint with prejudice.