No. _____

In The
Supreme Court of the United States

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al.,

Petitioners,

v.

TOM WOLF, GOVERNOR OF PENNSYLVANIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners allege that the Pennsylvania Turnpike imposes excessive and burdensome tolls in violation of the dormant Commerce Clause. The Third Circuit found that Congress expressed "unmistakably clear" intent to authorize states to impose unlimited tolls that would otherwise violate the dormant Commerce Clause in 23 U.S.C. § 129(a)(3)—a section that addresses how toll receipts may be spent, but which is silent as to the amount of tolls a state may impose and collect. The Third Circuit's decision diverged from decisions of the First, Second, Fourth, Fifth, and Ninth Circuits on this issue.

1. Can courts find that Congress authorized states to impose burdens on interstate commerce that would otherwise violate the dormant Commerce Clause on the basis of authorization implied by congressional silence?

Petitioners allege that the Pennsylvania Turnpike's excessive tolls violate their right to travel under *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and argue that the Third Circuit incorrectly applied the "actual deterrence" standard introduced in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (plurality opinion).

2. Did the Third Circuit err when it joined the D.C. and Ninth Circuits and split with the Sixth and Eighth Circuits in holding that a

QUESTIONS PRESENTED—Continued

state law's actual deterrence of travel is a necessary element of a claim under the constitutional right to travel, even when the claim is brought under the test set forth in *Evansville* challenging excessive user fees?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Owner Operator Independent Drivers Association, Inc.

National Motorists Association

Marion L. Spray

B.L. Reever Transport, Inc.

Flat Rock Transportation, LLC

Milligan Trucking, Inc.

Frank Scavo

Laurence G. Tarr

Respondents:

Tom Wolf, Governor of the Commonwealth of Pennsylvania, in his official and individual capacities

Pennsylvania Turnpike Commission

Leslie S. Richards, former Secretary of the Pennsylvania Department of Transportation and former Chair of the Pennsylvania Turnpike Commission, in her individual capacity*

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* Effective December 6, 2019, Yassmin Gramian became the Acting Secretary of the Pennsylvania Department of Transportation in place of Leslie S. Richards. To the best of Petitioners' knowledge, as of the date of this writing, no individual has been elected to serve as Chair of the Commission.

LIST OF PARTIES TO THE PROCEEDING BELOW—Continued

Yassmin Gramian, Acting Secretary of the Pennsylvania Department of Transportation, in her official capacity

William K. Lieberman, Vice Chair of the Pennsylvania Turnpike Commission, in his official and individual capacities

Barry T. Drew, Secretary-Treasurer of the Pennsylvania Turnpike Commission, in his official and individual capacities

Pasquale T. Deon Sr., Commissioner of the Pennsylvania Turnpike Commission, in his official and individual capacities

John N. Wozniak, Commissioner of the Pennsylvania Turnpike Commission, in his official and individual capacities

Mark P. Compton, Chief Executive Officer of the Pennsylvania Turnpike Commission, in his official and individual capacities

Craig R. Shuey, Chief Operating Officer of the Pennsylvania Turnpike Commission, in his official and individual capacities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14 and 29.6, Petitioner Owner Operator Independent Drivers Association, Inc. states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

Pursuant to Rules 14 and 29.6, Petitioner National Motorists Association states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

Pursuant to Rules 14 and 29.6, Petitioner B.L. Reever Transport, Inc. states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

Pursuant to Rules 14 and 29.6, Petitioner Flat Rock Transportation, LLC states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

Pursuant to Rules 14 and 29.6, Petitioner Milligan Trucking, Inc. states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

RELATED CASES

- *Owner Operator Independent Drivers Association, Inc., et al. v. Tom Wolf, Governor of Pennsylvania, et al.*, No. 1:18-CV-00608, U.S. District Court for the Middle District of Pennsylvania. Judgment entered April 4, 2019.

- *Owner Operator Independent Drivers Association, Inc., et al. v. Tom Wolf, Governor of Pennsylvania, et al.*, No. 19-1775, U.S. Court of Appeals for the Third Circuit. Judgment entered August 13, 2019.

- *Owner Operator Independent Drivers Association, Inc., et al. v. Tom Wolf, Governor of Pennsylvania, et al.*, No. 19-1775, U.S. Court of Appeals for the Third Circuit. Judgment entered September 12, 2019.

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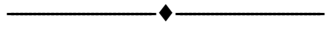
The August 13, 2019 opinion of United States Court of Appeals for the Third Circuit in Case No. 19-1775 is reported at 934 F.3d 283 and reproduced in the Appendix at App. 1-23. The April 4, 2019 opinion of the United States District Court for the Middle District of Pennsylvania dismissing Petitioners' claims in Case No. 1:18-CV-00608 is reported at 383 F. Supp. 3d 353 and reproduced in the Appendix at App. 24-98. The accompanying Order is reproduced in the Appendix at App. 99-100.

JURISDICTION

Federal subject matter jurisdiction in this case is based on 28 U.S.C. §§ 1331 and 1343. The causes of action alleged in Petitioners' Complaint arise under 42 U.S.C. § 1983.

The Court of Appeals issued its opinion affirming the District Court's decision on August 13, 2019. Petitioners timely filed a petition for rehearing en banc, which the Court of Appeals denied on September 12, 2019. That order is reproduced in the Appendix at App. 101-03.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, which is reproduced below and in the Appendix at App. 143. This case also involves 23 U.S.C. § 129, which is reproduced in full at App. 131-41. Relevant portions of the statute are reproduced below and at App. 145-46. This case also involves Pennsylvania's Act 44 (2007) and Act 89 (2013), which are reproduced in full at App. 104-15 and App. 116-30, respectively.

U.S. Const. art. I, § 8, cl. 3

> The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

23 U.S.C. § 129(a)

> (3) Limitations on use of revenues.—
>
> (A) In general.—A public authority with jurisdiction over a toll facility shall ensure that toll revenues received from operation of the toll facility are used only for—
>
> > (i) debt service with respect to the projects on or for which the tolls are authorized, including funding of reasonable reserves and debt service on refinancing;
> >
> > (ii) a reasonable return on investment of any private person financing the project, as determined by the State or interstate compact of States concerned;

> (iii) any costs necessary for the improvement and proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation;
>
> (iv) if the toll facility is subject to a public-private partnership agreement, payments that the party holding the right to toll revenues owes to the other party under the public-private partnership agreement; and
>
> (v) if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under this title.

STATEMENT OF THE CASE

I. Parties

Petitioners include motor carriers and drivers of commercial motor vehicles engaged in interstate commerce and their trade association (Owner Operator Independent Drivers Association, Inc.) as well as individual motorists and their association (National Motorists Association). Petitioners challenge the Respondents' imposition of unconstitutionally excessive and burdensome tolls on the use of the Pennsylvania Turnpike. Respondents include the Pennsylvania Turnpike Commission (PTC); Tom Wolf, the Governor of Pennsylvania; Leslie S. Richards, former Secretary of the

Pennsylvania Department of Transportation (PennDOT) and former Chair of the PTC; Yassmin Gramian, Acting Secretary of PennDOT; and various officers and officials within these organizations.

II. Claims and Defenses

Petitioners allege that Respondents' tolls impose an undue burden on interstate commerce in violation of the dormant Commerce Clause and that they impair Petitioners' constitutional right to travel. As the district court noted, the facts of this case are essentially undisputed. App. 11 n.6; App. 77. In 2007, Pennsylvania enacted a statutory scheme[1] that converted the Pennsylvania Turnpike into a source of revenue to fund myriad projects throughout the state that have no functional relationship to the Turnpike. PTC is required annually to transfer to the Pennsylvania Department of Transportation (PennDOT) vast amounts of money (currently $450,000,000 per year). App. 6-8, 28-30, 128-29. To generate the funds it is required to transfer, PTC sets tolls at levels that it admits exceed the cost of operating and maintaining the Turnpike by as much as 250 to 300 percent. *See* Appellants' Brief to the Third Circuit (A.B.) 7-8. Never in the history of the United States has Congress or a court concluded that

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[1] General Local Government Code (53 Pa.C.S.), Transportation (74 Pa.C.S.) and Vehicle Code (75 Pa.C.S.)—Omnibus Amendments, Act of Jul. 18, 2007, P.L. 169, No. 44, amended by Transportation (74 Pa.C.S.) and Vehicle Code (75 Pa.C.S.)—Omnibus Amendments, Act of Nov. 25, 2013, P.L. 974, No. 89. Act 44 and Act 89 are reproduced in the Appendix at App. 104-15 and 116-30.

user fees of this magnitude are constitutionally appropriate. The Third Circuit's decision sanctions these excessive tolls and permits states to charge unlimited tolls on federal-aid highways (App. 18-20) in violation of the dormant Commerce Clause and the constitutional right to travel.

Claims asserting individuals' rights to be shielded from excessive user fees (like tolls) under the dormant Commerce Clause and under the constitutional right to travel have heretofore been evaluated by this Court and others under the standard established in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

> [A] levy is reasonable under Evansville if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.

Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 369 (1994) (citing *Evansville*, 405 U.S. at 716-17). This standard applies to claims raised under both the Commerce Clause and the constitutional right to travel. *Evansville*, 405 U.S. at 714-15. Petitioners challenge the burdens imposed by these excessive tolls.

Respondents argued that Petitioners' Commerce Clause claim should be evaluated under the standard established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and that, in any event, in 1991 Congress authorized states to impose highway tolls without the limitations of the dormant Commerce Clause. Respondents

further contended that tolls—regardless of amount—are a "minor burden" that do not interfere with motorists' fundamental right to travel.

III. Opinions Below

The district court's Memorandum Opinion did not quarrel with the fact that the Complaint alleged facts sufficient to warrant relief using the standard found in *Evansville* and *Northwest Airlines*. App. 97. It held, however, that Respondents' liability under the Commerce Clause was to be assessed under *Pike*, rejecting the *Evansville/Northwest Airlines* test in a departure from Third Circuit precedent and splitting with other circuit courts as to how dormant Commerce Clause challenges to excessive user fees should be evaluated. App. 88. The district court declined to address Respondents' defense that Congress has authorized Pennsylvania's burdensome tolling scheme. App. 90 n.23.

The Third Circuit did not review the *Evansville* versus *Pike* question decided by the district court. App. 20 n.12. It ruled instead that Congress, through the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified in various sections of Title 23, U.S.C.), authorized states to impose highway tolls free from the limitations imposed under the dormant Commerce Clause. App. 20. The court found that 23 U.S.C. § 129(a)(3)(A)(v), App. 133-34, which imposes limitations on tolling authorities' use of toll revenues, also implicitly authorized state tolling authorities to

generate excess toll revenues free from dormant Commerce Clause limitations.

Both lower court decisions authorize massive transfers of user fees (toll revenues) generated by an instrumentality of interstate commerce to rescue states from budget shortfalls for services and facilities functionally unrelated to the tolled facility. Neither court addressed the broader implications of the massive burden upon interstate commerce imposed by its decision let alone the extraordinary disruption to interstate commerce if other states adopt similar schemes.

Petitioners' right-to-travel claims alleged that PTC's excessive tolls imposed an undue burden on their freedom to move about the Commonwealth and the nation in violation of the standard in *Evansville*. The Third Circuit rejected Petitioners' right-to-travel claims, adopting a standard—never endorsed by this Court—that Petitioners must allege that their travel was actually deterred by Respondents' toll amounts. App. 21-23.

REASONS FOR GRANTING THE WRIT

This petition for certiorari presents the Court with the opportunity to address confusion among the courts on two of the most contested yet basic constitutional principles: the dormant Commerce Clause and the constitutional right to travel. Petitioners raise the question of whether Pennsylvania's massive Turnpike

tolls (measuring 250 to 300 percent of the cost of providing the Turnpike) represent an undue burden on interstate commerce as well as a violation of the constitutional right to travel. This Court in *Evansville* found that the test used to measure an undue burden under the Commerce Clause was also appropriate in burden cases to determine whether a person's constitutional right to travel has been impaired. *Evansville*, 405 U.S. at 711-12, 716-17.

Congressional Authorization

The Third Circuit relied exclusively on a single provision of ISTEA to support its finding that congressional authorization to impose virtually unlimited tolls free from dormant Commerce Clause limitations was "unmistakably clear." 23 U.S.C. § 129(a)(3)(A)(v). Because Section 129 deals only with how toll revenue may be *spent*, and is silent with respect to toll rates and *collections*, the Third Circuit's holding is necessarily based upon authorization inferred from congressional silence—a proposition as to which there is significant division among the circuit courts.

The judicial task of finding "unmistakably clear" congressional intent to exempt state action from the limitations of the dormant Commerce Clause carries serious and widespread implications for the flow of commerce between and among the several states. Drivers have been forced to pay hundreds of millions of dollars in excess tolls annually to support state

infrastructure projects unrelated to their use of the Pennsylvania Turnpike.

The inconsistency among the circuit courts in determining whether Congress authorized states to violate the Commerce Clause is simply unacceptable. Certiorari is needed to eliminate the uncertainty and lack of uniformity that currently prevail among the circuit courts on the question of whether congressional authorization may be implied on the basis of legislative silence.

Constitutional Right to Travel

The constitutional right to travel protects the ability of individuals to freely move about this nation. The Court reaffirmed the breadth of this right in *Saenz v. Roe*, 526 U.S. 489 (1999)—the most recent case in which the Court addressed the right to travel. In *Saenz*, the Court recognized that the right to travel has been invoked to challenge an array of state laws and that the Court has developed distinct approaches based on the nature of the impairment.

This petition for certiorari comes before the Court because a circuit split has emerged on whether actual deterrence is a necessary element to assert a right-to-travel claim. This more demanding standard was introduced, as dicta, by the plurality opinion in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). To the extent deterrence has ever been considered by this Court—it has never been endorsed as necessary by a majority—it has arisen in the context of challenges

to durational residency laws that determine who is eligible for certain state benefits, a distinct subset of cases within this Court's right-to-travel jurisprudence. Deterrence has never been an element in burden cases, like *Evansville* and Petitioners' challenge here. Misled by the plurality in *Soto-Lopez*, even after *Saenz*, several courts, including the Third Circuit below, have applied the wrong standard for evaluating distinct right-to-travel claims.

Certiorari is essential to resolve this firmly established circuit split, particularly when requiring an allegation of actual deterrence conflicts with *Evansville*'s binding precedent. The Court has repeatedly rejected "actual deterrence" as a necessary element of a right-to-travel claim in all manner of cases and never considered deterrence when establishing the relevant standard for evaluating the constitutionality of user fees such as highway tolls. Stated plainly, persons who are burdened by paying excessive tolls should not be barred from relief on the ground that they have not actually been deterred from travel.

I. PTC's Tolls Violate The Commerce Clause.

"Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of states to enact laws imposing substantial burdens on such commerce." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This Court has recently "emphasized the connection between the trade

barriers that prompted the call for a new Constitution and [its] dormant Commerce Clause jurisprudence," stressing that "dormant Commerce Clause cases reflect a 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention.'" *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). Crucially, the Court also noted that—of all the provisions in the Constitution—only the Commerce Clause stands as the "primary safeguard" against states imposing undue burdens upon interstate commerce. *Id.*

The dormant Commerce Clause prevents states from imposing undue burdens on interstate commerce, but "Congress may 'redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" *Wunnicke*, 467 U.S. at 87-88 (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)). However, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Id.* at 91. Congress must "affirmatively contemplate" ceding its authority to the states. *Id.* "The requirement that Congress itself must affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine." *Id.* at 91-92. This Court and the prevailing view in the circuit courts reject "implied" approval or approval by "inference." *See infra* Part I.B.

Absent congressional authorization, courts apply *Evansville* to dormant Commerce Clause challenges to excessive user fees. 405 U.S. at 716-17. *Evansville*'s undue burden analysis focuses entirely on the amount of the user fee compared to the cost of the facility provided and/or the value of the benefits conferred upon the user. *Id.*; *see also Nw. Airlines*, 510 U.S. at 369. In finding "unmistakably clear" congressional authorization for unlimited toll collection, the Third Circuit relied solely on a single provision of ISTEA, found at 23 U.S.C. § 129(a)(3)(A)(v). App. 133-34. That section does not mention toll rates and does not specifically authorize any state tolling authority, including PTC, to burden interstate commerce with excessive highway tolls that would otherwise violate the Commerce Clause.

Instead, Section 129 imposes strict limitations upon the ways that tolling authorities may lawfully spend toll revenue. Section 129 is silent as to the *amount* of tolls a state may impose and collect. The Third Circuit viewed this congressional silence as to toll rates as implied authorization to impose unlimited tolls, irrespective of dormant Commerce Clause restraints. App. 18-19.

Congress's direction as to states' toll revenue *spending* did not authorize the *collection* of unlimited toll revenues free from dormant Commerce Clause restraints. Further, in holding that congressional authorization could be found by implication and inference as to what Congress probably intended in the absence of clear, direct, and unambiguous language, the Third Circuit joins the Sixth and Tenth Circuits and diverges

from contrary holdings by the First, Fourth, Fifth, and Ninth Circuits.

A. Congressional Legislation Addressing the *Spending* of Toll Revenues Does Not Free State Tolling Authorities from Dormant Commerce Clause Limitations on Toll *Collections*.

This Court employs an exacting standard to conclude that Congress intended to exempt state action from scrutiny under the dormant Commerce Clause. *See Wunnicke*, 467 U.S. at 91 ("[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear."); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve [a Commerce Clause violation]."); *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 342-43 (1982) (refusing to find congressional authorization because Congress's intent to remove state conduct from Commerce Clause scrutiny was not "expressly stated" (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946))).

That a state law or policy "appears to be consistent with federal policy—or even that state policy furthers the goals [the Court] might believe that Congress had in mind—is an insufficient indicium of congressional intent." *Wunnicke*, 467 U.S. at 92; *see also New England Power*, 455 U.S. at 343 ("[W]e have no authority to

rewrite [Congress's] legislation based on mere speculation as to what Congress 'probably had in mind.'" (quoting *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring))).

In *Wunnicke*, an Alaskan timber company brought a dormant Commerce Clause challenge to Alaska rules requiring that certain timber sold by the state be processed in Alaska before being sold elsewhere. 467 U.S. at 84-86. The district court enjoined the restrictions, but the Ninth Circuit reversed, holding that Congress authorized Alaska's policy when it imposed similar requirements on timber harvested on federal land in Alaska. *Id.* at 86-87. Although there was a clear federal policy to treat federal and even Alaskan timber differently than timber from other states, this Court disagreed that such policy implied authorization for Alaska to adopt a parallel policy. *Id.* at 88-90.

The Court refused to find *implied* authorization for Alaska to do anything. Instead, the Court held fast to its rule that congressional intent to authorize state conduct must be "expressly stated." This requirement is not mere formalism but ensures that Congress affirmatively contemplated the relevant state action. *See id.* at 91. Thus, even state conduct that is "consistent with federal policy" or "furthers the goals [the Court] might believe that Congress had in mind" does not show congressional intent to authorize conduct inconsistent with Commerce Clause limitations. Courts cannot infer such authorization. *See id.* at 92-93.

In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), landowners lodged a Commerce Clause challenge to a Nebraska law that effectively prohibited withdrawal of water from Nebraska wells for use in Colorado. *Id.* at 944. This Court found that Congress had not authorized Nebraska's policy. Numerous statutes deferring to *valid* state water laws and various water compacts did not amount to the requisite intent. *Id.* at 958-59.

Similarly, in *New England Power*, the Court analyzed whether New Hampshire could prohibit in-state hydroelectric energy producers from selling their energy to out-of-state customers. Proponents relied on Federal Power Act language affirming that federal law did not deprive states of authority to regulate the export of hydroelectric power. *New England Power*, 455 U.S. at 339-43. This Court concluded, however, that the federal statute merely affirmed existing *valid* state laws. Congress had not expressly stated its intent to authorize regulations that would otherwise violate the Commerce Clause. *Id.* at 342-43. The Court refused to "rewrite" the statute "based on mere speculation as to what Congress 'probably had in mind.'" *Id.* at 343 (quoting *Pub. Util. Comm'n of Cal.*, 345 U.S. at 319 (Jackson, J., concurring)).

Likewise here, Congress's expansion of how surplus toll revenues could be spent did not authorize states to generate burdensome highway tolls far exceeding the cost of the tolled roads and the benefits conferred upon tollpayers. *See Evansville*, 405 U.S. at 716-17.

B. The Courts of Appeals Are Divided on Whether Intent May Be Implied from Congressional Silence.

The Third Circuit in this case concluded that Congress intended, with unmistakable clarity, to remove even exorbitant highway tolls throughout the nation from Commerce Clause scrutiny based on congressional silence and inference. App. 18-20. In so doing, the Third Circuit joined a minority of circuit courts and deepened the divide with other circuit courts that have rejected congressional silence and inferences as bases for finding legislative intent to remove state and local acts from Commerce Clause scrutiny. Certiorari should be granted to resolve this divergence and clarify to what extent, if any, courts may rely on inference and silence to find "unmistakably clear" congressional intent to authorize violations of the dormant Commerce Clause.

1. The Third Circuit ruling departed from this Court's precedent when it found "unmistakably clear" intent from silence and inferences.

In this case, the Third Circuit relied on inferences and congressional silence to conclude that Section 129's failure to include a cap on toll rates or revenues implied that states could impose tolls without Commerce Clause limitations. App. 18-19. In particular, the court held that Section 129(a)(3) ("Limitations on use of revenues") and its permission for states to *spend* federal-aid highway toll money on certain projects evinced

"unmistakably clear" intent to remove tolling authorities' toll generation from Commerce Clause limitations. App. 18-19.

The Third Circuit defined its task as deciding only whether Congress had authorized tolling entities to *use* toll revenues on non-toll projects despite the fact that Petitioners' challenge was to Respondents' *collecting* excessive tolls. *See* App. 16-17. Although states and localities can defend the reasonableness of toll collections by tying expenditures to tolled facilities,[2] the billions of dollars in toll revenues extracted from tollpayers but used to support state projects not functionally related to the toll road puts this approach out of the reach of Respondents.

As acknowledged by the Court of Appeals, the actual language of the statute at issue speaks to the "use" of toll revenue—*i.e.*, how toll revenues can be spent (without jeopardizing a state's federal highway funding). *See*, *e.g.*, App. 17. The court inferred that when Congress addressed the *use* of toll revenues it also purposefully authorized the *collection* of toll revenues beyond Commerce Clause limits. *See*, *e.g.*, App. 17-18 (noting that the statute "envisions" excessive toll collection). The court reasoned that because the statute did not set a maximum limit on toll collection (no cap established), the statute impliedly authorized unlimited toll collection. *See id.* This decision exacerbated a

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[2] *See*, *e.g.*, *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 87 (2d Cir. 2009) (analyzing whether non-ferry projects bear "functional relationship" to tolled facilities and thus fit within *Evansville* determination).

split among the circuit courts as to whether authorization can be inferred from congressional silence.

2. Four Circuit Courts refuse to infer from congressional silence an "unmistakably clear" legislative intent to authorize state conduct that would otherwise violate the dormant Commerce Clause.

The First, Fourth, Fifth, and Ninth Circuits have articulated an unwillingness to look beyond the actual text of the statute or clear legislative history to find congressional authorization based on inference and speculation. These courts refuse to infer congressional action from congressional inaction—*i.e.*, Congress's failure to prohibit state policies or acknowledgement of valid state policies does not equate to Congress's authorization to implement otherwise valid policies free from Commerce Clause limitations.

The **First Circuit** refused to find implied authorization for Puerto Rican egg labeling regulations where federal law exempted Puerto Rico from an egg labeling prohibition. *United Egg Producers v. Dep't of Agric. of Commonwealth of P.R.*, 77 F.3d 567, 569 (1st Cir. 1996). Recognizing the high threshold required to find unmistakably clear congressional intent, the First Circuit found that Congress did not authorize the labeling requirements even though the statute was "perhaps susceptible" to this implied reading. *Id.* at 570-71.

The **Fourth Circuit** declined to infer unmistakably clear intent to permit discrimination in hazardous waste treatment from federal policy permitting state regulation of hazardous waste disposal. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 785-90 (4th Cir. 1991). Merely because the federal laws stated that they not be interpreted to prohibit state regulation did not authorize regulations violative of the Commerce Clause. *Id.* at 790.

The **Fifth Circuit** similarly refused to find unmistakably clear intent to authorize state laws restricting the marketing of foreign-farmed American catfish species and the use of "Cajun" in food marketing. *See Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 751 (5th Cir. 2006). Federal laws limited the labeling of "catfish" to only the American species and protected against marketing confusion but did not authorize the state restrictions even if their purposes aligned. *Id.*

In *Yakima Valley*, the **Ninth Circuit** rejected the state defendant's argument that Congress had authorized its medical licensing restrictions despite repealing a statute that required such licensing programs as a condition of federal funding. *See Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 933-35 (9th Cir. 2011). The repealing language was potentially ambiguous with respect to the licensing programs. Without clear legislative history, however, the defendant was "reduced to arguing that we can infer authorization from congressional silence—that Congress could not have meant to pull the rug out from

under the states after inducing their transition to certificate of need programs." *Id.* at 934-35 ("Congressional silence is not a clear statement, however.").

So too, here, Congress directed how states could spend toll receipts without incurring liability for repaying federal grant money. Standing alone, authorization as to how to spend toll revenues provides no authority to *generate* tolls beyond Commerce Clause limitations.

3. The Third Circuit joined the Sixth and Tenth Circuits in finding congressional intent from legislative silence and inferences.

Two other circuits have found "unmistakably clear" congressional intent to authorize state conduct that would otherwise violate the dormant Commerce Clause from Congress's failure to specifically prohibit such conduct.

The **Sixth Circuit** inferred congressional intent to authorize state securities regulations from congressional silence and general policy. *See L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 205-06 (6th Cir. 1985). That court, interpreting the federal securities statute that left in place state securities regulations not contradicted by federal law, inferred from Congress's policy of letting states fill in securities regulatory gaps that Congress removed such rules from Commerce Clause scrutiny. *Id.* at 205-06.

Similarly, the **Tenth Circuit** expanded narrow statutory language permitting "certain types of reasonable [airport] fees and charges" into blanket authority for a city to require operator leases based on operators' gross receipts from all operations, regardless of location, including income on out-of-state operations. *See Sw. Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1165-67, 1177 (10th Cir. 2001); *see also Nw. Airlines*, 510 U.S. at 367-68. This expansion by inference mirrors the Third Circuit's interpretation of toll generating authority from toll spending authority.

4. The Second Circuit has struggled to consistently apply the "unmistakably clear" standard.

In *Mid-A. Bldg.*, the **Second Circuit** refused to find that a federal statute that "prohibits states from setting trailer length limits less than 48 feet" impliedly authorized states to regulate trailers over 48 feet irrespective of the dormant Commerce Clause: "[W]e decline to imply a delegation from congressional silence. . . . Instead, by not addressing trailers longer than 48 feet, we believe Congress intended that state regulations of these trailers should not impose an undue burden on commerce." *See Mid-A. Bldg. Sys. Council v. Frankel*, 17 F.3d 50, 52 (2d Cir. 1994).

The same court, however, strained when addressing another provision of ISTEA. *See Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 886 F.3d 238,

245-47 (2d Cir. 2018). The court held that section, which expressly permitted *spending* Thruway toll receipts on the New York canal system, authorized using tolls exceeding Thruway costs by 9 to 14 percent to cover canal expenses. *See id.* at 243, 246-47. But the court suggested that when Congress permitted certain toll spending and did not limit that spending, it impliedly removed any amount of toll collection from Commerce Clause scrutiny. *See id.* at 246-47.

Thus, while four circuit courts have interpreted similar instances of congressional silence as failing to authorize state laws that would otherwise violate the Commerce Clause, the Third, Sixth, and Tenth Circuit Courts inferred "unmistakably clear" congressional intent from legislative silence or ambiguity, and the Second Circuit has applied multiple approaches. It is critical that the circumstances under which courts will permit states to dispense with this "primary safeguard" under the guise of congressional authorization be uniformly understood and sparingly applied. Certiorari is necessary to ensure this end.

II. PTC's Tolls Violate The Constitutional Right To Travel.

The Court has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz v.*

Roe, 526 U.S. 489, 499 (1999). Yet "both the nature and the source of that right have remained obscure." *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982); *see also Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 901-02 (1986) (plurality opinion) (citing *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972)) (characterizing the freedom to travel as a basic right with an elusive constitutional textual source). Accordingly, the Court has periodically intervened to resolve conflicts among the lower courts and to expound on the contours of the right to travel. *See*, *e.g.*, *Saenz*, 526 U.S. at 498-504; *Soto-Lopez*, 476 U.S. at 901-05 (plurality opinion); *United States v. Guest*, 383 U.S. 745, 757-59 (1966). The Court should do so now.

Petitioners challenge the Pennsylvania Turnpike's excessive tolls as a violation of their right to travel under the test established by *Evansville*—a test specifically adopted to determine when a user fee unconstitutionally burdens this fundamental right. The Third Circuit, departing from this Court's and its own precedent, rejected the application of *Evansville* in favor of the nonbinding, plurality opinion of *Soto-Lopez*, which introduced actual deterrence as a necessary element of a right-to-travel claim. That notion is inconsistent with this Court's right-to-travel jurisprudence and the Court's most recent word on the scope of the right to travel in *Saenz*. A circuit split regarding the necessity of actual deterrence in a right-to-travel challenge is now firmly established. *See infra* Part II.B. Certiorari should be granted to resolve this circuit court disagreement, to correct the Third Circuit's application of *Soto-Lopez*

rather than *Evansville*, and to clarify the relevance of *Soto-Lopez*, if any, under the broad right to travel standard subsequently articulated in *Saenz*.

A. *Soto-Lopez*'s Adoption of "Actual Deterrence" as a Necessary Element of a Right-to-Travel Claim Has Fostered a Circuit Split that Is Undermining This Court's Right-to-Travel Jurisprudence.

The right to travel has been grounded in numerous sources. *See Soto-Lopez*, 476 U.S. at 902 (citing to the Privileges and Immunities Clause of Art. IV, the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth Amendment, and the federal structure of government adopted by the Constitution); *Guest*, 383 U.S. at 764-70 (Harlan, J., concurring in part and dissenting in part); *Lutz v. City of York*, 899 F.2d 255, 260-61 & n.10-15 (3d Cir. 1990) ("Various Justices at various times have suggested no fewer than seven different sources."); *see also* Christopher S. Maynard, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 Case W. Res. L. Rev. 297, 314 & n.138-41 (2000) (surveying Justice Douglas's efforts to trace the source of the right). As a result, right-to-travel cases have been sorted into distinct categories based on the nature of the impairment and the supporting constitutional foundation. *See Lutz*, 899 F.2d at 260-61; Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 Stan. L. Rev. 1557, 1569-91 (1989). These categories,

however, have not always been neatly defined, engendering disagreement among the courts.

The latest source of disagreement is the inconsistency between the standards articulated in *Soto-Lopez* and *Saenz*. While *Saenz* articulated a broad, inclusive standard for determining when the right to travel is implicated that is consistent with this Court's diverse right-to-travel jurisprudence, *see infra* Part II.C., the plurality's standard in *Soto-Lopez* was substantially narrower.[3] The majority's choice in *Saenz* not to discuss or even cite *Soto-Lopez* has left the relevance of the *Soto-Lopez* standard up to the circuit courts and they have reached different conclusions. The sticking point at the center of the current circuit split is the *Soto-Lopez* plurality's introduction of actual deterrence as a necessary element of a right-to-travel claim.

B. The Courts of Appeals Are Divided.

The circuit courts disagree about the significance of whether a law actually deters individuals from exercising their right to travel. The D.C., Ninth, and

[3] *Compare Saenz*, 526 U.S. at 500 (asserting that the right to travel at least "protects the right of a citizen of one State to enter and leave another State, the right to be treated as a welcome visitor . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State"), *with Soto-Lopez*, 476 U.S. at 903 (plurality opinion) ("A state law implicates the right to travel when it actually deters such travel . . . when impeding travel is its primary objective . . . or when it uses any classification which serves to penalize the exercise of that right.").

Third Circuits have all adopted "actual deterrence" as a necessary element of a right-to-travel claim, citing the *Soto-Lopez* plurality opinion. *See infra* Part II.B.1. The Sixth and Eighth Circuits have expressly rejected "actual deterrence" as irrelevant. *See infra* Part II.B.2. This divide reflects a fundamental disagreement—one that the Second Circuit has also grappled with when analyzing the constitutionality of user fees such as the tolls in this case—about when the right to travel is implicated and how burdens on that right are assessed.

1. The D.C., Ninth, and Third Circuits have adopted "actual deterrence" as a necessary element of a right-to-travel claim.

In *Pollack v. Duff*, 793 F.3d 34 (D.C. Cir. 2015), the D.C. Circuit addressed a challenge to a federal job posting by the Administrative Office of the United States Courts that limited applications from non-employees to those living in the Washington, D.C. metropolitan area. *Id.* at 37. The applicant claimed that the geographical limitation violated her constitutional right to travel. In upholding the constitutionality of the geographical limitation, *see id.* at 45-48, the court held that it did not impose a burden that "actually deterred" interstate travel. *Id.* at 46-47. According to the D.C. Circuit, burdens on the right to travel that fall short of actually deterring travel do not "warrant scrutiny under the Constitution." *See id.* (citing *Soto-Lopez*, 476 U.S. at 903).

The Ninth Circuit took a similar approach in *Matsuo v. United States*, 586 F.3d 1180 (9th Cir. 2009). At issue in *Matsuo* was the Federal Employees Pay Comparability Act, which provides locality-based pay to federal employees in the contiguous 48 states. *Id.* at 1182. Two federal employees challenged the Act as a violation of their constitutional right to travel. The court inquired whether the Act "'actually deters . . . travel,'" *see id.* at 1182 (quoting *Soto-Lopez*, 476 U.S. at 903), and ultimately upheld the federal compensation legislation. *Id.* at 1184.

The Third Circuit in this litigation is the latest court to embrace *Soto-Lopez*'s right-to-travel standard and to adopt the "actual deterrence" element. App. 21-23. The Third Circuit's analysis turned entirely on whether Petitioners alleged that the Pennsylvania Turnpike's excessive tolls actually deterred people from traveling. *Id.* (citing *Soto-Lopez*, 476 U.S. at 903). According to the court, so long as there was no allegation of actual deterrence, there was no right-to-travel claim. App. 23. Applying *Soto-Lopez*, the Third Circuit held that the scope of the burden imposed on Petitioners' right to travel—in this case, by user fees disproportionate to the cost of operating and maintaining the Pennsylvania Turnpike—was irrelevant to the Third Circuit's constitutional analysis. *See* App. 23 n.15 (declining to apply the test set out in *Evansville* because there are non-toll routes to travel in and out of Pennsylvania).

The Third Circuit's reliance on *Soto-Lopez* is all the more problematic because it previously applied *Evansville* to a similar challenge in *Wallach v. Brezenoff*, 930

F.2d 1070 (3d Cir. 1991). Although *Wallach* was decided five years after *Soto-Lopez*, it made no mention of *Soto-Lopez* or any consideration of deterrence. Instead, the Third Circuit upheld bridge and tunnel toll increases against appellants' right-to-travel claim —like Petitioners' challenge to the Pennsylvania Turnpike's tolls—based on this Court's analysis in *Evansville*. The Third Circuit's decision in this case, compared to its approach in *Wallach*, further demonstrates that the circuit court disagreement spawned by the plurality opinion in *Soto-Lopez* remains unresolved even after *Saenz*.

2. The Eighth and Sixth Circuits have expressly rejected "actual deterrence" as a necessary element of a right-to-travel claim.

The Sixth and Eighth Circuit Courts have expressly rejected "actual deterrence" as a necessary element of a right-to-travel claim. According to both courts, *Soto-Lopez*'s consideration of deterrence was nonbinding dicta.

In *Minnesota Senior Federation Metropolitan Region v. United States*, 273 F.3d 805 (8th Cir. 2001), the appellants challenged the constitutionality of the Medicare+Choice program as a violation of the right to travel because it resulted in geographic discrepancies in the distribution of benefits. 273 F.3d at 807-08. The appellants argued that a "state law implicates the right to travel when it actually deters such travel" and that their right to travel had been violated because

they are "deterred from moving to a community they would prefer" by the reduced benefits. *Id.* at 809-10 (citing *Soto-Lopez*, 476 U.S. at 903).

The Eighth Circuit, in upholding the Medicare +Choice program, rejected appellants' reliance on the *Soto-Lopez* plurality opinion as mere dicta. *See id.* at 810 ("[A]ppellants cite no later case applying the 'deterrent' dicta"). Nor, according to the Eighth Circuit, does *Soto-Lopez*'s "actual deterrence" element accurately summarize the Court's previous right-to-travel jurisprudence. *See id.* (explaining that earlier cases spoke of state restrictions that served to penalize the exercise of the right to travel). Instead, the Eighth Circuit emphasized that the Supreme Court in *Saenz* summarized its "right-to-travel jurisprudence without citing *Soto-Lopez*, and it rejected an 'actual deterrence' analysis, focusing instead on 'the citizen's right to be treated equally.'" *Id.* (quoting *Saenz*, 526 U.S. at 504-05).

The Sixth Circuit took a similar approach. In *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019), indigent drivers brought a putative class action challenging Michigan's driver's license suspension scheme as a violation of their Fourteenth Amendment rights to due process and equal protection. *Id.* at 252-53. They alleged that the driver's license suspension scheme, which revoked driver's licenses for unpaid court debts, implicated the right to travel because it "actually deterred" travel. The Sixth Circuit rejected this argument, applied rational basis review, and upheld the law. *Id.* at 261 & n.8. According to the Sixth Circuit, the right to

travel was not at issue and the indigent drivers' reliance on the "actually deters travel" language from *Soto-Lopez* was misplaced because it is merely dicta. *Id*.

3. Second Circuit precedent further demonstrates the challenge circuit courts face in attempting to reconcile *Soto-Lopez* with *Saenz* and Supreme Court right-to-travel jurisprudence.

The Second Circuit stands apart because it has selectively applied *Soto-Lopez*. The result has been an approach that conflicts, at different times, with several of the circuit courts identified above and particularly with the Third Circuit's decision below. The Second Circuit's approach highlights the need for Supreme Court intervention to clarify the significance of *Saenz*, the continued viability of actual deterrence as a necessary element of a right-to-travel claim under *Soto-Lopez*, and the Court's prior right-to-travel jurisprudence under *Evansville*. *Compare N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 66-67 (2d Cir. 2018) (applying *Soto-Lopez*), *cert. granted*, 139 S. Ct. 939 (2019), *and Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 96, 101-02 (2d Cir. 2009) (endorsing *Evansville* over *Soto-Lopez*), *with Town of Southold v. Town of East Hampton*, 477 F.3d 38, 53-54 (2d Cir. 2007) (applying *Soto-Lopez*).

In *New York State Rifle & Pistol Association*, which is currently pending before this Court, the Second

Circuit held that a handgun licensing scheme did not violate plaintiffs' constitutional right to travel by limiting the ability to transport a handgun outside of the home. 883 F.3d at 53-54, 66-67. The court exclusively relied on *Soto-Lopez* and determined that the licensing scheme did not "impose a significant disincentive to travel." *Id.* at 67.

In *Selevan*, the Second Circuit analyzed whether a highway toll discount program for Grand Island, New York residents violated the right to travel of individuals residing elsewhere. 584 F.3d at 86-87. The court rejected any application of *Soto-Lopez* as dispositive of plaintiffs' constitutional right-to-travel challenge. *See id.* at 100-01 (explaining that minor restrictions on travel do not amount to a denial of a fundamental right and that the facts "suggest at most a 'minor restriction' on plaintiffs' right to travel"). Instead, the Second Circuit correctly instructed the district court to apply the analysis adopted in *Evansville*. *Id.* at 101-02 ("Nevertheless, plaintiffs' allegations implicate a possible violation of the right to travel in the context discussed in *Evansville* inasmuch as they contend that they have been charged an excessive toll."). Applying *Evansville* and the inclusive right-to-travel standard from *Saenz*, rather than the "actual deterrence" element from *Soto-Lopez*, the Second Circuit held that the district court erred in applying rational basis review and remanded the case to determine "whether the toll policy implicates the right to travel in the context discussed in *Evansville*." *Id.* at 102.

The Second Circuit applied *Soto-Lopez* two years earlier in *Town of Southold v. Town of East Hampton*. In that case, plaintiffs challenged the constitutionality of a law that required ferry operators to obtain a special permit and restricted the types of ferries that could use local terminals as a violation of the right to travel under the Equal Protection Clause. 477 F.3d at 42, 52-53. The Second Circuit applied *Soto-Lopez* and concluded that plaintiffs failed to satisfy the "actual deterrence" element of their right-to-travel claim. *Id.* at 53-54.

The Second Circuit's divergent approaches to right-to-travel challenges illustrate the need for Supreme Court intervention. The Second Circuit's adoption of *Soto-Lopez*'s "actual deterrence" element in *New York State Rifle & Pistol Association* and *Town of Southold* conflicts with both the Sixth and Eighth Circuits. On the other hand, its application of *Evansville* in *Selevan* conflicts with the Third Circuit's refusal to apply *Evansville* in Petitioners' challenge to the Pennsylvania Turnpike's tolling scheme. *Compare Selevan*, 584 F.3d at 102 (applying *Evansville* because plaintiffs alleged they had been charged an excessive toll), *with* App. 23 & n.15 (refusing to apply *Evansville* despite Petitioners' allegation and Respondents' admission that PTC's tolls are excessive).

It is unclear to what extent, if any, the question of whether a law actually deters travel is relevant. The courts are clearly in disagreement. Even if *Soto-Lopez*'s "actual deterrence" element is generally applicable after *Saenz*, it is inconsistent with this Court's

prior right-to-travel jurisprudence for evaluating the constitutionality of user fees as established in *Evansville*.

C. The Third Circuit's Decision Departed from Binding Precedent When It Applied *Soto-Lopez*'s "Actual Deterrence" Element Rather Than the Test Established by *Evansville*.

The circuit split fostered by the *Soto-Lopez* plurality opinion also reflects the failure of some courts, like the Third Circuit below, to apply the correct standard when evaluating distinct right-to-travel challenges. *See supra* Part II.B.1. Petitioners here challenged the PTC's excessive tolls under *Evansville*, in which the Court adopted a specific test for evaluating the constitutionality of user fees. That test, which measures whether the user fee is a fair approximation of the benefit obtained from using the facilities for which it is imposed, has never turned on whether the user fee actually deters travel. *See Evansville*, 405 U.S. at 709-10; *Crandall*, 73 U.S. at 39.

The Third Circuit's decision below conflicts with the Court's binding precedent. Apart from the *Soto-Lopez* plurality opinion, and then only in dicta, whether a law actually deters travel has never been a necessary element of a right-to-travel claim. *See Saenz*, 526 U.S. at 500, 504 (citing *Dunn*, 405 U.S. at 339); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 257-58 (1974) (citing *Dunn*, 405 U.S. at 339-40); *Dunn*, 405 U.S. at 339-40 &

n.9 (explaining that requiring actual deterrence is a "fundamental misunderstanding of the law" and "[n]or have other 'right to travel' cases in this Court always relied on the presence of actual deterrence"); *see also supra* at 28-29 (discussing *Minn. Senior Fed'n Metro. Region*, 273 F.3d at 810). But even if deterrence were an element of a right-to-travel claim, it has never been applied by this Court when evaluating burdens such as those imposed by user fees. *See Evansville*, 405 U.S. at 714-16; *cf. Dunn*, 405 U.S. at 340 n.9 (explaining that the tax in *Crandall* was unconstitutional even though $1.00 was "certainly a minimal deterrent to travel" and without considering the law's effect, if any, on choice of residence). Contrary to the Third Circuit's decision, *Evansville*, not *Soto-Lopez*, controls.

Consideration of a law's deterrent effect played no part in *Evansville*. *See* 405 U.S. at 711-14 (deriving its proportional user fee test from *Crandall*'s proposition that there are limits to the burdens that can be imposed on individuals via user fees for the exercise of their right to travel). Instead, cases such as *Saenz* and *Evansville* stand for the proposition that the right to travel can be impermissibly impaired without any evidence or prospect of actually deterring travel. Even after *Soto-Lopez*, circuit courts have applied *Evansville* to determine whether user fees have imposed unconstitutional burdens on the right to travel. *See*, *e.g.*, *Selevan*, 584 F.3d at 100-01; *Wallach*, 930 F.2d at 1072-73; *cf. Pollack*, 793 F.3d at 47-48 (citing *Saenz*, 526 U.S. at 501, and *Evansville*, 405 U.S. at 712) (acknowledging that the mere imposition of financial costs can violate

the Constitution). The Third Circuit should have done the same in this case.

The same conflicts do not occur under the Court's standard in *Saenz* and with good reason. *See Minn. Senior Fed'n Metro Region*, 273 F.3d at 810 (citing *Saenz*, 526 U.S. at 504-05). *Saenz* purposely recognizes and accommodates the diversity of this Court's right-to-travel jurisprudence where *Soto-Lopez* does not. That *Saenz* overlooked *Soto-Lopez* and dismissively rejected deterrence as a necessary element of a right-to-travel claim further demonstrates the Court's intention to reject the analysis applied by the Third Circuit below. *See Saenz*, 526 U.S. at 504. Yet the persistence of "actual deterrence" as an element of a right-to-travel claim and the erroneous analysis it inspires demonstrates the need for this Court's intervention. *See supra* Part II.B.1-3.

The disagreement between the Courts of Appeals is fully developed. The Supreme Court should accept this petition as an opportunity to resolve the circuit split, to correct the Third Circuit's error in applying *Soto-Lopez* instead of *Evansville*, and to clarify its right-to-travel jurisprudence in light of *Saenz*.

III. The Questions Presented Are Of Exceptional Importance And Merit The Court's Attention.

In 1972 this Court rejected challenges under both the Commerce Clause and constitutional right to travel to the imposition of head taxes (user fees) on commercial airline passengers. The user fees at issue

in *Evansville* were upheld because the amounts of such fees ($1.00 per passenger) were based upon a fair approximation of use and were not shown to be excessive in relation to the cost of the benefits conferred. 405 U.S. at 716-20. Today, nearly a half-a-century later, Petitioners present the same legal challenges to excessive tolls (user fees) imposed for using the Pennsylvania Turnpike.

It is undisputed here that the tolls collected between 2013 and 2018 were between 250 and 300 percent of the cost of operating and maintaining the Turnpike. A.B. at 7-8. These excessive toll receipts are directed by statute to be transferred—in amounts now totaling billions of dollars—to PennDOT to support mass transit and other infrastructure projects having no functional relationship to the Turnpike. A.B. at 6. By Respondents' own admission, transfers of funds from PTC to PennDOT during this period included cash on hand and funds generated from Subordinate Revenue Bonds issued by PTC to meet its statutory obligation to contribute $450,000,000 annually to PennDOT to underwrite the Commonwealth's non-Turnpike transportation spending. PTC's bond debt to enable these PennDOT transfers at the start of 2019 was $6.1 billion. A.B. at 9. The full faith and credit of the Commonwealth of Pennsylvania is not pledged to secure these debts. (ECF No. 1 ¶ 34; 74 Pa.C.S. § 8104.) Since toll receipts represent 97 percent of PTC's annual revenue (A.B. at 6-7), toll payers (Petitioners) must necessarily shoulder the burden of servicing and repaying this $6.1 billion bond debt that bears no

relation to the cost of operating or maintaining the Turnpike.

Absent this Court's review, the Third Circuit's decision will have profoundly negative implications for the regulation of commerce among the several states. This will be so whether one views the implications for travelers using the Pennsylvania Turnpike itself or travelers throughout the nation if, as is likely, other states follow Pennsylvania's approach as sanctioned by the Third Circuit.

This Court has repeatedly stressed that the practical effect of a state statute "'must be evaluated not only by considering the consequences of the statute itself, but also by considering . . . what effect would arise if not one, but many or every, State adopted similar legislation.'" *Wyoming v. Oklahoma*, 502 U.S., at 453-54, (quoting *Healy v. Beer Institute*, 491 U.S. 324, 336, (1989)). In *Southern Pacific Company v. State of Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), for example, this Court noted that "Congress has left it to the courts to formulate the rules [interpreting the application of the Commerce Clause], doubtless because it has appreciated the destructive consequences to the commerce of the nation if [the courts'] protection were withdrawn." 325 U.S. at 775. Justice Stone wrote, "[i]f one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation." *Id.* This case presents the same problem. If, as the Third Circuit concluded, ISTEA in 1991 allowed states to collect unlimited amounts of tolls to be spent on projects unrelated to the tolled facility, then there is no

barrier to any state in the union designating a toll road to serve as a source of revenue from interstate commerce to address its state budget deficit. Interstate travelers and commerce, rather than local taxpayers, will be required to bear the burden of every state's transportation budget shortfalls.

If every state along the route imposed a toll on the highways that traverse the nation from San Francisco to Atlantic City at the same amount per mile as the cash toll on the Pennsylvania Turnpike, a Class 9 trucker would pay $16,341 for a one-way cross-country trip. The more common Class 8 (4 axle) commercial motor vehicle would pay $3,169. In a family car, an ordinary traveler would pay $510 in tolls alone to drive from coast to coast only once.[4] There is no indication that either the district court below or the Third Circuit considered these broader consequences if other states followed Pennsylvania's lead.

In 1972 it was easy enough for this Court to uphold a $1.00 head tax on airline travel against both Commerce Clause and right-to-travel challenges. The cost-based tests announced in *Evansville* to evaluate claims of undue burden are clear and easily applied. Neither the Respondents nor the courts below contested the position that Pennsylvania's statutory directive for PTC to monetize Turnpike tolls in order to

[4] The toll amounts reflected in this paragraph were determined by calculating the per-mile rate of the current cash tolls on the Pennsylvania Turnpike as published on PTC's website and multiplying those per-mile tolls by the 2,933.9-mile distance between San Francisco and Atlantic City.

support unrelated statewide projects violates *Evansville* and the rights of individuals to be free from the undue burdens associated with those violations.

Pennsylvania has the right to protect the health and safety of its people, but only by "regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States." *Tennessee Wine*, 139 S. Ct. at 2464 (quoting *Mugler v. Kansas*, 123 U.S. 623, 659 (1887)). When statutes result in a "palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler*, 123 U.S. at 661. The Third Circuit's finding of congressional authorization is unsupported in the text of ISTEA. Moreover, it raises significant separation of powers issues involving judicial usurpation of Congress's role in the regulation of commerce among the states. Courts must take care not to approve exceptions to dormant Commerce Clause limitations where Congress has not spoken with unmistakable clarity. Finally, the Third Circuit's requirement that right-to-travel claimants allege actual deterrence eviscerates the Constitution's protection of a person's right to move freely about his neighborhood, state, and nation. Certiorari should be granted to address these issues.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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