

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

OWNER OPERATOR INDEPENDENT	:	
DRIVERS ASSOCIATION, INC., <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 1:18-CV-00608-YK
	:	
vs.	:	Judge Yvette Kane
	:	
PENNSYLVANIA TURNPIKE	:	Electronically Filed Document
COMMISSION, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

PROCEDURAL HISTORY ..... 2

STATEMENT OF FACTS ..... 3

QUESTION PRESENTED ..... 5

REQUEST FOR RELIEF ..... 5

ARGUMENT ..... 6

    I. THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF ..... 6

    II. PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS ..... 7

        A. This Court Has Subject Matter Jurisdiction ..... 7

            i. The Individual Plaintiffs and Organizational Plaintiffs Have Standing to Challenge Defendants’ Constitutional Violations ..... 7

            ii. The Court Has Jurisdiction to Grant Declaratory and Injunctive Relief Against PTC Defendants and Officials of the Commonwealth in Their Official Capacities ..... 8

        B. Tolls Imposed Upon Users of the Pennsylvania Turnpike Are Excessive and Violate Plaintiffs’ Constitutional Rights ..... 10

            i. Act 44/89 Requires PTC to Transfer Enormous Amounts of Excess Toll Revenues to PennDOT ..... 10

            ii. PTC Must Increase Tolls Every Year to Make Its Act 44/89 Payments ..... 12

iii. Toll Revenue Grossly Exceeds the Cost of Turnpike Services .....	13
iv. Excess Toll Revenues Are Improperly Diverted to Support Facilities Having No Functional Relationship to the Turnpike .....	15
C. Excess Tolls Imposed by PTC Upon Commercial Motor Vehicles Constitute an Undue Burden on Commerce .....	20
D. Tolls Imposed on Motorists Impermissibly Burden Their Constitutional Right to Travel.....	22
i. A State May Not Infringe upon a Person’s Right to Travel by Imposing an Excessive Tax on the Exercise of That Right .....	22
ii. The Commerce Clause Also Prohibits Pennsylvania’s Statutory Scheme Because the Resulting Tolls are Excessive and are not a Fair Approximation of the Use of the Turnpike.....	25
III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF.....	25
IV. THE BALANCE OF EQUITIES TIPS DECIDEDLY IN FAVOR OF PLAINTIFFS .....	28
V. THE PUBLIC INTEREST WOULD BE WELL-SERVED BY INJUNCTIVE RELIEF.....	30
VI. BECAUSE DISPUTED FUNDS WILL BE SEQUESTERED <i>PENDENTE LITE</i> , ONLY A NOMINAL BOND WILL BE REQUIRED .....	31
CONCLUSION.....	32

**Table of Authorities**

**Cases**

*Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*,  
42 F.3d 1421 (3d Cir. 1994).....30

*Am. Trucking Ass’ns, Inc. v. N.Y. State Thruway Auth.*,  
199 F. Supp. 3d 855 (S.D.N.Y. 2016)..... 20, 21

*Am. Trucking Ass’ns, Inc. v. N.Y. State Thruway Auth.*,  
No. 17-737 (L), 2018 WL 1526362 (2d Cir. Mar. 29, 2018) .....20

*Angus Partners LLC v. Walder*,  
52 F. Supp. 3d 546 (S.D.N.Y. 2014).....25

*Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*,  
893 F. Supp. 301 (D.N.J. 1995) .....26

*Balon v. Enhanced Recovery Co.*,  
264 F. Supp. 3d 597 (M.D. Pa. 2017) .....8

*Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*,  
567 F.3d 79 (2d Cir. 2009)..... 21, 22

*Camps Newfound/Owatonna, Inc. v. Town of Harrison*,  
520 U.S. 564 (1997).....25

*Christy v. Pa. Tpk. Comm’n*,  
54 F.3d 1140 (3d Cir. 1995).....8

*Corfield v. Coryell*,  
6 Fed. Cas. 546 (1823) .....22

*Edward G. Rahl & Sons, Inc. v. Zach*,  
No. CIV A 1:08-CV-1384, 2008 WL 3853311 (M.D. Pa. Aug. 14, 2008) .....31

*Edwards v. California*,  
314 U.S. 160 (1941)..... 22, 23

*Elliott v. Kiesewetter*,  
98 F.3d 47 (3d Cir. 1996).....31

*Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*,  
 405 U.S. 707 (1972) ..... 1, 15, 24

*Ex Parte Young*,  
 209 U.S. 123 (1908) .....9, 10

*Fields v. Speaker of the Pa. H.R.*,  
 251 F. Supp. 3d 772 (M.D. Pa. 2017) .....8

*Free Speech Coal., Inc. v. Attorney Gen. of the U.S.*,  
 825 F.3d 149 (3d Cir. 2016).....7

*G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*,  
 23 F.3d 1071 (6th Cir. 1994).....30

*Gannett Co. v. DePasquale*,  
 443 U.S. 368 (1979) .....30

*GoodCat, LLC v. Cook*,  
 202 F. Supp. 3d 896 (S.D. Ind. 2016) .....25

*Highmark, Inc. v. UPMC Health Plan, Inc.*,  
 276 F.3d 160 (3d Cir. 2001).....6

*Hunt v. Wash. State Apple Adver. Comm’n*,  
 432 U.S. 333. 343 (1997) .....8

*Int’l Harvester Co. v. Evatt*,  
 329 U.S. 416 (1947) .....15

*Interstate Transit, Inc. v. Lindsey*,  
 283 U.S. 183 (1931) .....16

*Issa v. Sch. Dist. of Lancaster*,  
 847 F.3d 121 (3d Cir. 2017).....6, 30

*Johnson v. Wetzel*,  
 209 F. Supp. 3d 766 (M.D. Pa. 2016) .....30

*Lujan v. Defenders of Wildlife*,  
 504 U.S. 555 (1992) .....7

*Massachusetts v. United States*,  
435 U.S. 444 (1978) .....16

*N. Pa. Legal Servs., Inc. v. Lackawanna County*,  
513 F. Supp. 678 (M.D. Pa. 1981) .....32

*N.J. Thoroughbred Horsemen’s Ass’n v. Nat’l Collegiate Athletic Ass’n*,  
137 S. Ct. 2326 (2017) .....9

*Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*,  
832 F.3d 389 (3d Cir. 2016).....9

*Ne. Women’s Ctr., Inc. v. McMonagle*,  
665 F. Supp. 1147 (E.D. Pa. 1987) .....28

*Nw. Airlines, Inc. v. County of Kent*,  
510 U.S. 355 (1994) .....1, 20

*Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*,  
656 F.3d 560 (7th Cir. 2011).....7

*Pennsylvania v. Trump*,  
281 F. Supp. 3d 553 (E.D. Pa. 2017) .....31

*Pomicter v. Luzerne Cnty. Convention Ctr. Auth. & SMG*,  
No. 3:16-CV-00632-RDM, 2016 WL 1706165 (M.D. Pa. Apr. 27, 2016) .....32

*Reilly v. City of Harrisburg*,  
858 F.3d 173 (3d Cir. 2017).....6

*Schulz v. U.S. Boxing Ass’n*,  
105 F.3d 127 (3d Cir. 1997).....30

*Slaughter-House Cases*,  
83 U.S. (16 Wall.) 36 (1873) .....22

*Smith v. Turner*,  
48 U.S. (7 How.) 283 .....23

*Twining v. New Jersey*,  
211 U.S. 78 (1908) .....23

*Verizon Md., Inc. v. Pub. Serv. Comm’n*,  
535 U.S. 635 (2002).....9, 13

*Wallach v. Brezenoff*,  
930 F.2d 1070 (3d Cir. 1991).....25

*Williams v. Fears*,  
179 U.S. 270 (1900).....23

**Statutes**

Title 74, Section 2104(A)(2).....19

36 P.S. § 6521 .....10

74 Pa. C.S. § 1503.....18

74 Pa. C.S. § 1506.....3

74 Pa. C.S. § 1513.....18

74 Pa. C.S. § 2101.....18

74 Pa. C.S. § 2104.....18

74 Pa. C.S. § 8112.....3

74 Pa. C.S. § 8116.....3, 10

75 Pa. C.S. § 8901.....3, 11

75 Pa. C.S. § 8915.3.....3

75 Pa. C.S. § 9511.2.....3

75 Pa. C.S. § 9511.4.....3

**Rules**

Rule 65 of the Federal Rules of Civil Procedure .....2

**Other Authorities**

P.L. 169, No. 44 (“Act 44”) (July 18, 2007).....3  
P.L. 794, No. 89 (“Act 89”) (Nov. 25, 2013) .....3  
11 C. Wright & A. Miller, Federal Practice & Procedure (1973) .....28  
Commonwealth of Pa. H.R. House Comm. on Appropriations, Fiscal Note,  
H.B. 1060 PN 2697 (Nov. 21, 2013) ..... 17, 35

## INTRODUCTION

The Pennsylvania Turnpike Commission (PTC) collects tolls from Plaintiffs and other users of the Pennsylvania Turnpike that far exceed a fair approximation of the value of the use of facilities or services conferred and the cost of providing those facilities and services. Collection of that portion of the toll that is excessive—more than half the toll—violates the Commerce Clause and Plaintiffs’ constitutional right to travel.

The law concerning an undue burden on interstate commerce is straightforward. That law is easily applied to the facts that Defendants have publicly acknowledged and upon which Plaintiffs rely in seeking injunctive relief. The imposition of excess tolls for the stated purpose of funding state projects that have no functional relationship to the Turnpike plainly constitutes an undue burden on interstate commerce in violation of the Commerce Clause. *See Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994) (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972)).

Plaintiffs require a preliminary injunction to preserve the status quo pending resolution of their claims. Plaintiffs do not seek preliminary relief to prevent collection of the excess tolls, but only to sequester the excess funds once collected. In fiscal year 2016, PTC collected \$560,488,000 more in tolls than it needed to operate and maintain the Turnpike. *See Table 4A, infra*. In fiscal year 2017, the

excess toll revenue totaled \$597,873,000. These overages were used by PTC to meet its obligations under state statutes to make payments to the Pennsylvania Department of Transportation (PennDOT), to fund projects that have no functional relationship to the Turnpike, and to service debt related to bonds PTC had previously issued to make such payments. *See* PTC, Comprehensive Annual Financial Report: Fiscal Years Ended May 31, 2017 and 2016 (2016-17 Financial Report) at 107-08, 113-14 (2017) (Ex. 2<sup>1</sup>). The statutes that mandate the imposition of excessive tolls and authorize the use of such excessive toll receipts for services and facilities that have no functional relationship to the Turnpike are facially unconstitutional or unconstitutional as applied. Unless enjoined *pendente lite*, PTC will never be in a position to refund to Plaintiffs the excessive tolls PTC imposed upon them in violation of their constitutional rights. Absent the requested preliminary injunction, Plaintiffs do not have an adequate remedy at law. Plaintiffs seek preliminary injunctive relief that is modest in scope, that protects the interests of the public and all interested parties, and that satisfies the criteria set forth in Rule 65 of the Federal Rules of Civil Procedure.

### **PROCEDURAL HISTORY**

Plaintiffs filed their Complaint on March 15, 2018. There have been no other

---

<sup>1</sup> All citations to exhibits herein refer to the exhibits attached to the Declaration of Katherine Quiniola (Quiniola Declaration), filed contemporaneously herewith.

substantive filings in the case.

### **STATEMENT OF FACTS**

An act of the General Assembly of Pennsylvania, approved on July 18, 2007, P.L. 169, No. 44 (Act 44) (Ex. 35), as amended by the Act of November 25, 2013, P.L. 794, No. 89 (Act 89) (Ex. 33) (collectively Act 44/89) directs PTC to make annual payments of \$450 million to PennDOT through fiscal year 2022. 75 Pa. C.S. §§ 8915.3, 8901; 74 Pa. C.S. § 1506(a), (b). *See* Ex. 2 at 26; Annotated Complaint (Ex. 1) ¶ 54. After 2022, PTC's obligation is reduced to \$50 million annually through 2057. 75 Pa. C.S. §§ 8915.3, 8901; 74 Pa. C.S. § 1506(a), (b). *See* Ex. 2 at 26; Ex. 1 ¶ 54. Act 44/89 directs PTC to raise tolls on the Turnpike to secure funds from toll-payers to make PTC's mandated payments to PennDOT, and to issue bonds to make up for any cash shortfall in making such payments. 74 Pa. C.S. §§ 8112; 8116(a); 75 Pa. C.S. §§ 9511.2, 9511.4(a); Ex. 1 ¶ 59.

PennDOT uses the Act 44/89 payments to support facilities and services throughout the Commonwealth that have no functional relationship to the Turnpike. *See* PTC, Act 44 Financial Plan Fiscal Year 2018 (Act 44 Financial Plan FY 2018), 1 (June 1, 2017) (Ex. 7); Commonwealth of Pennsylvania, Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2016 at 188 (Dec. 15, 2016) (describing the Public Transportation Trust Fund as being funded in part by PTC and providing "dedicated funding for public transportation in the Commonwealth") (Ex.

22); Ex. 1 ¶¶ 66-85. PTC annually collects more than twice as much in tolls as is necessary to operate the Turnpike. *See* Ex. 2 at 118, 122; Ex. 1 ¶¶ 95-97. The excess funds collected go either directly to PennDOT or to service debt incurred by PTC previously to support its prior Act 44/89 payments to PennDOT. Ex. 2 at 118; *see* Ex. 1 ¶¶ 60, 65.

PTC, PennDOT, and other Commonwealth sources have published and disseminated statements and official documents that plainly concede all the material facts of this case. *See* Quiniola Declaration and Exhibits thereto. The tolls collected on the Turnpike do not represent a fair approximation of the Turnpike's use, they are excessive in relation to the benefits conferred upon the Turnpike's users, and they significantly exceed the costs that PTC incurs in operating, maintaining, and improving the Turnpike. The excess tolls collected by PTC and transferred to PennDOT are expended to finance community enhancements throughout the Commonwealth that have no functional relationship to the Turnpike. These include projects as disparate as aviation facilities, ports and waterways, bus garages, bicycle trails, streetscapes, decorative lighting, and pedestrian safety, *see* Ex. 1 ¶¶ 77-84, all—by PTC's admission—"infrastructure improvements in every corner of Pennsylvania." News Release, PTC, PA Turnpike Outlines Act 44 Payments, Details of Jan. 4, 2009 Toll Increase (Dec. 4, 2008) (Ex. 21) (quoting Turnpike CEO Joseph Brimmeier); *see* Ex. 1 ¶ 72.

### **QUESTION PRESENTED**

Should Defendants be enjoined from transferring and expending funds generated by Pennsylvania Turnpike tolls imposed upon Plaintiffs and others similarly situated pending resolution of their claim that such tolls are excessive, are an undue burden on interstate commerce, and/or violate the constitutional right to travel?

### **REQUEST FOR RELIEF**

Plaintiffs seek to enjoin, prior to April 30, 2018, the PTC Defendants from: (1) transferring to PennDOT any sums derived from Pennsylvania Turnpike toll revenue to satisfy PTC's obligations under Act 44/89 or for any other purpose except operating, maintaining, or improving the Turnpike; (2) using any sums derived from such toll revenue to pay the cost of debt service on bonds issued by PTC for any purpose other than operating, maintaining, or improving the Turnpike; and, (3) issuing or causing to be issued any additional debt instruments for the purpose of making further payments to PennDOT pursuant to Act 44/89. Plaintiffs request that the Court order PTC to hold in PTC's Revenue Fund<sup>2</sup> all toll revenue in excess of that which is needed to pay for the operation and maintenance of the Turnpike, pending the final disposition of this case. Plaintiffs further request that the Court

---

<sup>2</sup> Ex. 7 at 16 ("All revenues of the Commission are deposited daily into its Revenue Fund.").

prohibit Defendants Richards and Wolf from further acquiring or spending any funds originating from the PTC Defendants in payment of putative obligations of PTC under Act 44/89 pending final disposition of this case. The requested preliminary injunctive relief would not require any change in the currently active toll schedules until the conclusion of the litigation.

## **ARGUMENT**

### **I. THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF**

To grant a preliminary injunction, the Court must find: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent a preliminary injunction, (3) that the balance of equities tips in favor of issuing an injunction, and (4) that an injunction is in the public interest. *See, e.g., Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017).

To establish a likelihood of success on the merits, “the movant need only prove a ‘prima facie case,’ not a ‘certainty’” of success. *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017) (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001)). Plaintiffs rely substantially on facts that Defendants themselves have documented, with great care and precision, in a variety of documents published and disseminated to inform the public and all interested parties of PTC’s activities. *See* Quiniola Declaration and Exhibits thereto. Defendants’ own statements constitute admissions against interest from

which they may not now retreat. Defendants' own admissions of fact favor a finding that Plaintiffs have a strong likelihood of prevailing on the merits.

**II. PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS.**

**A. This Court Has Subject Matter Jurisdiction.**

**i. The Individual Plaintiffs and Organizational Plaintiffs Have Standing to Challenge Defendants' Constitutional Violations.**

The Court has subject matter jurisdiction over this proceeding. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 560, 585 (7th Cir. 2011). The individual Plaintiffs have alleged concrete and particular economic harm that is caused by Defendants and that is redressible through the intervention of this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs (and putative class members) have been required to pay unlawfully excessive tolls. Defendants have caused and continue to cause Plaintiffs concrete injury by imposing and collecting the excessive tolls. *E.g.*, Ex. 1 ¶¶ 5-7, 9-18, 36, 96-106, 124-25, 129-30. Plaintiffs' concrete injuries can and will be redressed by the requested injunction to end this unconstitutional conduct. Further, without judicial intervention, the constitutional violations will likely continue for decades. *E.g.*, *id.* ¶¶ 89-95; *Free Speech Coal., Inc. v. Attorney Gen. of the U.S.*, 825 F.3d 149, 165-66 (3d Cir. 2016) (future harm required for prospective claims). Therefore, the individual Plaintiffs have met each element required for Article III

standing. *See Balon v. Enhanced Recovery Co.*, 264 F. Supp. 3d 597, 603-04 (M.D. Pa. 2017).

Additionally, associations can sue on behalf of their members if: (1) the members would have standing; (2) the interests the association seeks to protect in the lawsuit are “germane” to the association’s purpose(s); and (3) neither the asserted claims nor the sought-for relief require the members’ participation. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1997); *Fields v. Speaker of the Pa. H.R.*, 251 F. Supp. 3d 772, 783 (M.D. Pa. 2017). Both the Owner-Operator Independent Drivers Association, Inc. (OOIDA) and the National Motorists Association (NMA) have alleged that some of their members have paid PTC’s excessive tolls, and the interests at stake in this lawsuit are “germane” to OOIDA’s and NMA’s purposes, which include advancing the economic and legal interests of commercial truckers (OOIDA) and traveling motorists (NMA). Ex. 1 ¶¶ 9-18. Finally, although this case does not require members’ participation, several members from each organization are participating nonetheless, as named Plaintiffs and potential class representatives. *Id.* ¶¶ 13-18.

**ii. The Court Has Jurisdiction to Grant Declaratory and Injunctive Relief against PTC Defendants and Officials of the Commonwealth in Their Official Capacities.**

We note in passing that the Third Circuit has previously held that PTC is not immune from suits for damages under the Eleventh Amendment. *Christy v. Pa.*

*Tpk. Comm'n*, 54 F.3d 1140, 1148, 1150 (3d Cir. 1995) (holding that PTC is not an arm of the Commonwealth and “is subject to suit in federal court”). The PTC’s lack of Eleventh Amendment immunity is not implicated in Plaintiffs’ Motion for a Preliminary Injunction. Rather, the issue before the Court today is whether federal courts can enter declaratory and prospective injunctive relief against state officials in their official capacities under the facts presented here. Federal courts are empowered to hold state officials to federal standards when those officials attempt to enforce a state enactment that violates federal law. *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 832 F.3d 389, 394 n.3 (3d Cir. 2016)<sup>3</sup> (citing *Ex Parte Young*, 209 U.S. 123, 160 (1908)). The jurisdictional test is simple: The court has jurisdiction to enter injunctive relief when “the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Id.* (quoting *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002)).

Application of the test here is straightforward, and *Ex Parte Young*’s exception to sovereign immunity applies. Plaintiffs have sued the Commissioners and Executive Officers of PTC and Commonwealth officers—Governor Wolf and Secretary Richards, in both their individual and official capacities—for prospective relief to vindicate their federal rights that are being violated by the state officers’

---

<sup>3</sup> *Cert. granted sub nom. N.J. Thoroughbred Horsemen’s Ass’n v. Nat’l Collegiate Athletic Ass’n*, 137 S. Ct. 2326 (2017), and *cert. granted sub nom. Christie v. Nat’l Collegiate Athletic Ass’n*, 137 S. Ct. 2327 (2017).

enforcement of Act 44/89. The Defendants' actions are ongoing, and the current Motion seeks only prospective relief.

Plaintiffs' request here for prospective relief falls within the *Ex Parte Young* exception. The Court, therefore, has the authority to grant Plaintiffs' requested prospective relief against PTC, its Commissioners and Executive Officers in their official capacities, and against the individual Commonwealth Defendants in their official capacities as well. Plaintiffs seek to vindicate their federal rights violated by the PTC commissioners' ongoing and unconstitutional implementation of Act 44/89.

**B. Tolls Imposed Upon Users of the Pennsylvania Turnpike Are Excessive and Violate Plaintiffs' Constitutional Rights.**

**i. Act 44/89 Requires PTC to Transfer Enormous Amounts of Excess Toll Revenues to PennDOT.**

By statute, PTC is responsible for fixing, revising, and collecting tolls on the Turnpike. 36 P.S. § 6521; 74 Pa. C.S. § 8116(a). This responsibility is intended to ensure that the Turnpike generates sufficient funds to make the payments mandated by Act 44/89 to fund diverse public projects all over the Commonwealth. 74 Pa. C.S. § 8116(a)(3); Ex. 2 at 25 (describing Act 44/89 as providing "funding for roads, bridges and transit *throughout* the Commonwealth"); Ex. 1 ¶¶ 44, 71, 78-84. But PTC's Act 44/89 obligations render it impossible for PTC to discharge this state statutory responsibility without violating the rights of Turnpike users under the

federal constitution.

Act 44 required PTC to make payments of \$2.5 billion to PennDOT between fiscal years 2008-2010 and \$900 million annually thereafter, subject to a 2.5 percent annual increase. 75 Pa. C.S. § 8901 (Ex. 35) (defining “Scheduled annual commission contribution”); Commonwealth of Pennsylvania, Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2007 125 (Dec. 20, 2007) (Ex. 24); Ex. 1 ¶ 52, Table 1. Act 44 was amended by Act 89 (Ex. 33) to reduce those annual payments to \$450 million between fiscal years 2011 and 2022 and to \$50 million between fiscal years 2023 and 2057. 75 Pa. C.S. § 8901 (defining “Scheduled annual commission contribution” and “Annual base payments”); Ex. 1 ¶¶ 52-54.

As of January 4, 2018, PTC has made \$5.875 billion in Act 44/89 payments to PennDOT. Ex. 1 ¶ 56. Pennsylvania’s Auditor General calculates that PTC will be required to make \$9.65 billion in payments through 2057. Commonwealth of Pennsylvania Dep’t of the Auditor Gen. (PA Auditor General), Performance Audit: Pennsylvania Turnpike Commission (2016 Performance Audit) at 6 (2016) (Ex. 26); Ex. 1 ¶ 55. The Auditor General’s September 2016 report disclosed that PTC had issued \$5.6 billion in new debt in order to make its Act 44/89 payments. Ex. 26 at 6; Ex. 1 ¶ 57. That number has undoubtedly grown larger in the last year and a half. In fact, in fiscal year 2017, PTC reported more than \$12 billion in long term debt,

and a net negative position of \$5.2 billion. Ex. 2 at 29; *see also* PTC, Long Range Plan 2035: The Bridge to Zero Fatalities Executive Summary at 10 (Nov. 2016) (Ex. 18). PTC's debt instruments require PTC to pay millions of dollars in principal and interest, multiple times per year, for decades into the future. *See, e.g.*, PTC, Official Statement, \$244,855,000 Turnpike Subordinate Revenue Bonds, Series 2008A (44/89 Bonds 2008A) at 2, 21-22 (Apr. 18, 2008) (Ex. 12); PTC, Official Statement, \$411,075,000 Revenue Refunding Bonds at 2-3, 5 (Oct. 20, 2016) (Ex. 11). Act 44/89 unconstitutionally demands that PTC Defendants raise tolls to excessive levels in order to make payments to PennDOT or to service debt incurred to make previous payments.

**ii. PTC Must Increase Tolls Every Year to Make Its Act 44/89 Payments.**

Act 44/89 necessitates that PTC continually raise tolls on Turnpike users to enable it to make its mandatory payments to PennDOT for purposes unrelated to the Turnpike. *See* Ex. 2 at 18, 83; Ex. 7 at 2; Ex. 1 ¶ 60. PTC does not have the financial resources to make its PennDOT payments without continuously raising tolls and increasing debt. Ex. 2 at 83; Ex. 1 ¶ 60. The Commonwealth's Auditor General has projected that a 215 percent increase in toll revenue will be needed between 2015 and 2035 to satisfy the statutory scheme. Press Release, PA Auditor General, Auditor General DePasquale Says Turnpike Commission Audit Finds Unrealistic Growth Projects Could Cause Transportation Disaster (Sept. 6, 2016)

(Ex. 25); Ex. 1 ¶ 89.

PTC's actual and projected annual toll increases between 2009 and 2026 are shown in Table 2 of the Annotated Complaint. Ex. 1 ¶ 90; *see also* Ex. 12 at 4-5. By comparison, PTC increased tolls only five times from 1957 through 2008, using the revenue for upgrades and capital improvements to the Turnpike itself. Ex. 12 at A-4. The practical implications of PTC's ongoing toll increases are shown in Table 3. Ex. 1 ¶ 93. The current cost of a trip on the Turnpike from Ohio to New Jersey has increased between 213 and 223 percent (depending on class of vehicle) since 2006. *Id.* The individual Plaintiffs have been required to pay these excessive tolls in order to use the Turnpike.

**iii. Toll Revenue Grossly Exceeds the Cost of Turnpike Services.**

Toll rates and toll revenue have both grown significantly over the past ten years. For purposes of the current Motion, the Court should examine the relationship between annual toll revenues and the annual cost of operating and maintaining the Turnpike. Table 4 at Annotated Complaint (Ex. 1) ¶ 95 shows this relationship between 2007 and 2017. Plaintiffs derived the data on the cost of turnpike services in comparison to gross toll revenue directly from PTC's 2015-16 and 2016-17 Financial Reports. Ex. 2 at 118, 122; PTC, Comprehensive Annual Financial Report (2015-16 Financial Report) at 139, 143 (Sept. 2, 2016) (Ex. 3). In each year, toll revenues grossly exceed the cost of Turnpike services. Table 4

shows that current toll revenues actually exceed the cost of operating and maintaining the Turnpike by over 215 percent.<sup>4</sup>

The current Motion seeks to sequester the excess toll revenues presently charged, and to prevent such toll revenues from being diverted pending resolution of this litigation. The following Table 4A is a variation of Table 4 found at Annotated Complaint (Ex. 1) ¶ 95. It calculates the numerical difference between annual gross toll revenue and the annual cost of Turnpike services. In 2016, PTC collected toll revenues of \$560,488,000 in excess of the cost of the Turnpike; in 2017, PTC collected \$597,873,000 in excess revenue. Ex. 2 at 118, 122. The pending Motion seeks to prevent such excess toll revenues from being expended by Defendants pending final resolution of this litigation.

---

<sup>4</sup> Toll revenue as a percentage of the cost of services is a simple calculation: gross toll revenue divided by the cost of Turnpike services, multiplied by 100, equals the percentage of toll Revenue in relation to the cost of services.

TABLE 4A

Year	Cost of Turnpike Services	Gross Toll Revenue	Difference Between Gross Toll Revenue & Cost of Services	Toll Revenue as a % of Cost of Services
2007	\$369,855,000	\$617,616,000	\$247,761,000	166.99%
2008	\$372,959,000	\$619,150,000	\$246,191,000	166.01%
2009	\$393,364,000	\$638,244,000	\$244,880,000	162.25%
2010	\$378,426,000	\$718,038,000	\$339,612,000	189.74%
2011	\$359,870,000	\$763,856,000	\$403,986,000	212.26%
2012	\$387,506,000	\$797,779,000	\$410,273,000	205.88%
2013	\$412,484,000	\$821,740,000	\$409,256,000	199.22%
2014	\$438,981,000	\$866,066,000	\$427,085,000	197.29%
2015	\$459,780,000	\$934,252,000	\$474,472,000	203.20%
2016	\$471,132,000	\$1,031,620,000	\$560,488,000	218.97%
2017	\$517,103,000	\$1,114,976,000	\$597,873,000	215.62%

Ex. 2 at 118, 122; Ex. 3 at 139, 143.

In *Evansville-Vanderburgh*, the Supreme Court noted that courts reviewing the constitutional standard forbidding excess burdens on interstate commerce “must be content with rough approximation rather than precision.” 405 U.S. at 716 (citing *Int’l Harvester Co. v. Evatt*, 329 U.S. 416, 422 (1947)). Imposing tolls that represent over two hundred percent of the actual cost of maintaining and operating the Turnpike misses even this “rough approximation” mark by a wide margin. Turnpike tolls are grossly excessive by any reasonable measure.

**iv. Excess Toll Revenues Are Improperly Diverted to Support Facilities Having No Functional Relationship to the Turnpike.**

The Commerce Clause allows a state to require that “those who specifically benefit from its services pay the cost” of those services—including highways.

*Massachusetts v. United States*, 435 U.S. 444, 462 (1978). But it does not permit a state to exact payments that “bear[] no reasonable relation to the privilege of using the highways” for which the payments are made. *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 185-86 (1931). The Constitution does not allow a state to divert fees paid for access to interstate commerce facilities to finance other projects simply to avoid the need to impose higher taxes. Ex. 1 ¶ 85.

The Defendants’ own admissions and public statements document a substantial departure from these constitutional norms. On December 4, 2008, PTC issued a press release regarding an imminent 25 percent toll increase:

In December 2008, PTC’s CEO announced: “The mission of [the Turnpike] has changed . . . . For the first time, toll income isn’t only going back into our toll roads, but helping to *fund infrastructure improvements in every corner of Pennsylvania* . . . . Toll increase proceeds are mainly earmarked for *non-Turnpike projects*, so the funds generated by this [2009 toll] increase will largely be used by PennDOT to help finance off-Turnpike road and bridge projects and the state’s 74 mass-transit operations.”

Ex. 21 (emphasis added) (quoting Turnpike CEO Joseph Brimmeier). According to PennDOT and PTC, “the mission of the PTC was effectively transformed from being a low-toll facility that operated on a breakeven basis, to a market-based revenue generator . . . .”). Application to the Federal Highway Administration for Tolling Interstate 80 under the Interstate System Reconstruction and Rehabilitation Pilot Program, Amended Phase I at 2 (July 17, 2008) (Ex. 6).

According to the Pennsylvania Auditor General’s 2016 Performance Audit of

PTC, beginning in 2015, PTC's Act 44/89 payments have been dedicated solely to "non-highway purposes," including transit. Ex. 26 at 8. The PTC Act 44 Financial Plan for fiscal year 2018 makes this abundantly clear:

*Act 89 substantially altered the Commission's funding obligations to PennDOT. While the Commission's aggregate payment obligation remains at \$450 million annually, beginning July 1, 2014, none of the payments are dedicated to highways and bridges. Instead, all \$450 million is allocated to support transit capital, operating, multi-modal and other non-highway programs.*

Ex. 7 at 1 (emphasis added); *see also* Ex. 12 at A-5-A-6. Then, when Act 44/89 payments decrease after 2021, the "revenue will be replaced with a percentage of the sales tax, not less than \$450 million, and will be disbursed from the sales and use tax on motor vehicles and trailers." Commonwealth of Pa. H.R. House Comm. on Appropriations, Fiscal Note, H.B. 1060 PN 2697 at 2 (Nov. 21, 2013) (Ex. 34).

Turnpike tolls should be spent on operations, maintenance, reconstruction, and improvements on the Turnpike itself, including rest stops and service plazas, law enforcement to patrol the Turnpike, and other costs that are functionally related to and benefit Turnpike travelers. Pennsylvania's statutory scheme, however, requires PTC to contribute hundreds of millions of dollars every year to PennDOT, which then distributes those funds for purposes that even PTC acknowledges are non-Turnpike projects installed in every corner of the state. *See* Ex. 21; Ex. 7 at 1; Ex. 1 ¶¶ 68-69. PTC Defendants have no statutory authority to control how PennDOT uses excess toll receipts. There is no statutory requirement that

PennDOT use these excessive toll receipts to support services or facilities that have a functional relation to the Turnpike. Ex. 1 ¶¶ 71-73.

The toll revenues transferred by PTC to PennDOT pursuant to Act 44/89 are expended on a wide variety of programs around the Commonwealth, including:

- “Free fares for senior passengers” on public transportation, *see* 74 Pa. C.S. §§ 1513(c)(2)(B) & 1503;
- Eligible programs related to:
  - Aviation;
  - Rail freight;
  - Passenger rail;
  - Ports and waterways; and
  - PennDOT’s administrations thereof, *see* 74 Pa. C.S. § 2104(a); and
- Multimodal Funds programs, including, for example:
  - Coordinating local land use with transportation assets to enhance communities;
  - Projects related to streetscape, lighting, sidewalk enhancement; and pedestrian safety;
  - Improving connectivity or utilization of existing transportation assets. *See* 74 Pa. C.S. § 2101; Ex. 1 ¶¶ 78-79.

The Complaint highlights only a few of the many toll-funded projects, including: (1) creation of a mixed-use development consisting of residential units, office space, and a transportation facility with vehicle and bicycle parking, bicycle repair, electric-vehicle charging stations, kayak storage, and transit station in Pittsburgh; (2) rehabilitation of nine stone-arch bridges along the SEPTA regional

railway line; and, (3) Phase II Construction of Erie Metropolitan Transportation Authority's Maintenance and Paratransit Bus Storage Facility. Ex. 1 ¶ 84; PennDOT, 2014-15 and 2015-16 PennDOT Multimodal Transportation Fund Awards at 1 (Ex. 31); PennDOT, Transit Benefits from Act 89 at 1 (Feb. 22, 2018) (Ex. 32). These projects—and countless others funded by Turnpike tolls—are so disconnected from the function of the Turnpike that it is plain that the tolls are based on Pennsylvania's general capital needs rather than a fair approximation of the use of the Turnpike and its amenities. The projects funded by the Turnpike tolls paid over to PennDOT are not functionally related in any way to the operation, maintenance, repair, and improvement of the Turnpike.

PennDOT itself publishes at least two documents that further emphasize the absence of any functional relationship. PennDOT's "Multimodal Transportation Fund Program Under Title 74, Section 2104(A)(2): Frequently Asked Questions," (Jan. 30, 2018) (Ex. 29), and its "Guidelines: Multimodal Transportation Fund ('MTF')" (Jan. 30, 2018) (Ex. 28) contain suggestions to applicants for grants from only one of PennDOT's Turnpike-toll-funded Funds. Neither document even mentions the Turnpike.

The statutory scheme burdens Turnpike toll-payers with financing numerous public projects that have no relationship whatever to the Turnpike and do not benefit its users. The tolls are intentionally excessive.

**C. Excess Tolls Imposed by PTC Upon Commercial Motor Vehicles Constitute an Undue Burden on Commerce.**

A toll is a user fee and is constitutionally permissible under the “dormant” Commerce Clause only if: (1) it is based on some fair approximation of the use of the facilities on which it is imposed; (2) it is not excessive in relation to the benefits conferred; and, (3) it does not discriminate against interstate commerce. *See Nw. Airlines*, 510 U.S. at 369. A toll that fails any prong of the *Northwest Airlines* test cannot stand. The tolls imposed upon users of the Pennsylvania Turnpike violate prongs 1 and 2 of the *Northwest Airlines* standard.

In 2016, the District Court for the Southern District of New York decided a case strikingly similar to this one. In *American Trucking Ass’ns, Inc. v. New York State Thruway Authority*, 199 F. Supp. 3d 855, 873 (S.D.N.Y. 2016), *vacated on other grounds*, 238 F. Supp. 3d 527, *aff’d*, *Am. Trucking Ass’ns, Inc. v. N.Y. State Thruway Auth.*, No. 17-737 (L), slip op. at 20-21, 2018 WL 1526362, at 6 (2d Cir. Mar. 29, 2018) (holding that Congress specifically exempted New York Thruway’s expenditure of excess toll revenues on New York State Canal System from the strictures of the Dormant Commerce Clause), commercial trucking companies and their trade association challenged the constitutionality of tolls on the New York State Thruway (hereinafter “Thruway”) because the tolls were purposely inflated to cover the costs of improving and maintaining the New York State Canal System in upstate New York, an amenity “that Plaintiffs d[id] not use and that afford[ed] them no

benefit.” *Id.* at 858-59. The district court described a highway toll as the quintessential example of “a fee imposed by government to defray the costs of facilities used by those engaged in interstate commerce.” *Id.* at 873.

Applying the *Northwest Airlines* test, the *American Trucking* court held that the 9 percent to 14 percent of tolls paid by Thruway users to support the upkeep of the Canal System—“facilities they do not use and from which they derive no benefit”—rendered the tolls unconstitutionally excessive. *Am. Trucking*, 199 F. Supp. 2d at 879. “The truckers may wish to enjoy bike paths, hiking trails, and museums while on vacation,” the court opined, “but they are irrelevant when sitting in the cab of an eighteen wheeler.” *Id.* This analysis applies here as well.

In *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79 (2d Cir. 2009), the Bridgeport Port Authority (“BPA”) imposed a surcharge (called a “passenger fee”) on all persons and vehicles embarking or disembarking from plaintiff’s ferries between Bridgeport, Connecticut and Port Jefferson, New York. *Bridgeport*, 567 F.3d at 81. BPA used the proceeds of the passenger fees (along with rental revenues from lease agreements with the ferry service company) to fund its entire mission, which included “to foster and stimulate the shipment of freight and commerce through the ports,” “to develop and promote port facilities with the district in order to create jobs, increase the city’s tax base and provide special revenues to the city,” “to maximize the usefulness of available public

funding,” and “to develop strategies and initiatives to promote and create port facilities within the district, [and] participate in the economic development of the harbor and waterfront area.” *Id.* The Second Circuit found that the fee violated the first two prongs of the *Northwest Airlines* test and required adjustments, opining:

If, as the district court ruled, some of the BPA’s expenses confer no benefit on the ferry passengers, either enjoyed or available to be enjoyed, then to that extent the fee, imposed solely on ferry passengers, is not a fair approximation of the use of the facilities supported by the fee and is also excessive in relation to the benefits enjoyed or available to be enjoyed by the passengers.

*Id.* at 86. The same conclusion must be drawn under the controlling facts here.

**D. Tolls Imposed on Motorists Impermissibly Burden Their Constitutional Right to Travel.**

**i. A State May Not Infringe upon a Person’s Right to Travel by Imposing an Excessive Tax on the Exercise of That Right.**

The freedom to move at will between and among the various states—the right to travel—has long been enshrined in our jurisprudence. As long ago as the ruling by Supreme Court Justice Bushrod Washington in the circuit court case of *Corfield v. Coryell*, 6 Fed. Cas. 546 (1823), courts have acknowledged freedom of movement as a fundamental Constitutional right. *See also Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74, 79 (1873) (right to travel “protected by the implied guarantees” of the Constitution).

In *Edwards v. California*, 314 U.S. 160, 177-80 (1941), the Supreme Court struck down on Commerce Clause grounds a California statute criminalizing the

transport of an indigent person into the state. In his concurring opinion, however, Justice Douglas emphasized that “the right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.” *Id.* at 177 (Douglas, J., concurring); *see also Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (right to travel protected by the Privileges or Immunities Clause of the Fourteenth Amendment); *Williams v. Fears*, 179 U.S. 270, 274 (1900) (same).

Justice Douglas was adamant that the right of persons to travel “occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, or coal across state lines.” *Edwards*, 314 U.S. at 177. “We are all citizens of the United States, and as members of the same community must have the right to pass through every part of it without interruption....” *Id.* at 179 (quoting *Smith v. Turner*, 48 U.S. (7 How.) 283, 492 (Taney, J., dissenting)); *see also id.* at 182 (Jackson, J., concurring) (“[M]igrations of a human being . . . do not fit easily into my notions of what is commerce.”). Justice Jackson—like Justice Douglas—rejected the Commerce Clause as the only source of protection of the right to travel and embraced “that clause of the Constitution by which [plaintiff was] a citizen of the United States and which forbids any state to abridge his privileges and immunities as such.” *Id.* Justice Jackson insisted that, “[w]hile instances of valid ‘privileges or immunities’ must be but few, I am convinced that [the right to travel]

is one.” *Id.* at 183. Based on an analysis under the Privileges or Immunities Clause, a state law that could “curtail the right of free movement of those who are poor or destitute . . . would be to contravene every conception of national unity.” *Id.* at 181.

Similarly, in *Evansville-Vanderburgh*, Justice Douglas wrote:

Usually the right to travel has been founded on the Commerce Clause. *See United States v. Guest*, 383 U.S. 745, 758-59 [1966]. Some, including myself, have thought the right to travel was a privilege and immunity of national citizenship. *Edwards v. California*, 314 U.S. 160, 177 . . . (Douglas, J., concurring). Whatever the source, the right exists.

405 U.S. at 723-24 (Douglas, J., dissenting). Based on analysis under the Privileges or Immunities Clause, Justice Douglas would have struck down the airport’s passenger fee at issue as unconstitutional. Opining that (1) while interstate commerce can certainly be “made to pay its fair share of the cost” of the benefits it enjoys and (2) local citizens can be taxed to support their communities, Justice Douglas insisted that a United States citizen cannot be taxed for exercising his constitutional rights. *Id.* at 726. But in this case before the Court, Pennsylvania is taxing—by imposing excessive fees on—citizens who are merely exercising their right to travel. Accordingly, the excessive tolls are unconstitutional.

**ii. The Commerce Clause Also Prohibits Pennsylvania’s Statutory Scheme Because the Resulting Tolls are Excessive and are not a Fair Approximation of the Use of the Turnpike.**

The Commerce Clause too prohibits state laws that “substantially affect[]” interstate commerce, “and thereby impede[] interstate commerce in the form of travel.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997).

Courts have noted that, absent strict scrutiny (which Plaintiffs do not suggest is required for purposes of this Motion), the analyses for a right to travel claim and a dormant Commerce Clause claim are identical. *See Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3d Cir. 1991); *Angus Partners LLC v. Walder*, 52 F. Supp. 3d 546, 560 n.5 (S.D.N.Y. 2014). For the same reasons that the Turnpike tolls violate the Commerce Clause, they likewise impermissibly burden individuals’ right to travel freely. Because the tolls do not represent a fair approximation of the use conferred on those who pay them, and are excessive in relation to the benefits conferred, they violate the constitutional right to travel of those who pay them. The burdens Defendants place on the right to travel currently threaten and will continue to threaten the exercise of that right. Ex. 1 ¶¶ 98-104.

**III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF.**

Plaintiffs and those similarly situated will suffer irreparable harm in at least five ways unless the Court grants the requested injunction. First, courts generally hold that “a reasonable likelihood of a constitutional violation . . . rises to the level of irreparable harm for the purposes of injunctive relief.” *GoodCat, LLC v. Cook*,

202 F. Supp. 3d 896, 918 (S.D. Ind. 2016); *see also Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 893 F. Supp. 301, 308-09 (D.N.J. 1995) (“[A] violation of rights under the dormant Commerce Clause constitutes the ‘irreparable harm’ necessary for a plaintiff to avoid denial of a preliminary injunction on this ground . . . .”) (collecting cases). In this instance, Plaintiffs have demonstrated a strong likelihood of success on the merits of two constitutional claims: a violation of the Commerce Clause and a violation of the constitutional right to travel. *See supra* Part II.

Second, PTC’s **next transfer payment** to PennDOT under the Amended Lease and Funding Agreement **falls due on April 30, 2018**. Lease and Funding Agreement ¶¶ 11.1(a), 11.2(d) (Oct. 14, 2007) (Ex. 5). Hence, the need for relief is immediate.

Third, PTC issues bonds to private entities and pays interest and principal (collectively referred to as “debt service”) on these bonds. As of September 2017, there are several dozen outstanding bond series issued for purposes other than to pay for Turnpike construction and maintenance, with a total value of \$5.8 billion. Ex. 2 at 54-55; Ex. 7 at 1, 14. Interest payments on nearly all of these bonds are due semiannually, with ***the next payment due on June 1, 2018 and millions of dollars in principal maturing no later than May 31, 2018***. Ex. 2 at 54-55, 67. Once PTC uses toll revenue to make these debt service payments, that money will move to the

possession of bondholders who are not parties to this suit and against whom Plaintiffs do not have a realistic chance of recovery.

Fourth, PTC plans to continue issuing debt dependent on toll revenue. Ex. 7 at 9, 23-24. Therefore, if the Court does not enjoin the PTC Defendants from using toll revenue to pay for debt service on these bonds, and from issuing further bonds, Plaintiffs and those similarly situated will be unable to recover the unconstitutionally excessive user fees they are being forced to pay to use the Pennsylvania Turnpike. Plaintiffs' inability to recover constitutes irreparable harm.

Fifth, Plaintiffs and those similarly situated will suffer irreparable harm if the Court does not enjoin Defendants Richards and Wolf from further acquiring or spending any funds originating with the PTC Defendants. PennDOT is currently accepting applications for the Fiscal Year 2018-19 Multimodal Transportation Fund; applications are due on March 30, 2018, after which time PennDOT will use toll revenue to fund yet more projects bearing no functional relationship to the Pennsylvania Turnpike. PennDOT, Multimodal Transportation (last visited Mar. 30, 2018) (Ex. 28). Once PennDOT distributes these funds to local jurisdictions, they will be out of reach by Plaintiffs and those similarly situated, likewise resulting in irreparable harm.

Defendants' impending distribution or expenditure of monies derived from toll revenue is not a one-time event; such distributions or expenditures will occur

multiple times, during the course of this litigation (and, without Court intervention, beyond), causing additional injury to Plaintiffs in each instance. There is no adequate remedy at law for Defendants' ongoing violation of the Constitution. "The legal remedy is inadequate if the plaintiff's injury is a continuing one, where the best available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew." *Ne. Women's Ctr., Inc. v. McMonagle*, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) (citing 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2944, at 398 (1973)).

#### **IV. THE BALANCE OF EQUITIES TIPS DECIDEDLY IN FAVOR OF PLAINTIFFS.**

Plaintiffs seek a preliminary injunction to temporarily freeze funds that PTC acquired (or is acquiring) by imposing excessive tolls in violation of the Constitution. At the conclusion of this litigation, those funds will be available for disbursement in accordance with the final judgment of this Court. Preserving the status quo will protect the rights of all interested parties.

First, the requested injunction will protect the rights of Plaintiffs and similarly situated individuals who have demonstrated a likelihood of success on the merits. If these funds are allowed to be distributed now, Plaintiffs will face insurmountable obstacles to recovery. *See supra* Part III.

Second, the injunction would not harm the PTC Defendants, who have no interest in the funds that would be frozen. The injunction would not affect toll

receipts necessary to operate and maintain the Turnpike. Only funds otherwise scheduled for transfer to PennDOT or other parties would be frozen.

Third, the injunction would not unduly harm others who have participated in PTC debt offerings to support Act 44/89 payments. PTC has repeatedly warned potential bondholders that PTC Act 44/89 bonds are a risky investment, with debt service contingent upon PTC's ability to raise tolls and collect revenue from Turnpike users. *See, e.g.*, Ex. 12 at 13-16. Beginning on October 20, 2016, PTC's debt instruments began to explicitly reference the *American Trucking* case, stating: "The Commission cannot predict whether any similar action will be brought [against PTC] . . . , or . . . whether any such action would be successful or result in monetary damages or other relief being imposed on the Commission." Ex. 11 at A-13. PTC's bondholders will not suffer undue harm from PTC's inability to make interest payments—a possibility of which the bondholders were all aware at the time they purchased the bonds. Moreover, revenue frozen by the requested injunction will be available to interested parties including bondholders at the conclusion of this litigation in the event that Plaintiffs do not prevail. Unlike bondholders and others whose interests are fully protected by an injunction that preserves the status quo, the interests of Plaintiffs will be irreparably harmed should preliminary injunctive relief be withheld and they eventually prevail on the merits. Under these circumstances, the balance of equity tips decidedly in favor of Plaintiffs.

**V. THE PUBLIC INTEREST WOULD BE WELL-SERVED BY INJUNCTIVE RELIEF.**

“[P]ublic policy on its own can justify judicial protection of a plaintiff’s interests.” *Schulz v. U.S. Boxing Ass’n*, 105 F.3d 127, 134 (3d Cir. 1997). In this case, the consideration of the public interest militates strongly in favor of a preliminary injunction for at least three reasons.

First, Plaintiffs have demonstrated a strong likelihood of success on the merits and of irreparable harm. *See supra* Parts II-III. As the Third Circuit has consistently held, “[i]f a plaintiff proves ‘both’ a likelihood of success on the merits and irreparable injury, it ‘almost always will be the case’ that the public interest favors preliminary relief.” *Issa v. Sch. Dist. of Lancaster*, 847 F.3d at 143 (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)).

Second, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979)); *accord Johnson v. Wetzel*, 209 F. Supp. 3d 766, 781 (M.D. Pa. 2016) (“[The public] interest is particularly strong where the right to be vindicated derives from the United States Constitution.”). Conversely, neither the Commonwealth nor the public has any interest in prolonging any violation of the Commerce Clause or restriction of the constitutional right to travel.

Third, in this case, “a preliminary injunction is unquestionably in the public interest because it maintains the status quo pending the outcome of a trial on the merits.” *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017). Plaintiffs do not seek, at this juncture, a final ruling that the toll rates in question are constitutionally excessive, or an award of damages. Rather, Plaintiffs request merely that the toll revenue in question be sequestered pending the outcome of this litigation. If Plaintiffs prevail on the merits and are awarded damages, such toll revenue will be available to satisfy an award. If Plaintiffs are not successful, Defendants will be able to use the funds immediately. If, however, the Court were to deny Plaintiffs’ request for preliminary relief, but Plaintiffs ultimately succeeded on the merits of their claims, they would face extreme difficulty in recovering monies that were already distributed to third parties.

**VI. BECAUSE DISPUTED FUNDS WILL BE SEQUESTERED PENDENTE LITE, ONLY A NOMINAL BOND WILL BE REQUIRED.**

In the Third Circuit, district courts may waive Rule 65(c)’s bond requirement where the balance of the equities weighs overwhelmingly in favor of an injunction. *E.g., Elliott v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996) (remanding and directing district court to evaluate whether waiver is appropriate); *see also Edward G. Rahll & Sons, Inc. v. Zach*, No. CIV A 1:08-CV-1384, 2008 WL 3853311, at \*1 (M.D. Pa. Aug. 14, 2008) (waiving bond requirement where defendants were in

possession of plaintiffs' property and equities therefore weighed overwhelmingly in favor of movant); *cf. N. Pa. Legal Servs., Inc. v. Lackawanna County*, 513 F. Supp. 678, 685-86 (M.D. Pa. 1981) (requiring nominal bond where defendants failed to show that maintaining status quo would cause additional harm); *Pomicter v. Luzerne Cty. Convention Ctr. Auth. & SMG*, No. 3:16-CV-00632-RDM, 2016 WL 1706165, at \*8 (M.D. Pa. Apr. 27, 2016) (requiring nominal bond of \$100 where parties did not provide evidence as to financial harm to be caused by injunction).

In this case, the circumstances merit this Court waiving Rule 65(c)'s bond requirement. First, the balance of equities heavily favors Plaintiffs; second, Plaintiffs have asked the Court to order PTC merely to hold such unlawfully-collected tolls which will be distributed to the appropriate parties upon resolution of the merits. *See supra* Parts IV-V. This Court should therefore waive Rule 65(c)'s bond requirement or, in the alternative, require a nominal bond to secure the injunction.

### **CONCLUSION**

Plaintiffs have a likelihood of success on the merits in establishing that excessive Turnpike tolls, imposed at a rate more than double the cost and benefit of Turnpike services and used to support projects that have no functional relationship to the Turnpike, are an undue burden on interstate commerce and a significant impairment on the right to travel guaranteed by the United States Constitution.

Plaintiffs have demonstrated that they will suffer irreparable harm absent a preliminary injunction sequestering only *excess* toll receipts pending final disposition of their claims. Without such sequestration, Plaintiffs will have no adequate remedy at law to recover the excess tolls they are currently required to pay. Further, with sequestration of excess toll receipts, the rights of all interested parties will be protected pending a final judgment by this Court.

The Motion for Preliminary Injunction should be granted.

Respectfully submitted,

/s/ Kevin J. McKeon

Kevin J. McKeon ID No PA 30428  
Dennis A. Whitaker ID No PA 53975  
Melissa A. Chapaska ID No PA 319449  
Hawke McKeon & Sniscak, LLP  
100 North Tenth Street  
Harrisburg, PA 17101  
(717) 236-1300  
(717) 236-4841 (f)  
[kjmckeon@hmslegal.com](mailto:kjmckeon@hmslegal.com)  
[dawhitaker@hmslegal.com](mailto:dawhitaker@hmslegal.com)  
[machapaska@hmslegal.com](mailto:machapaska@hmslegal.com)

Co-Counsel for Plaintiffs

Paul D. Cullen, Sr. ID No DC 100230\*  
Paul D. Cullen, Jr. ID No DC 463759\*  
Kathleen B. Havener ID No DC 432638\*

\* *Appearing Pro Hac Vice*

The Cullen Law Firm, PLLC  
1101 30<sup>th</sup> Street NW, Suite 300  
Washington, DC 20007  
(202) 944-8600

[fdc@cullenlaw.com](mailto:fdc@cullenlaw.com)

[pxc@cullenlaw.com](mailto:pxc@cullenlaw.com)

[kbh@cullenlaw.com](mailto:kbh@cullenlaw.com)

Counsel for Plaintiffs

Dated: April 2, 2018

## CERTIFICATE OF SERVICE

I hereby certify that, on April 2, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Middle District of Pennsylvania by using the ECF system. Pursuant to LR 5.7, participants in the case who are registered ECF users will be served by the ECF system.

I further certify that the following individuals have been served by United States First Class Mail:

Attorney General Josh Shapiro  
Pennsylvania Office of Attorney General  
16th Floor, Strawberry Square  
Harrisburg, PA 17120

Governor Tom Wolf  
Office of the Governor  
508 Main Capitol Building  
Harrisburg, PA 17120

Pennsylvania Department of Transportation  
1101 South Front Street  
Harrisburg, PA 17104

/s/ Melissa A. Chapaska  
Melissa A. Chapaska  
Hawke, McKeon & Sniscak, LLP  
100 N. 10<sup>th</sup> Street  
Harrisburg, PA 17101  
machapaska@hmslegal.com  
Telephone: 717-236-1300