No. ________

In The
Supreme Court of the United States

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

Petitioners,

v.

ERIC HOLCOMB,
GOVERNOR OF INDIANA, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The dormant Commerce Clause authorizes judicial intervention to address state discrimination to and undue burdens upon interstate commerce. The "market participant" exception shields state proprietary marketplace activity from the dormant Commerce Clause. The Seventh Circuit here applied the market participant exception after considering only whether Respondents were buying or selling access to the Indiana Toll Road. This analysis splits with the Second, Third, and Ninth Circuits which also consider whether a state actor is exercising governmental powers and authority unavailable to private marketplace participants, which precludes the application of the market participant exception.

The Seventh Circuit also decided that state conduct that does not expressly discriminate in favor of in-state interests does not implicate the Commerce Clause, splitting with the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits which recognize that the Commerce Clause also guards against states imposing unreasonable burdens on interstate commerce even where the implementing law is expressly neutral.

Issue 1

To determine whether state conduct constitutes proprietary "market participation" exempt from the dormant Commerce Clause, may a court look only to whether the state is simply buying or selling, as the Seventh Circuit did here, or must courts examine whether the state is also exercising exclusively governmental authority or power, as is done by the Second, Third, and Ninth Circuits?

Issue 2

Does the operation and tolling of a publicly-controlled interstate highway constitute proprietary "market participation" shielded from scrutiny under the dormant Commerce Clause as held by the Seventh Circuit here, or does such control over a channel of interstate commerce constitute governmental activity subject to Commerce Clause scrutiny as held by the Second and Ninth Circuits?

Issue 3

Does the dormant Commerce Clause limit only discriminatory state conduct, as held by the Seventh Circuit, or does it also apply to neutral state actions that result in burdens on interstate commerce, as held by the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Owner-Operator Independent Drivers Association, Inc.

Chutka Trucking LLC

Mark Elrod

B. L. Reever Transport, Inc.

David Jungeblut

Willie W. Kaminski

Respondents:

Eric Holcomb, individually and in his capacity as Governor of the State of Indiana

Joe McGuinness, individually and in his capacity as Commissioner of the Indiana Department of Transportation

The Indiana Finance Authority

Dan Huge, individually and in his capacity as Indiana Public Finance Director

Micah G. Vincent, individually and in his capacity as a member of the Indiana Finance Authority

Kelly Mitchell, individually and in her capacity as a member of the Indiana Finance Authority

LIST OF PARTIES TO THE PROCEEDING BELOW—Continued

Owen B. Melton, Jr., individually and in his capacity as a member of the Indiana Finance Authority

Harry F. McNaught, Jr., individually and in his capacity as a member of the Indiana Finance Authority

Rudy Yakym, III, individually and in his capacity as a member of the Indiana Finance Authority

ITR Concession Company LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Owner-Operator Independent Drivers Association, Inc.; Chutka Trucking LLC; and B. L. Reever Transport, Inc. state that they have no parent corporations, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public. Petitioners Mark Elrod, David Jungeblut, and Willie W. Kaminski are unincorporated drivers.

RELATED CASES

- *Owner Operator Independent Drivers Association Inc., et al. v. Eric Holcomb, Governor of Indiana, et al.*, No. 1:19-cv-00086-RLY-MJD, U.S. District Court for the Southern District of Indiana, Indianapolis Division. Judgment Entered March 10, 2020.
- *Owner Operator Independent Drivers Association Inc., et al. v. Eric Holcomb, Governor of Indiana, et al.*, No. 20-1445, U.S. Court of Appeals for the Seventh Circuit. Judgment Entered March 9, 2021.
- *Owner Operator Independent Drivers Association Inc., et al. v. Eric Holcomb, Governor of Indiana, et al.*, No. 20-1445, U.S. Court of Appeals for the Seventh Circuit. Judgment Entered April 7, 2021.

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The March 9, 2021 opinion of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the United States District Court for the Southern District of Indiana, is reported at 990 F.3d 565 and reproduced at pages App.1-9 of the appendix to this Petition. The district court's March 10, 2020 order granting Respondents' motion to dismiss is not reported but is available at 2019 WL 8955083 and reproduced at pages App.10-33 of the appendix to this Petition.

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 March 9, 2021. Petitioners timely filed a petition for rehearing *en banc*, which the Court of Appeals denied on April 7, 2021. That order is reproduced in the Appendix at App.34-35. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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. . . .

Ind. Code § 5-1.2-3-1(a):

> There is established for the public purposes set forth in this article a body politic and corporate, not a state agency but an independent instrumentality exercising essential public functions, to be known as the Indiana finance authority. The authority is separate and apart from the state in its corporate and sovereign capacity, and though separate from the state, the exercise by the authority of its powers constitutes an essential governmental, public, and corporate function.

Ind. Code § 8-15-2-12(b):

> As the operation and maintenance of toll road projects by the authority will constitute the performance of essential governmental functions, the authority shall not be required to pay any taxes or assessments upon any toll road project or any property acquired or used by the authority under the provisions of this chapter or upon the income therefrom.

Ind. Code § 8-15-3-23(b):

> Since the operation and maintenance of a tollway by the department or the authority

> constitutes the performance of essential governmental functions, neither the department nor the authority is required to pay any taxes or assessments upon a tollway or any property acquired or used by the department under this chapter or IC 8-15.7 or upon the income from a tollway.

Ind. Code § 8-15-3-34:

> The department may arrange for the use and employment of police officers to police a tollway. The police officers employed under this section are vested with all necessary police powers to enforce state laws. A police officer employed under this section has the same powers within the property limits of a tollway as a law enforcement officer (as defined in IC 35-31.5-2-185) within the law enforcement officer's jurisdiction. A warrant of arrest issued by the proper authority of the state may be executed within the property limits of the tollway by a police officer employed by the department or an operator.

Ind. Code § 8-15.7-7-1:

> A project under this article and tangible personal property used exclusively in connection with a project that are:
>
> > (1) owned by the authority or the department and leased, licensed, financed, or otherwise conveyed to an operator; or
> >
> > (2) acquired, constructed, or otherwise provided by an operator on behalf of the authority or the department;

> under the terms of a public-private agreement are considered to be public property devoted to an essential public and governmental function and purpose. The property, and an operator's leasehold estate or interests in the property, are exempt from all ad valorem property taxes and special assessments levied against property by the state or any political subdivision of the state.

STATEMENT OF THE CASE

A. Parties

Petitioners include motor carriers and drivers who own and operate commercial motor vehicles ("CMVs") that haul freight in interstate commerce, along with their trade association, the Owner Operator Independent Drivers Association, Inc. ("OOIDA"). Petitioners allege in their Complaint that CMV drivers and motor carriers have paid excessive, burdensome and/or discriminatory user fees (tolls) imposed by Respondent ITR Concession Company, LLC ("ITRCC") for use of the Indiana Toll Road under the direction of and with the approval of other Respondents.

B. Claims and Defenses

Relying on *Northwest Airlines Inc. v. County of Kent*, 510 U.S. 355 (1994) and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), Petitioners allege that ITRCC, acting under color of state law and with the approval and cooperation of individual state Respondents, also acting under color of state law, are unlawfully imposing excessive and discriminatory user fees (tolls) on Class 3 and higher CMVs (*i.e.*, heavy trucks only) in violation of the dormant Commerce Clause. *See* First Amended Class Action Complaint for Declaratory & Injunctive Relief & Damages ("Complaint") ¶¶ 4, 143, 149, App.38, 68-70. Petitioners seek declaratory and injunctive relief and monetary damages pursuant to 42 U.S.C. §§ 1983 and 1988.

The district court granted Respondents' Rule 12(b)(6) motion with respect to Petitioners' dormant Commerce Clause claims based solely on its determination that the Respondents were collectively acting as a market participant in imposing highway tolls thereby rendering their actions exempt from Commerce Clause limitations. App.10-33. The Seventh Circuit affirmed on the same grounds.

In 2018, Respondent ITRCC raised—by 35 percent—the tolls heavy trucks must pay to travel across Indiana's section of I-90 connecting Ohio and Illinois (the Indiana Toll Road, or "Toll Road"). ITRCC is a private entity that leases the Toll Road from the Indiana Finance Authority ("IFA"), a state entity. The ITRCC paid IFA $1 billion for the authority to impose the increased tolls on heavy trucks using the Toll Road. The State Respondents (Governor Holcomb, the IFA, and several state officials) used the $1 billion to fund various projects not functionally related to the Toll Road. Complaint ¶¶ 88-124, App.54-60.

The toll increase on heavy trucks has significant and immediate implications on truck transport through Indiana, and if the Seventh Circuit's decision is allowed to stand, it will lead to a paradigm shift in the imposition of user fee burdens on interstate commerce, as states across the country seek to make up their budget shortfalls on the backs of persons to whom they are not politically responsible—persons from other states moving freight in interstate commerce. According to the Federal Highway Administration, on a national basis,

> [t]wo-thirds of ton miles moved by truck are classified as interstate commerce. Almost 40 percent of ton miles moved by truck pass through a state between out-of-state origins and destinations. In the Midwest and many western states, a large majority of ton miles is considered through traffic, meaning that such traffic uses one state highway in order to serve shippers and consumers in other states.

U.S. Dep't of Transp. Fed. Highway Admin., *Freight Facts & Figures 2009*, https://ops.fhwa.dot.gov/freight/freight_analysis/nat_freight_stats/docs/09factsfigures/table3_10.htm (last visited August 26, 2021). This is especially true of the Indiana Toll Road:

- Indiana's state motto—"Crossroads of America," and that of the Toll Road itself as "the Main Street of the Midwest," tout the Toll Road's strategic location. *See* Ind. Dep't of Transp., *Indiana Toll Road: "Main Street of the Midwest"*, https://www.in.gov/

indot/files/trmap.pdf (last visited September 1, 2021).

- Seventy-five percent of the U.S. and Canadian populations live within a single day's truck trip of Indiana. *See* Ind. Dep't of Transp., Indiana Multimodal Freight Plan Update 2018 at 1, 7, https://www.in.gov/indot/files/Indiana%202018%20State%20Freight%20Plan.pdf (last visited September 1, 2021). The Indiana Toll Road "serve(s) as a key freight corridor for freight originating, terminating, and passing through the State." *Id.* at 39; *see also* Oscar H. Williams, History of Indiana (Classic Reprint 2015).

- The Indiana Department of Transportation acknowledges that "Indiana's economy is heavily dependent on freight movement." *See* Ind. Dep't of Transp., *Freight*, https://www.in.gov/indot/2677.htm (last visited August 25, 2021).

- Each year, 724 million tons of freight travels though Indiana, making it the fifth busiest state for commercial freight traffic. *Id.*

- As much as one-third of the freight on Indiana's transportation network passes through the state without stopping. *Id.*

- According to the Environmental Systems Research Institute (ESRI),[1] Indiana has the most pass-through ton-miles of freight in the nation. ESRI, *Geographic Distribution of Pass-Through Truck Traffic in the United States (2)*, https://www.arcgis.com/apps/MapJournal/index.html?appid=c1c0b7d4136947cc9c4b7ffb9db0f898 (last visited August 30, 2021).

Thus, when Governor Holcomb announced his Next Level Connections Program to be funded by the 35 percent increase in tolls on heavy vehicles and proclaimed, "[t]he majority of traffic is from out-of-state[,] [w]e're capturing other people's money," Complaint ¶¶ 88-124, App.54-60, the Governor acknowledged the state's intent to burden interstate commerce. The temptation that the Seventh Circuit's opinion presents to other states should not be underestimated. The Seventh Circuit's deconstruction of the dormant Commerce Clause needs to be addressed *now*.

Petitioners sued ITRCC, IFA, and state officials (collectively, "Respondents") alleging in two separate counts that the increased truck tolls violated the dormant Commerce Clause because they impose impermissible burdens on interstate commerce (Count One) and discriminate against interstate commerce in intent and effect (Count Two). Complaint ¶¶ 4, 143, 149, App.38, 68-70. Respondents argued that their

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[1] ESRI is an international supplier of geographic information system (GIS) software, web GIS and geodatabase management applications.

actions fell within this Court's market participant exception to the dormant Commerce Clause as state proprietary participation in an economic market. According to the Seventh Circuit, providing toll road access for a fee, standing alone, constitutes "proprietary" conduct that qualifies state actors to assert the market participant exception to claims raised against them under the dormant Commerce Clause. But participating in a commercial transaction does not address the totality of circumstances relevant to whether state actors are conducting themselves in a proprietary capacity. Petitioners presented to the courts below numerous additional circumstances which various circuit courts have found relevant to whether such activity constitutes proprietary economic activity or an activity that involves the exercise of government authority or power. The presence of such additional circumstances, disregarded by the Seventh Circuit here, preclude a finding of proprietary market participation. Those additional circumstances include:

- Indiana state statutes provide unambiguously that the challenged activity (providing a toll road) is the performance of an essential government function;
- The challenged activity benefits from the grant of additional powers and authority not available to proprietary businesses in a marketplace but reserved for government actors, including (1) comprehensive statutory tax exemptions granted only because the state actors are performing essential government functions, (2) the

> availability of police power and other governmental assistance to enforce compliance, (3) the authorization of the use of eminent domain, and (4) the control of channels of interstate commerce.

By failing to consider these additional factors, the Seventh Circuit split with the Second, Third, and Ninth Circuits, which consider all the legal or factual circumstances in the conduct of the challenged activity to determine whether states are acting in a proprietary or governmental capacity.

C. Opinions Below

The Magistrate Judge's Report and Recommendation ("Report"), recommending granting Respondents' Fed. R. Civ. P. 12(b)(6) motion, advanced the simplistic notion that when a "government entity offers access to its property in exchange for a fee and generally carries itself as a business would in similar settings, it is acting as a property owner and not a regulator." App.22 (quoting *Hlinak v. Chicago Transit Auth.*, No. 13 C 9314, 2015 WL 361626, at *3 (N.D. Ill. Jan. 28, 2015)). The Magistrate Judge did not address the circumstances identified by Petitioners that, if credited, would demonstrate that Respondents are acting as only a government could, which precludes a finding that they are acting in a proprietary capacity like an ordinary business. The district court accepted the Magistrate Judge's Report without qualification. App.28-31. The district court concluded, based solely on the fact that tolling involved the commercial sale of access to the Toll Road and related services, that Respondents are "acting as a market participant" whose imposition of excessive and discriminatory tolls is not subject to scrutiny under the dormant Commerce Clause. App.30-31.

On appeal, the Seventh Circuit also rejected the alleged facts and citations to state law identified by the Petitioners and held that Respondents were acting as proprietors in the operation and maintenance of the Toll Road and, "like any private proprietor, [Respondents] can turn a profit from [their] activities." App.4. Thus, the Seventh Circuit asked, "[w]hy should it matter" that Defendants charged at least $1 billion in excessive truck-only tolls to be used "for state purposes unrelated to maintenance of the Toll Road"? *Id.* In so holding, the Seventh Circuit split with the Second, Third, and Ninth Circuits, which look beyond the mere fact that the offending conduct involves buying or selling and instead review the challenged activity for the exercise of government authority or powers like those cited by the Petitioners. The availability of these powers indicates that the state's conduct is governmental and, therefore, not an appropriate candidate for application of the market participant exception to Commerce Clause scrutiny. The Seventh Circuit also held that causes of action under the dormant Commerce Clause extend *only* to actions implicating expressly discriminatory or protectionist activity, splitting from the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits which recognize that the dormant Commerce Clause also limits facially neutral laws that place burdens on interstate commerce. App.5-6.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit created two irreconcilable conflicts between the circuits. First, the Seventh Circuit looks only at whether the state is buying or selling something; other circuits examine the kind of powers actually exercised in connection with the purchase or sale. Because of the Seventh Circuit's holding, the dormant Commerce Clause never limits user fees—which by definition involve selling—for states in the Seventh Circuit. *See*, *e.g.*, Jasper L. Cummings, Jr., The Supreme Court, Federal Taxation, and the Constitution ch. IV, § A.1 (Am. Bar Ass'n 2013) (ebook) ("In general a fee is a voluntarily incurred governmental charge in exchange for a benefit conferred on the payor, which fee should somehow reasonably approximate the payor's fair share of the costs incurred by the government in providing the benefit, which benefit (and hence the fee) may vary with usage of the benefit."); *see also* Ind. Code § 8-15.7-2-22 ("'User fees' means the rates, tolls, or fees imposed for use of, or incidental to, all or part of a qualifying project under a public-private agreement."). The Seventh Circuit's approach renders any user fee imposed by a state actor exempt from Commerce Clause scrutiny. Second, because the Seventh Circuit now holds that, absent discrimination, protections under the dormant Commerce Clause do not extend to undue burdens on commerce, this Court's holdings in *Evansville* and *Northwest Airlines*, applied by the other circuit courts, have been effectively nullified. The Seventh Circuit's drastic reduction of Commerce Clause protections and the resulting potential for new, unrestrained burdens on interstate commerce and Balkanization of the national economy present questions of exceptional importance.

I. The Seventh Circuit's Opinion splits with decisions of the Second, Third and Ninth Circuits which hold that states utilizing powers and privileges not available to private entities are government actors, not "proprietary" market participants.

The Seventh Circuit dramatically expanded the scope of the market participant exception by ignoring whether a state, while engaging in the challenged conduct, exercises state authority or power not available to private market participants, which precludes a finding that the state actors are operating in a proprietary capacity. At the same time, the Seventh Circuit greatly narrowed the scope of Commerce Clause protections by holding that the dormant Commerce Clause applies only to discriminatory or protectionist activities, but not to neutral state conduct that nevertheless imposes undue burdens upon commerce. The Seventh Circuit's significant deconstruction of the dormant Commerce Clause leaves us "with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019).

The dormant Commerce Clause advances a "central concern of the Framers": "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies." *Id.* at 2461 (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). This Court has recognized two categories of state conduct that have the potential to disrupt the national economy: (1) state actions that discriminate against interstate commerce; and (2) state actions that impose undue burdens on interstate commerce. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

This Court has also recognized that there exists a narrow exception to these Commerce Clause limits for a state's proprietary forays into discrete economic markets. This "market participant" exception allows a state to favor local interests free from dormant Commerce Clause restrictions when the state acts solely as a private party in a particular marketplace. *E.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."); *see also White v. Mass. Council of Constr. Empl'rs, Inc.*, 460 U.S. 204, 214-15 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980). But where a state acts like a government when conducting the challenged activity, wielding authority not available to private market participants, the Commerce Clause applies. *E.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592-94 (1997) (recognizing that some conduct is uniquely governmental even if used to incentivize social services); *see also S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95 (1984); *accord Am. Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641, 651 (2013). States utilizing powers and privileges not available to private entities are not "proprietary" market participants.

The circuit courts have applied this rule to a variety of state activities. For instance, in *Selevan v. N.Y. Thruway Authority*, the Second Circuit addressed a discount tolling scheme adopted by the New York State Thruway Authority ("NYTA"). 584 F.3d 82, 87 (2d Cir. 2009). NYTA relied on the Seventh Circuit's decision in *Endsley* to argue that the plaintiffs failed to state a claim under the dormant Commerce Clause because the operation and maintenance of public bridges, including tolling, fell under the market participant exception. *Id.* at 91, 93-94 (citing *Endsley v. City of Chicago*, 230 F.3d 276, 283-85 (7th Cir. 2000)). The Second Circuit expressly disagreed. The *Selevan* court identified several independent factors establishing that the NYTA was not "acting like a private business" in an existing market: (1) the authorizing statute describing the NYTA as "performing a governmental function"; (2) the ability to use or possess state property; and (3) the ability to invoke eminent domain. *Id.* at 93-94. The same factors exist here and were highlighted by Petitioners. *See*, *e.g.*, Appellants' Brief at 14-23.

A. The Indiana legislature designates the operation of the Toll Road as the performance of an essential governmental function.

A state's classification of its own conduct reveals much about the underlying nature of that conduct. Here, the Indiana legislature has established by statute that IFA's and ITRCC's operation of the Toll Road is an "essential governmental function." The enabling statute establishing the IFA provides that its activities constitute "essential governmental, public, and corporate function[s]":

> Sec. 1. (a) There is established for the public purposes set forth in this article a body politic and corporate, not a state agency but *an independent instrumentality exercising essential public functions*, to be known as the Indiana finance authority. The authority is separate and apart from the state in its corporate and sovereign capacity, and though *separate from the state*, *the exercise by the authority of its powers constitutes an essential governmental, public, and corporate function*.

Ind. Code § 5-1.2-3-1(a) (emphasis added). In addition, Indiana statutes provide that ITRCC performs an essential governmental function:

- "[T]he operation and maintenance of toll road projects by the authority will constitute the performance of *essential governmental functions*." *Id.* § 8-15-2-12(b) (emphasis added).

- IFA's public-private projects are "considered to be public property devoted to an *essential public and governmental function and purpose*." *Id.* § 8-15.7-7-1 (emphasis added).

Consistent with these legislative designations, the General Assembly endowed IFA with valuable tax exemptions in the operation of the Toll Road specifically because that conduct is a governmental function:

> Since the operation and maintenance of a tollway by the department or the authority *constitutes the performance of essential governmental functions*, neither the department nor the authority is required to pay any taxes or assessments upon a tollway or any property acquired or used by the department under this chapter or IC 8-15.7 or upon the income from a tollway.

Id. § 8-15-3-23(b) (emphasis added). Furthermore, the General Assembly conferred tax benefits to private operators in a public-private partnership, exempting parties such as the ITRCC from all "*ad valorem* property taxes and special assessments" precisely because the property they manage is "devoted to an *essential public and governmental function and purpose*." *Id.* § 8-15.7-7-1 (emphasis added).

The Second Circuit in *Selevan* examined similar statutory provisions in New York and found that they (and other factors identified here) precluded the state from establishing that it was acting as a private business when engaged in its tolling activities. *Selevan*, 584 F.3d at 93-94. The Seventh Circuit's market participant analysis splits from the Second Circuit by considering only whether the state is buying or selling something.

The Seventh Circuit's speculation as to how the Founding Fathers may have viewed private toll roads in the late eighteenth century (App.3-4), or its assertion that private tolling was common on the primitive roads of that time, does not change the current reality of the interstate highway systems and how state governments view the highways that span their territories. The statutory designations of the Indiana General Assembly and other state legislatures accord with myriad decisions across state and federal courts deeming the provision of interstate highways as essential government functions,[2] and they cannot be

[2] Courts in Indiana and the rest of the country agree. *See, e.g.*, *Ennis v. State Highway Comm'n*, 108 N.E.2d 687, 693 (Ind. 1952) (quoting Indiana statutes recognizing highways as an essential government function and recognizing that the "state is charged with the duty of providing and maintaining highways"); *see also Moss v. Calumet Paving Co.*, 201 F. Supp. 426, 427-28 (S.D. Ind. 1962) (quoting Indiana statutes and *Ennis* recognizing that operating the Toll Road is an essential government function); *Bonney v. Ind. Fin. Auth.*, 849 N.E.2d 473, 487-88 (Ind. 2006) (recognizing trial court's deference to the General Assembly's express finding that the Toll Road "serves a public purpose"); *see also Atkin v. Kansas*, 191 U.S. 207, 222 (1903) ("[I]t is one of the functions of government to provide public highways. . . ."); *Dodge Cty. Comm'rs v. Chandler*, 96 U.S. 205, 208 (1877) ("Turnpikes are public highways. . . ."); *Kendrick v. Conduent State & Local Sols., Inc.*, 910 F.3d 1255, 1259 (9th Cir. 2018) (recognizing defendant "performs the government function of processing bridge tolls, collecting fines and imposing penalties in the name of the state"); *Selevan*, 584 F.3d at 93 (noting "repeated

brushed aside by the circuit court's conjecture as to how the Founding Fathers might have viewed private toll roads in those early days.

B. In providing the Toll Road, Respondents control a recognized transportation corridor and channel of interstate commerce.

The dormant Commerce Clause exists in part to prevent state and local governments from using their sovereign control of transportation corridors and channels of interstate commerce to disrupt the national

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observation that building and maintaining roads is a core governmental function"); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1284 (2d Cir. 1995) (identifying "the operation of toll roads" as a "governmental function[ ]"); *Fowler v. Cal. Toll-Bridge Auth.*, 128 F.2d 549, 550-51 (9th Cir. 1942) (agreeing with and quoting extensively from *Kansas City Bridge Co.*); *Kansas City Bridge Co. v. Ala. State Bridge Corp.*, 59 F.2d 48, 48-50 (5th Cir. 1932) ("It is well settled that the construction of public roads and bridges is a governmental function."); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 835-36 (E.D. Va. 2015) ("[T]he operation of, and enforcement of laws on, roads and public highways, including toll roads, is a function traditionally reserved to the state."); *Cohen v. R.I. Tpk. & Bridge Auth.*, 775 F. Supp. 2d 439, 445 (D.R.I. 2011) (quoting *Selevan* for "the general rule that 'building and maintaining roads is a core governmental function' "); *Bester v. Chicago Transit Auth.*, 676 F. Supp. 833, 838 (N.D. Ill. 1987) ("The toll road case is relatively easy because building and maintaining the roads, and indeed the toll road, has been a government function since ancient ages."), *aff'd and remanded*, 887 F.2d 118 (7th Cir. 1989); *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 422 (Fla. 1958) (quoting Florida statutes recognizing turnpike operations as an essential government function).

economy. This control represents the type of "governmental" conduct unavailable to private "proprietary" market participants and therefore outside the scope of the market participant exception. In *Shell Oil Co. v. City of Santa Monica*, the Ninth Circuit rejected a market participant defense of franchise fees for easements on "lands held in a sovereign capacity that are recognized transportation corridors for commerce" because "restrictions on publicly controlled transportation corridors raise the dormant commerce clause concern for impediments to the free flow of commerce." 830 F.2d 1052, 1057 (9th Cir. 1987). The city's argument that the market participant exception applied because it competed "with other entities that also might supply Shell's [transportation] needs"—including private landowners and other municipalities—would allow states to "allocate rights to the use of publicly held transportation corridors in a manner that discriminated against interstate commerce." *Id.* (noting that Shell conceded the existence of alternatives other than under city streets); *see also City of Portland v. United States*, 969 F.3d 1020, 1045 (9th Cir. 2020). The consequence for interstate commerce that the Ninth Circuit found "untenable" did not bear on the constitutionality of state conduct in the Seventh Circuit here, where the only question deemed relevant was whether the state was buying or selling.

The Seventh Circuit's market participant holding, permitting uniquely governmental conduct to proceed free from constitutional limits, squarely conflicts with the Ninth Circuit's rejection of the market participant exception to operation and control of channels of interstate commerce.

C. Indiana's specific grant of police power and other enforcement authority to the operation of the Toll Road renders that conduct inherently governmental.

This Court has drawn a bright line between proprietary and regulatory conduct: when a state actor chooses "a tool to fulfill [its] goals which only a government can wield," it is engaging in regulatory, not proprietary, conduct. *Am. Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641, 651 (2013) (citing *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006) (holding that the state actor was not eligible for the market participant exception in a dormant Commerce Clause challenge), *aff'd*, 550 U.S. 330 (2007)). Even before this Court's decision in *American Trucking Associations*, circuit courts routinely applied that test.

For example, in *Tri-M Group, LLC v. Sharp*, the Third Circuit held that Delaware was not acting as a market participant in requiring that apprenticeship programs be registered in-state under the threat of civil penalties. 638 F.3d 406, 425-26 (3d Cir. 2011) ("Where the state relies on its coercive power to effectuate compliance with contractual provisions, it distinguishes itself from a truly private actor, which must rely on contractual remedies to remedy breaches."); *see also SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 512 (2d Cir. 1995) (citing *Wash. State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982)). In *Selevan*, the Second Circuit likewise held that the market participant exception did not apply because, unlike a private actor, the NYTA could engage in conduct exclusively reserved for the government. 584 F.3d at 93-94 (listing the governmental authority available to the agency responsible for operating the toll bridge).

Respondents here also wield the authority of the state to enforce compliance with their tolling policies. Respondents can penalize users in ways that only the state can. *See* Ind. Code § 8-15-3-34 (empowering officers employed to police the Toll Road with the same authority granted to any other state law enforcement officer). Numerous courts have found that the ability to exercise such "distinctively governmental" legal authority precludes a finding of proprietary conduct. *See*, *e.g.*, *Tri-M Grp.*, 638 F.3d at 425-26 (holding that "the potential civil penalty threatened by the State for failure to comply with the prevailing wage condition . . . confirms that its role is not merely that of a market participant"); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995) (holding that the city acted as a market regulator in denying licenses to all garbage haulers and establishing civil and criminal penalties for unlicensed haulers); *SSC Corp.*, 66 F.3d at 512 (holding that the state actor is engaging in market regulation if it imposes the threat of criminal penalties).

In the Seventh Circuit, states can simultaneously compel compliance with their tolling policies under threat of civil or criminal penalties and avail themselves of a Commerce Clause market participant exception predicated on their status as proprietary actors. The Seventh Circuit's eschewing an examination of these characteristics deemed relevant to the market participation analysis in other circuits represents a fundamental split between the circuit courts.

II. The Seventh Circuit's Opinion removed dormant Commerce Clause limitations from an entire category of state conduct: the imposition of undue burdens on interstate commerce.

The Seventh Circuit's decision also drastically reshaped the dormant Commerce Clause. The Opinion recognized only claims for express discrimination and wholly disposed of the undue burden prong of this Court's Commerce Clause framework, discarding *Evansville*—this Court's test for evaluating user fees—in the process. In so holding, the Seventh Circuit split from the other circuit courts, which recognize that the dormant Commerce Clause also limits burdens on interstate commerce and that *Evansville* applies to user fee challenges.

A. States in the Seventh Circuit can now impose undue burdens on interstate commerce so long as the burdens are facially neutral.

"Modern [dormant Commerce Clause] precedents rest upon two primary principles that mark the boundaries of a state's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, states may not impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2090-91. After the decision below, courts in the Seventh Circuit may no longer consider the undue burden prong of this framework. In those courts, only expressly discriminatory state conduct faces Commerce Clause scrutiny.

The Seventh Circuit discarded dormant Commerce Clause protections against neutral undue burdens, basing its repudiation of numerous decisions of this Court and other circuit courts primarily on the length of time since this Court has invalidated a non-discriminatory state law. *See* App.6 ("But it has been a long time since the Court used *Pike*'s[3] approach to deem any state law invalid. . . . The prevailing approach has been to sustain neutral state laws while finding invalid those that discriminate against interstate commerce."). States' previous forbearance from exceeding these standards, however, does not upend Supreme Court precedent setting those standards. This case presents the Court with the opportunity to

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[3] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

affirm that the Commerce Clause protects against states' unduly burdening interstate commerce.

1. This Court has repeatedly held that the dormant Commerce Clause protects against both discrimination against and undue burdens on interstate commerce.

Since at least 1970, this Court has repeatedly emphasized that the dormant Commerce Clause protects interstate commerce by restricting states' ability to enact policies that *either* discriminate against out-of-state interests *or* impose undue burdens on interstate commerce. *Wayfair*, 138 S. Ct. at 2091; *cf. Fla. Transp. Services, Inc. v. Miami-Dade County*, 703 F.3d 1230, 1254 (11th Cir. 2012) ("Even if the law does not discriminate against interstate commerce, it may still violate the dormant Commerce Clause if it places an undue burden on interstate commerce that exceeds local benefits.").

Consistent with this undue burden analysis, this Court has developed at least three different tests to measure whether various categories of state activities impose undue burdens beyond Commerce Clause limits. The distinctions between these tests are not arbitrary; they reflect that states can and do impact interstate commerce through multiple specific exercises of their sovereign authority.

Pike applies to regulatory measures and asks if a law's putative local benefits outweigh the burden on interstate commerce. 397 U.S. at 142-43, 146 (invalidating Arizona's nondiscriminatory cantaloupe processing rules because it found that the rules imposed an unconstitutional burden on interstate commerce). *Evansville* applies to user fees and requires fees to pass two comparative tests: (1) between the fee and the payer's approximate use of the facility; and (2) between the fee and the benefits conferred on the payer. *Northwest Airlines*, 510 U.S. at 369 (citing *Evansville*, 405 U.S. at 716-17). And *Complete Auto* requires that neutral general revenue taxes apply to an activity with a "substantial nexus" to the state, be fairly apportioned, and be fairly related to the services provided by the state. *Wayfair*, 138 S. Ct. at 2091 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).[4]

Thus, for 50 years, this Court has recognized that burdensome nondiscriminatory state activity can run afoul of the dormant Commerce Clause and has

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[4] Circuit courts have applied these tests consistently. *E.g.*, *Fla. Transp. Servs., Inc.*, 703 F.3d at 1254; *accord Selevan*, 584 F.3d at 97; *see also Doran v. Mass. Tpk. Auth.*, 348 F.3d 315, 320 (1st Cir. 2003); *Yerger v. Mass. Tpk. Auth.*, 395 Fed. App'x 878, 884 n.3 (3d Cir. 2010); *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013); *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 501 (5th Cir. 2004); *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 450-51 (6th Cir. 2009); *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016); *W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1345 (9th Cir. 1984); *Am. Civ. Liberties Union v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *Milton S. Kronheim & Co., Inc. v. District of Colombia*, 91 F.3d 193, 201 (D.C. Cir. 1996).

developed specifically-tailored tests to measure such burdens.

2. The Seventh Circuit eliminates the constitutional restriction against states' imposing undue burdens on interstate commerce.

In the Seventh Circuit, however, state conduct must discriminate against interstate commerce or Commerce Clause protections do not apply. App.5-6. ("The Supreme Court might well deem the absence of express discrimination conclusive in favor of a per-mile toll. . . . The prevailing approach has been to sustain neutral state laws while finding invalid those that discriminate against interstate commerce."). And the Seventh Circuit dismissed the Supreme Court's balancing analysis, exemplified by *Pike*, because "it has been a long time since the Court used *Pike*'s approach to deem any state law invalid." App.6.

Even if the "prevailing approach" has been to affirm neutral state activities and invalidate discriminatory laws, the Supreme Court has not overruled the multiple *standards* it has established and repeatedly reaffirmed—namely *Pike*, *Evansville*, and *Complete Auto*—that require an analysis of the burdens imposed by different types of state conduct. *See Wayfair*, 138 S. Ct. at 2091. This Court has not altered the standards used to evaluate dormant Commerce Clause challenges, but affirming this category of dormant Commerce Clause jurisprudence is necessary to ensure national uniformity. The Seventh Circuit's departure from this caselaw significantly expands the scope of state conduct that is shielded from Commerce Clause scrutiny and mandates its districts courts, and invites other circuit courts, to depart from this Court's well-established precedent.

B. The circuit courts consistently recognize that this Court's *Evansville* standard applies to Commerce Clause user fee challenges.

This Court has clearly established a specific standard to measure the constitutionality of burdens when a government imposes user fees. *See Northwest Airlines*, 510 U.S. at 368-69 (citing *Evansville*, 405 U.S. at 716-17). Relying on prior highway toll cases, *Evansville* held that the standard for Commerce Clause challenges to excessive user fees is whether "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." *Evansville*, 405 U.S. at 716-17.

This Court has repeatedly reaffirmed this standard, most recently in *Northwest Airlines*. There, the Court analyzed whether airline fees violated a federal statute or the dormant Commerce Clause. The Court applied *Evansville* to assess both claims: "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." *Northwest Airlines*, 510 U.S. at 369, 373-74; *see also Ore. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 103 n.6 (1994); *Massachusetts v. United States*, 435 U.S. 444, 464 (1978). It is clear that the *Evansville* standard applies to Commerce Clause challenges to user fees.

Several circuit courts have applied this standard consistently. The Second Circuit in *Selevan* analyzed the various Supreme Court dormant Commerce Clause standards and determined that *Evansville* applies to highway toll challenges. 584 F.3d at 98. The First, Fourth, Sixth, Ninth, and Eleventh Circuits have also held that *Evansville* applies to a variety of user fees. *See Doran v. Mass. Tpk. Auth.*, 348 F.3d 315, 320-21 (1st Cir. 2003) (applying *Evansville* to toll claims); *Ctr. for Auto Safety Inc. v. Athey*, 37 F.3d 139, 142-43 (4th Cir. 1994) (recognizing *Evansville* applies to user fees); *Enter. Leasing Co. of Detroit v. County of Wayne*, 191 F.3d 451, 1999 WL 777678, at *2 (6th Cir. Sept. 14, 1999) (applying *Evansville* to airport user fees); *Endsley*, 230 F.3d at 284 (quoting *Northwest Airlines*, 510 U.S. at 369); *W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1344 (9th Cir. 1984), *aff'd*, 471 U.S. 81 (1985) (holding, under *Evansville*, that excessive fees for use of state land designed as a revenue-raising measure rather than mere recoupment of costs constituted an undue burden on interstate commerce); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d

516, 518-19 (11th Cir. 1990) (applying *Evansville* to airport user fee).

The Seventh Circuit, however, did away with the *Evansville* standard—in particular, its undue burden prongs—because *Evansville* "precede[d] the first market-participant case."[5] But *Northwest Airlines* (1994), which expressly affirmed *Evansville*, was decided 18 years after *Alexandria Scrap* (1976), which first recognized the market participant exception. *See also Reeves*, 447 U.S. at 436-39 (1980) (applying *Alexandria Scrap*). Moreover,the Court's 1972 *Pike* decision also precedes the Court's first market participant case, and the Seventh Circuit suggested that it was still bound by *Pike*. *See* App.6.

Neither *Pike*, nor *Evansville*, nor *Northwest Airlines* has been overruled. They continue to provide a solid foundation for undue burden challenges. The Seventh Circuit declined to apply *Pike* for lack of Supreme Court guidance in a "state-as-proprietor situation." App.6. But *Pike* is irrelevant to user fee cases. This Court has spoken to "state-as-proprietor" situation: *Evansville* applies. The Seventh Circuit's nullification of *Evansville*, as well as its statements

[5] The Opinion also asserts that *Evansville* "does not say that the validity of the fee depended on how the money was used." App.5. This belies the *Evansville* analysis and standard, which plainly provides that a fee must not exceed the benefit conferred to the fee payer or the payer's use of the tolled facility. 405 U.S. at 716-17. This imbalance provides the basis for Petitioners' claims: The truck tolls exceed a fair approximation of truckers' use of the Toll Road and the benefits conferred on truck users. *E.g.*, Complaint ¶¶ 88-124, 142-44, App.54-60, 68-69.

confining the dormant Commerce Clause to discrimination cases only, demonstrate that the Seventh Circuit rejected the Commerce Clause's undue burden protections altogether.

III. The Seventh Circuit's decision to free entire new categories of state conduct that burden interstate commerce from constitutional restraint presents a question of exceptional importance.

A. The Seventh Circuit's opinion expanded the scope of the market participant exception beyond state discriminatory and preferential conduct identified by this Court as market participation.

This Court's decisions establishing the market participant exception have extended that defense only to cases involving state discriminatory and preferential proprietary conduct. The Court's market participation cases, and the reasoning supporting them, make clear that the exception gives a Commerce Clause pass only to governments' attempts to prefer in-state interests to their out-of-state counterparts. A state's imposing burdens on interstate commerce does not fit within this rationale.

1. The market participant exception was created to permit local favoritism in proprietary activity.

The Court's market participant cases "stand for the proposition that, for purposes of analysis under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.'" *Camps Newfound*, 520 U.S. at 592-93 (quoting *Alexandria Scrap*, 426 U.S. at 810). Starting with *Alexandria Scrap*, this Court established that the dormant Commerce Clause does not restrict a state's participation in a specific economic market. That case involved Maryland's preference for junk autos processed in Maryland; the state purchased these "hulks" but imposed onerous documentation requirements on hulks processed outside of Maryland. *See Alexandria Scrap*, 426 U.S. at 796-801. The effect of this unequal document requirement was to favor in-state hulk processors over their out-of-state competitors. *Id.* at 802.

This Court refused to subject the disparate rules to the dormant Commerce Clause, distinguishing previous protectionist cases because they did not involve "the State itself [entering] into the market as a purchaser, in effect, of a potential article of interstate commerce." *Id.* at 808. Maryland, on the other hand, was simply using state funds to purchase articles of commerce. "Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. Thus, the dormant Commerce Clause did not prohibit Maryland from preferring hulks processed in-state when it purchased them on the market.

Likewise, the dormant Commerce Clause did not prohibit South Dakota from choosing to whom it sold concrete it produced at a state plant. *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980). In *Reeves*, the Court examined South Dakota's preference for in-state purchasers of cement produced and sold by the state, which "fits the 'market participant' label more comfortably" than Maryland's purchase of locally-processed hulks. *Id.* at 432-33, 440. Affirming the distinction between conduct subject to the Commerce Clause and proprietary market participation, the Court noted that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace" and that market participant precedents have regularly approved "similar preferences." *Id.* at 436-37 & n.9.

In *White v. Massachusetts Council of Construction Employers, Inc.*, the Court approved of another local preference in the expenditure of government funds. *See* 460 U.S. 204, 205-06 (1983). At issue in *White* was the local government's requirement that city construction contractors use at least 50 percent local workers. *Id.* Analogizing the local preferences in *Reeves* and *Alexandria Scrap*, the Court held that the dormant Commerce Clause did not prevent the city from favoring local residents when it spent its money on construction projects. *Cf. Wunnicke*, 467 U.S. at 95-96 (preferential timber processing requirement); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988) (protectionist ethanol tax scheme). Thus, states can favor local interests when they act like private parties in the marketplace.

2. State conduct imposing burdens on interstate commerce does not fit within this Court's definition of market participation.

Private parties cannot impose undue burdens on interstate commerce. Only governments can do so, through economic control and exercise of sovereign powers. Only governments adopt regulations that burden parties in the marketplace; only governments impose (or authorize the imposition of) fees for the use of interstate highways or other channels of interstate commerce. Definitionally, these activities are governmental, not proprietary.

Thus, it follows that those activities are not proprietary activity exempt from dormant Commerce Clause limits. Courts must, when faced with a state's invocation of the market participant exception, determine whether the challenged conduct is proprietary or governmental/regulatory. When the challenged conduct does not discriminate against interstate commerce or out-of-state interests, the task is a straightforward one: a state's burdening interstate commerce is a non-proprietary exercise of governmental authority beyond the bounds of the market participant exception. *Cf.*

Wunnicke, 467 U.S. at 97 ("Contrary to the State's contention, the doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.").

Stated another way, state "market participation" can only occur in an economic market. *E.g.*, *Camps Newfound*, 520 U.S. at 593-94; *Wunnicke*, 467 U.S. at 97-98. This Court has recognized the significance of narrowly defining such a market lest the exception swallow the whole of the dormant Commerce Clause. *Wunnicke*, 467 U.S. at 97-98 ("Unless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry."). State conduct that falls into the "undue burden" category of dormant Commerce Clause jurisprudence, however, can never be such participation. Either the state is imposing regulations on the market via authority not available to private participants (*e.g.*, *Pike*) or the state is collecting user fees for government services and facilities that represent exercises of traditional government authority (*e.g.*, *Evansville*) for which there exists no private marketplace. In both cases, the burdensome conduct at issue is not proprietary activity like that available to a private market participant.

B. The Seventh Circuit's opinion undermines the Constitution's primary defense against economic Balkanization.

Nearly every user fee imposed by states involves a commercial sale, rental, or lease transaction involving goods or services. Without consideration of those factors that indicate the governmental or proprietary character of the challenged activity, the Seventh Circuit's application of the market participant exception here places every user fee that burdens interstate commerce beyond the reach of the dormant Commerce Clause. The Seventh Circuit's holding that the dormant Commerce Clause does not apply to claims independent of discrimination does the same, gutting the protections against economic Balkanization enshrined in the Commerce Clause. These rulings dramatically expand the universe of state action that is free from constitutional constraint, enabling Indiana and potentially every revenue-starved state to shift the cost of local projects away from their own citizens by funding them with proceeds generated by excessive, burdensome, or discriminatory tolls imposed overwhelmingly upon interstate commerce and travelers—persons to whom they are not politically accountable.

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. 437, 453-54 (1992) (quoting *Healy v. Beer Institute*, 491

U.S. 324, 336 (1989)). In *Southern Pacific Company v. State of Arizona ex rel. Sullivan*, Justice Stone acknowledged these dangers by observing that "[i]f one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation." 325 U.S. 761, 775 (1945). This case presents the same problem. If any state can exempt itself from constitutional scrutiny merely by offering goods or services for a fee, then every state can do the same and highway tolls are no longer subject to any Commerce Clause limitations. If the Seventh Circuit is correct, then nothing bars any state in the union from designating a toll road or other state-owned facility to serve as a source of revenue—unrestricted by any limitation—imposed on users of instrumentalities of interstate commerce.

If this decision is allowed to stand, every state is free to address its budget shortfalls by monetizing its services and disproportionately imposing the costs on interstate travelers and commerce rather than local taxpayers. The Seventh Circuit's decision risks undoing this Court's careful and longstanding protections against the economic disruptions feared more than 230 years ago.

> This Court has declared that [o]ur dormant Commerce Clause cases reflect 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."

Tennessee Wine, 139 S. Ct. at 2461 (quoting *Granholm*, 544 U.S. at 472).

Tennessee Wine illustrates the extent to which this Court has labored to ensure that our Founding Fathers' concerns over economic Balkanization would be honored through the careful and thoughtful implementation of the dormant Commerce Clause. The Seventh Circuit's holding below substantially deconstructs the dormant Commerce Clause by limiting its reach to include only discriminatory activities and by expanding the reach of the market participant exemption to include virtually any recognizable purchase or sale activity by a state or state actor without consideration of circumstances recognized by other circuits that could rule out a finding of proprietary conduct.

Under these rulings, virtually no user fee could be challenged under the dormant Commerce Clause. "[W]ithout the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Tennessee Wine*, 139 S. Ct. at 2460. Certiorari should be granted to protect the fundamental principles advanced by the Founding Fathers that were so eloquently identified in and defended under *Tennessee Wine*.

CONCLUSION

The Seventh Circuit's opinion reflects a significant retreat from the concerns over the dangers of economic Balkanization that animated our Founding Fathers' drive to establish the Constitution with a strong Commerce Clause and this Court's recent reaffirmation of those concerns in *Tennessee Wine*. The Seventh Circuit dramatically expanded the reach of the market participant exception by ignoring circumstances that establish when states are acting in a governmental, rather than proprietary, capacity, while at the same time significantly narrowing the scope of dormant Commerce Clause protections by eliminating limits upon state burdens on interstate commerce. The Seventh Circuit's opinion will serve as an invitation for cash-strapped states to follow in Indiana's footsteps by shifting the financial burdens of state and local projects by collecting excessive and burdensome tolls from persons to whom they have no political accountability—interstate travelers.

In a time when states are giving renewed attention to how to pay for their extensive infrastructure needs, this Court should grant this Petition *now* to address the Seventh Circuit's strides toward economic Balkanization before they spread further and the burdens upon interstate transportation and commerce without limits become entrenched.

Respectfully submitted,

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