No. 20-571

IN THE
Supreme Court of the United States

Yoel Weisshaus,

Petitioner,

v.

Port Authority Of New York And New Jersey,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals for The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. When Congress exercises authority under the Commerce Clause, whether a negative impact to that act of Congress is actionable within the parameters of the dormant Commerce Clause?

2. Whether a State agency may impose a surcharge or penalty for the use of cash as legal tender?

3. Whether the dormant Commerce Clause allows using the Cost-Of-Living-Adjustment and the regional Consumer Price Index as the ground for price fixing in establishing a toll rate, based on what a local authority deems is the user's maximum adorability, rather than a fair approximation of the use or privilege?

4. Whether a complaint is required to plead extra facts to exclude any alternative theory, as held by the Ninth Circuit and applied by the Second Circuit, or that a complaint does not need to exclude alternative theories, as held by the Fourth Circuit?

PARTIES TO THE PROCEEDINGS

The petitioner is Yoel Weisshaus.

The Respondent is PORT AUTHORITY OF NEW YORK AND NEW JERSEY.

The previously dismissed defendants are NEW YORK STATE, NEW YORK STATE ASSEMBLY, NEW YORK STATE SENATE, STATE OF NEW JERSEY, NEW JERSEY STATE LEGISLATOR, NEW JERSEY STATE GENERAL ASSEMBLY, NEW JERSEY STATE SENATE, JOHN DOES 1 THROUGH 20, JANE DOES 1 THROUGH 20. Their dismissal was prior to the amended complaint and were not parties to the appeal below.

There were no other named parties in this action below.

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Yoel Weisshaus ("Weisshaus") respectfully petitions for certiorari from a final decision by the Court of Appeals for the Second Circuit ("Second Circuit").

In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1146, 197 L. Ed. 2d 442 (2017) the Court directed the Second Circuit to address the impacts of surcharges for the use of credit cards. Here, the Second Circuit sidestepped on addressing the impact of surcharges on the use of cash.

ORDERS BELOW

On December 17, 2018, the United States District Court for the Southern District of New York, dismissed the action. (a13). On May 28, 2020, in a summary order, the Second Circuit vacated and affirmed in part. (a1).

JURISDICTION

The matter arises under 33 USC 508, 42 USC 1983 and the Commerce Clause. On May 28, 2020, the Second Circuit decided the appeal. (a1). Under 28 USC 1254(1), the Court has jurisdiction. Timeliness is under U.S. Sup. Ct. R. 13.1, 13.3, 30.1.

PROVISIONS INVOLVED

The relevant portions of Article I of the Constitution for the United States:

Section 8. The Congress shall have Power ... To regulate Commerce... among the several States... To coin Money, regulate the Value thereof... fix the Standard of Weights and Measures;

Section 9. No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Section 10. No State shall ... coin Money; emit Bills of Credit; make any Thing ... Tender in Payment of Debts.... No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports... No State shall, without the Consent of Congress, lay any Duty of Tonnage. ...

STATEMENT OF THE CASE

1. On September 18, 2009, the Port Authority of New York and New Jersey ("Port Authority") set out to inflate its toll rates to cross the Hudson River. The scheme levies the maximum prices achievable under the Cost-Of-Living-Adjustment and the regional Consumer Price Index and encompasses inflating the toll rates every other year as cash is phased out. (a34-a35).

The Port Authority operates river crossings connecting New York and New Jersey, including the Bayonne Bridge, the Outerbridge Crossing, the Goethals Bridge, the George Washington Bridge, the Holland and Lincoln tunnels, PATH Rail System, and bus terminals: referred to as the Interstate Transportation Network (a14-15) or Interdependent Transportation System" (a3) (the "ITN" in short).

On March 21, 2011, in a memorandum, the Port Authority directed each department to bring forth whatever unconstrained projects possible, including previously deferred projects, in anticipation of a broader funding envelope (*i.e.* more toll revenues) than previously available. (a34-a35).

On May 10, 2011, in a Phase II memorandum, the Port Authority directed searching again and adding whatever projects possible, to exceed the forecast scenarios of revenues. The goal was to show a deficit and eliminate any appearance of a surplus. (a34-a35).

In drafting the Capital Plan, scheduled for July 15 -19, 2011, the Port Authority instructed each department to compare the "capital plan submission vs. the financial affordability envelope" and close the showing of any surplus. On July 22, 2011, each department demonstrated that their capital submissions exceeded the affordability envelope targets. (a35). To inflate the capital plan, on July 29, 2011, the Port Authority designated $1.8 billion for the Pulaski Skyway, a non-ITN facility belonging to the State of New Jersey.

2. On August 5, 2011, the Port Authority announced in a press release that it will raise all toll prices, highlighting that 9/11 and rebuilding the World Trade Center required raising the tolls. (a41).

The press release devised a surcharge per axle, for cash payment. (a44). "The agency's proposed toll structure, which would be adjusted in September 2011 and in 2014, focuses the greatest increase on cash users and trucks that cause the most traffic congestion and

wear and tear" (a43) and "The surcharge is expected to increase the E-ZPass market share to approximately 85 percent, which will reduce travel delays during the peak of traffic congestion by 10 to 20 minutes" (a44).

On August 19, 2011, the new toll rate was enacted ("2011 rate"). The surcharge was classified as a penalty. (a51). The highlight morphed, that the toll rate increase is necessary to fund completing the World Trade Center, repairing the airport runways, rebuilding the ITN, but without mentioning the Pulaski Skyway. (a50).

The 2011 rates began at $10 with a $2 cash penalty setting the price at $12 per axle of the vehicle. The E-ZPass holder paid $9.50 during peak hours and $7.50 at off-peak hours. (a52). This table outlines the increases.

Year	E-ZPass		Cash Payers		
	Off-Peak	Peak	Price	Penalty	Total
2008	$6	$8	$8	-	$8
2011	$7.50	$9.50	$10	$2	$12
2012	$8.25	$10.25	$11	$2	$13
2013	$9	$11	$11	$2	$13
2014	$9.75	$11.75	$12	$2	$14
2015	$10.50	$12.50	$13	$2	$15
2020	$11.75	$13.75	$14	$2	$16

Further, for vehicles with three or more axles, penalties are multiplied and levied at $3 per axle for cash payment. (a53). This table outlines the increases.

Year	E-ZPass		Cash Payers		
	Off-Peak	Peak	Price	Penalty	Total
2008	$6	$8	$8	-	$8
2011	$9	$10	$10	$3	$13
2012	$11	$12	$12	$3	$15
2013	$13	$14	$14	$3	$17
2014	$15	$16	$16	$3	$19
2015	$17	$18	$18	$3	$21
2020	$18	$19	$19	$3	$22

3. On September 19, 2011, Weisshaus, a New Jersey resident, who frequently travels to New York City, sued in the Southern District of New York. (a18).

Weisshaus pled under the dormant Commerce Clause that a penalty restricting the use of cash is a discrimination not authorized by Congress; (i) since Congress under the Coinage Clause has the exclusive authority to regulate currency and the penalty is regulating against the use of cash; (ii) although Congress under 31 USC 5103 made cash as legal tender, Weisshaus is penalized for engaging in lawful conduct without there being a civil or moral wrong; and (iii) the penalty multiplied *per axle* is not a fair approximation of use or privilege, there is no relationship between the costs of *collection* with the *axles* of a vehicle. (a24).

Weisshaus also pled that the penalty offends the First Amendment on speech and exercise of lawful conduct, *i.e.* the payment by cash, blackmailing purchasing a transponder from E-ZPass. Weisshaus pled further that the penalty is automatic, violating the Fourteenth

Amendment, by not affording Weisshaus a way to avoid the penalty, except by purchasing E-ZPass, and fails to provide the commuter a post deprivation hearing to vindicate from the penalty. (Id).

Further, under the dormant Commerce Clause, Weisshaus pled that the price itself is not a fair approximation of use or privilege, the benefits conferred is extinguished, and burdensome on interstate commerce. Congress enacted 29 USC 206(a)(1)(C) to protect interstate commerce, by setting $7.25 as the national minimum wage. The injury is that the average laborer, working about 8.8 hours per day[1], must tender about two hours of labor just to pay the toll, rendering the benefit conferred for interstate labor worthless, compared to the cost to achieve it. As the Port Authority conceded on appeal, a laborer "cannot afford the cost of the toll" and it "is true for a resident of New York in identical circumstances doing business in New Jersey that requires using the tunnels or bridges." Given that the 2011 rates used the national minimum wage as the ground for setting the rates to the highest level possible by using the Cost-Of-Living-Adjustment and the regional Consumer Price Index as the guide, rather than a fair approximation of the use or privilege, the rates itself offends the dormant Commerce Clause. (a32).

Moreover, Weisshaus challenges the toll rates as not being a fair approximation of use of facilities as toll revenues are diverted on facilities outside the ITN. The

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[1] *Time use on an average work day...* U.S. Bureau of Labor Statistics, https://www.bls.gov/tus/charts/chart1.pdf

Port Authority does not separate ITN revenues from non-ITN expenses. (a15 n. 2, a26-a31).

Finally, to show that prices are not uniform for everyone, Weisshaus alleged that the after the toll prices were increased, Port Authority discounted for Staten Island residents to pay only half the price that is charged to everyone else during peak-hours. (a61).

4. The District Court dismissed the action citing *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) as the standard, that "the plaintiff may need to provide facts that tend to exclude the possibility that the defendant's alternative explanation is true." (a21). The District Court adopted the Port Authority's alternative theory that the ITN projects an infinite deficit, when projecting financing for facilities at least ten years in advance, and a diversion of ITN funds is thus impossible. The District Court sidestepped on the cash penalty claims by focusing on the benefits of E-ZPass. On the minimum wage, the District Court concluded that the negative impact also affects intrastate. (a22-a40). Weisshaus appealed timely.

5. The Second Circuit vacated in part inasmuch that toll revenues are applied for non-ITN facilities and to test the assertion of a deficit. The Second Circuit affirmed on the penalty for payment in cash under because the press release mentioned a benefit of reducing traffic. The Second Circuit also affirmed the toll for being twofold the minimum wage as minor restriction, because travelers do not have a constitutional right to the most convenient form of travel. (a1-a12).

6. The following errors guide this petition: (i) the claim for the cash penalty focused solely on currency as the element discriminating in interstate commerce, the lower courts sidestepped on this issue; (ii) there was no claim challenging the benefits of E-ZPass per se, the lower courts concentrated on E-ZPass; (iii) the claim is that the toll rate is based on the Cost-Of-Living-Adjustment and the regional Consumer Price Index rather than a fair approximation of the use or privilege depriving Weisshaus of the pursuit for minimum wage in interstate commerce, the lower courts viewed that as a minor restriction on travel; (iv) the projecting financing for facilities at least ten years in advance is not a fair approximation of facilities, the lower courts held that such projecting serves a functional relationship; and (v) that Weisshaus's claims did not go far enough to exclude any alternative theory that the Port Authority might assert. While interstate laborers lose virtually any benefit of labor in interstate commerce, rendering the benefits of the toll useless, the Second Circuit imparted an illusionary benefit of reducing traffic with a cash penalty and the deterrence of interstate commerce as a minor restriction.

The urgency here is that a state or local authority need not intend to discriminate in order to offend the policy of maintaining a free-flowing national economy. A statute that on its face restricts both intrastate and interstate transactions may violate the Clause by having the "practical effect" of discriminating in its operation. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 136 (1978).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT CONTRAVENES *BMW OF N. AM., INC. V. GORE*, 517 U.S. 559, 585, (1996), BY ALLOWING A PENALTY ON THE NATIONAL CURRENCY

The Port Authority regulates against the use of cash with a penalty. The Second Circuit's justification of E-ZPass per se, still does not negate the regulating cash use. Can a person be penalized for using cash, and can a local authority deter the use of cash by way of a penalty?

The Court held in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) that, "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." It is respectfully submitted that the penalty serves as punitive-damages-deterrent on the payment of cash.

1. It is well established that Congress is authorized "to establish, regulate and control the national currency and to make that currency legal tender money for all purposes, including payment of domestic dollar obligations." *Guar. Tr. Co. of New York v. Henwood*, 307 U.S. 247, 259 (1939). This authority is provided by the Constitution under the Coinage Clause and 31 USC 5103, that "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues."

Congress "has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights, and measures, bankruptcies, the postal system, patent and copyright laws, the public lands, and interstate commerce; all which subjects are expressly or impliedly prohibited to the state governments." *Ping v. United States*, 130 U.S. 581, 605 (1889). One would think the law is settled that regulating the use of cash belongs exclusively to Congress, being self-evident that a local authority cannot penalize the use of the national format of currency, cash.

In this era, credit and debit cards have become an important feature of the national economy. For one person a credit card is an easier form of a transaction. For another person, a credit or debit card leads to an accumulation of unbearable debt and unwanted spending or is beyond reach. Each argument has merit according to a person individually. While the use of E-ZPass depends on credit or debit cards, cash remains king as an act of Congress; only Congress especially can impose penalties on cash, especially when it threatens the use while undermining the circulation and value of the dollar as legal tender. See *The Legal Tender Cases*, 110 U.S. 421, 448 (1884) ("Under the two powers [Commerce and Coinage clauses], taken together, congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the nation government or private individuals"). One way or

another, the constitutionality of E-ZPass per se does not justify that the Port Authority to regulate against the use of cash by way of a penalty.

2. A number of States prohibit discrimination against cash. N.J. Stat. Ann. § 56:8-2.33 (West), Mass. Gen. Laws Ann. ch. 255D, § 10A (West), 44 R.I. Gen. Laws Ann. § 44-7-24 (West). On January 23, 2020, the City of New York enacted legislation that prohibits discrimination against cash. New York City, N.Y., Code § 20-840. The NYC Committee on Consumer Affairs and Business Licensing found that, an average of 25% residents in the City of New York either do not have bank accounts or are underbanked and would consequently be excluded from the local economy if merchants are allowed to discriminate against cash. See NYC Law No. 2020/034, File No. Int 1281-2018.

Yet, the Port Authority has practiced for the past ten years punishing commuters with a penalty for paying with cash. The impact of a penalty for cash affects: (i) those who do not have credit cards or are underbanked, (ii) visitors from other states who have no regular need for E-ZPass, (iii) those who lost E-ZPass privileges (*e.g.* late payment, etc.) and (iv) those who do not have the luxury of unexpected electronic debits.[2]

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[2] "People who had bad credit or people who had no credit, and yet still need, sometimes desperately needed, transportation" are "vulnerable victims." *U.S. v. Williams*, 547 F. App'x 251, 259 (4th Cir. 2013). A large part of the population is seemingly living paycheck to paycheck and cannot cover an emergency. Yahoo Finance, *58% of Americans Have Less Than $1,000 in Savings,*

Regardless of any E-ZPass benefits, regulating against the use of cash is still a trespass into the jurisdiction of Congress, burdening interstate commerce by deterring the use of cash.

Certiorari should be granted, because if a State can reject the format of notes employed by Congress for a national currency, then any other State who desires its local economy to operate on a different method, such as bitcoin, can usurp a prerogative that only Congress can regulate. There is a public interest in addressing the penalizing of cash when steering the national economy in an emerging era of digital forms of payment. Thus, a writ of certiorari should be granted.

II. THE SECOND CIRCUIT DEPARTED TOO FAR FROM THE STANDARD AND JUDICIAL PROCEDURE, CALLING FOR AN EXERCISE OF SUPERVISORY POWER.

In *Chemical v. Hunt*, 504 U.S. 334, 341–42 (1992) the Court held, when an "additional fee discriminates both on its face and in practical effect, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id* at 342. "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.*

Survey Finds, Cameron Huddleston (May 2019) https://finance.yahoo.com/news/58-americans-less-1-000-090000503.html.

One would think, the Port Authority may not impose a penalty on the national currency by employing a "punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996). One would think that only Congress can regulate the value of cash.

Instead of addressing the penalty on cash, the Second Circuit extracted a few words from a press release attached to the amended complaint and inferred that the mention of a benefit reducing traffic justify the penalty for payment in cash and affirmed dismissal of an otherwise plausible cause of action.

1. The Second Circuit departed from the Court's precedent in *Chemical*, by failing to scrutinize whether there is no availability of an adequate nondiscriminatory alternative.

2. The Court held, "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The Second Circuit departed from the standard by allowing the excuse of reducing traffic to be achieved by the illegitimate means of penalizing the use of cash, or the penalty for the lack of E-ZPass.

3. Moreover, "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*,

476 U.S. 573, 579 (1986). Aa statute that on its face restricts both intrastate and interstate transactions may violate the Clause by having the "practical effect" of discriminating in its operation. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 136 (1978). The Second Circuit departed from reviewing the nature of the cash penalty as a regulation against interstate commerce, namely against the national format of currency, in favor of the local economic interests to reduce traffic. This was a complete departure on a pre-answer motion to dismiss, (i) because when a local authority directly regulates interstate commerce, there is no need juggle the local benefits verses the burden, the violation is struck without further inquiry; (ii) penalizing cash is a regulation of activities that are inherently national or require a uniform system of regulation; (iii) there was no need to plead facts showing a direct discrimination; and (iv) by venturing for an alternative theory of a traffic reduction, at this early stage of the litigation, without there being a developed record to conclusively established that there is no availability of an adequate nondiscriminatory alternative.

In any event, "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). The Second Circuit failed to scrutinize whether the local benefits of

reducing traffic outweigh the burden it places with penalty on interstate to justify such discrimination.

III. THE CIRCUITS CONFLICT ON THE STANDARD WHETHER A PLAINTIFF MUST EXCLUDE AN ALTERNATIVE THEORY

In *Kelly v. United States*, 140 S. Ct. 1565, 1569–70, 206 L. Ed. 2d 882 (2020), the Court reviewed a "cover story" for the media, created by William Baroni, the former Deputy Executive for the Port Authority, falsely claiming "public policy" and a "traffic study" justified disrupting the flow of traffic, when in reality the cover story was a "lie".

In contrast, a week later, the Second Circuit took a press release, issued two years earlier under Baroni's oversight, an individual instrumental in inflating the 2011 Rates, and used the mention of a traffic reduction as a benefit to excuse the cash penalty.

The Second Circuit relied on *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013), that "the plaintiff may need to provide facts that tend to exclude the possibility that the defendant's alternative explanation is true" (a21), and stated that "Weisshaus has never contended that this benefit was inauthentic, nor does he do so on appeal" (a8). On the basis that Weisshaus did not exclude the alternative theory of reducing traffic, the Second Circuit sided with the standard enunciated by Ninth Circuit and affirmed.

Notwithstanding, on the precedent on interstate commerce discussed *supra*, the Second Circuit

amplified a conflict with the well-established standard followed by the Fourth Circuit in *Woods v. City of Greensboro*, 855 F.3d 639, 653 (4th Cir. 2017):

> While the court correctly accepted the complaint's factual allegations as true, it incorrectly undertook to determine whether a lawful alternative explanation appeared more likely. To survive a motion to dismiss, a plaintiff need not demonstrate that her right to relief is probable or that alternative explanations are less likely.... If her explanation is plausible, her complaint survives a motion to dismiss under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation. The district court's inquiry into whether an alternative explanation was more probable undermined the well-established plausibility standard.

This conflict goes on in other circuits as well, the Sixth and Eight Circuits also hold that a plaintiff is not required to rule out alternative theories. *Doe v. Baum*, 903 F.3d 575, 587 (6th Cir. 2018), *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009). In the exact opposite, the Eleventh and D.C. Circuits hold that a district court may infer alternative theories and the plaintiff is required to negate them. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012), *Reid v. Hurwitz*, 920 F.3d 828, 838 (D.C. Cir. 2019).

Following the alternative theory paradigm, the Second Circuit presupposed a misconception that people choose to sit in traffic over the Hudson River for no reasonable purpose. The logic reached for this alternative theory is not grounded, because sitting in traffic is

an annoyance and not a luxury. But meanwhile, in the past ten years, there is no evidence whatsoever that the penalty reduced any traffic.

This case is the proper vehicle for resolving this conflict. The amended complaint provided a plausible cause of action but was only dismissed on an alternative theory, which was neither substantiated nor supported by any fact, let alone responsive to the actual of action of regulating against an act of Congress. This case does not require the Court to ponder between many theories, and the conflict is straight forward. Thus, certiorari is warranted.

IV. THE SECOND CIRCUIT CONFLICTS WITH THIS COURT IN *EVANSVILLE-VANDERBURGH AIRPORT AUTH. DIST. V. DELTA AIRLINES, INC.*, 405 U.S. 707, 716 (1972).

The Port Authority used the Cost-Of-Living-Adjustment (COLA) and the regional Consumer Price Index (CPI) as the ground for price fixing in establishing the 2011 Rate, exaggerating the price to the user's maximum affordability, rather than a fair approximation of the use or privilege. The goal was to obtain a windfall of revenues by price gouging. Afterwards, the Port Authority inflated the capital plan to exaggerate their expenses and exceed that new windfall of revenues. Only then the 2011 Rate was enacted. The meaning of fair approximation of use of the facilities remains unsettled. Thus, a question arises whether the raising based the user's maximum adorability is a fair approximation of the use or privilege?

1. Under the dormant Commerce Clause, "state or local tolls must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716 (1972) "At least so long as the toll is based on some fair approximation of use or privilege for use,... and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster." *Id* at 716–17.

One would think a toll is not based on a fair approximation of use of facilities, when the price is based on what is the maximum price the authority assumes that commuters can afford. The Second Circuit recognized that Weisshaus ought to be heard on the 2011 Toll being "motivated by an ulterior motive of setting the tolls at its highest level." (a12). But affirmed the dismissal on the ground that the claim is not actionable under the dormant Commerce Clause as minor restriction when considering that the "toll was prohibitively expensive for a minimum wage earner." (a11). Thus, the question persists, whether the dormant Commerce Clause allows using the COLA and the CPI, or any similar system based on the user's maximum affordability, as the reason for establishing a toll rate?

2. The Second Circuit disregarded assessing whether using COLA and CPI to devise a toll amount, which only targets a user's affordability, is a

permissible method, rather than to assess a fair approximation of use or privilege for use.

The Second Circuit conflicts with *Evansville-Vanderburgh*, without citing to any authority. Under the standard in *Evansville-Vanderburgh*, the price must be based on the approximate value the user receives, not the affordability. "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision." *Id* at 716. "Upon this t[y]pe of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.* Thus, the price ought to ask what it costs to maintain the facilities, instead of asking what maximum price the user can be charged.

3. The Port Authority, using COLA and the CPI, reengineered the toll rates to seize a substantial portion of what a person would earn under the minimum wage. Thus, depriving minimum wage earners from pursuing employment across state line by levying a laborer earnings, at least 2 hours of an 8.8 day just to pay the toll and make up for the loss. The effect is equally true to employers depending on access to the interstate labor market.

The reality is that the "cost-of-living adjustment" and "consumer price index" are tied to wages. *Jones &*

Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538 (1983). CPI-U "is the most common index used to adjust state minimum wage rates." *Real Wage Trends*, 1979 TO 2017, 2018 WL 7627855, at *16. According to the U.S. Bureau of Labor Statistics, Division of Consumer Prices and Price Indexes, the CPI-U is based on urban wages. "Over 2 million workers are covered by collective bargaining agreements which tie wages to the CPI. The index affects the income of almost 80 million people as a result of statutory action: 47.8 million Social Security beneficiaries, about 4.1 million military and Federal Civil Service retirees and survivors, and about 22.4 million food stamp recipients." https://www.bls.gov/cpi/overview.htm

This Court held that the minimum wage is an element of interstate commerce arising from Congress's authority under the Commerce Clause, which "extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it." *United States v. Darby*, 312 U.S. 100, 119–20 (1941).

The State may not cause those coming from other States to "surrender whatever competitive advantages they may possess." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986). Thus, the 2011 rate forces laborers to surrender whatever advantage they would otherwise confer from crossing State line.

4. The public importance of this issue is that this method of pricing used by the Port Authority does not

stop there. Other cities are now considering following the Port Authority's example to use tolls as a method to raise general revenues under the "congestion pricing" banner,[3] by taxing the use of the road, as opposed to compensating for the fair approximation of use of the facilities conferred.

The 2011 rate has excited that very jealousy of trying to protect local economic concerns by exacting more than paying for the fair approximation of use of the facilities conferred. If States are to follow this regime of setting toll prices based on the maximum rate, they assume users can afford, the ramifications would be, making it impossible for laborers to pursue interstate commerce.

Notably, before the Constitution was ratified and the States levied fees on interstate commerce, those levies would have passed with flying colors as just and reasonable when employing the Second Circuit's approach of minor restriction. The revenues collected from those levies surely were necessary to fund a government's budget, *e.g.* the costs in maintaining roads,

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[3] The Guardian, *New York becomes first city in US to approve congestion pricing*, April 1, 2019, *https://www.theguardian.com/us-news/2019/apr/01/new-york-congestion-pricing-manhattan;* The Philadelphia Inquirer, *How congestion pricing might come to Philadelphia's streets*, April 2, 2019, https://www.inquirer.com/transportation/congestion-pricing-new-york-philadelphia-traffic-20190402.html; WUSA9 *Nearly $50 toll projected in draft study of I-270 project*, October 15, 2020 https://www.wusa9.com/article/traffic/toll-lanes-on-270-could-cost-50/65-cb1fa706-1fc9-4a8a-a485-a22938a032ef

law enforcement, and maintaining a functional government. The very excuses justifying those levies as reasonable "notoriously obstructed the interstate shipment of goods" and the "[i]nterference with the arteries of commerce was cutting off the very life-blood of the nation." *Tennessee Wine v. Thomas*, 139 S.Ct. 2449, 2460 (2019). For this reason, the dormant Commerce Clause confers a "right to engage in interstate trade" free from undue state regulation and "was intended to benefit those who are engaged in interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 470, 112 S. Ct. 789, 808, 117 L. Ed. 2d 1 (1992).

5. Moreover, "the dormant Commerce Clause precludes States from discriminating between transactions on the basis of some interstate element." *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787, 1799 (2015). "The Commerce Clause regulates effects." *Id* at 1801. A "state law may discriminate against interstate commerce either on its face or in practical effect." *Id* at 1805. As such, one would think that the national minimum wage is an interstate element.

While there may be an argument that there is no facial discrimination based on in-state interest, however, the burden on interstate commerce persists by exerting from the user more than a fair approximation of use of the facilities. The Commerce Clause "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union

would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015). The Court "implicitly recognized the settled principle that interstate commerce may be made to 'pay its way'" and "one of the central purposes of the Clause was to prevent States from 'exacting more than a just share' from interstate commerce." *Oregon Waste v. Department of Environmental*, 511 U.S. 93, 102 (1994). Given that the price was framed beyond the fair approximation of use of the facilities, but on the maximum price that the Port Authority deems as "affordable", this is precisely the type of economic Balkanization that the Commerce Clause prevents, the depriving laborers from going across state lines to pursue employment.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Dated: New Milford, NJ
October 25, 2020

Respectfully submitted,

Yoel Weisshaus

19-161-cv
Weisshaus v. Port Authority

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of May, two thousand twenty.

PRESENT:

BARRINGTON D. PARKER,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.