No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

TOM WOLF, GOVERNOR OF PENNSYLVANIA, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

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

QUESTIONS PRESENTED—Continued

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

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Owner Operator Independent Drivers Association, Inc.

National Motorists Association

Marion L. Spray

B.L. Reever Transport, Inc.

Flat Rock Transportation, LLC

Milligan Trucking, Inc.

Frank Scavo

Laurence G. Tarr

Respondents:

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

Pennsylvania Turnpike Commission

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

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

LIST OF PARTIES TO THE PROCEEDING BELOW—Continued

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

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

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

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

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

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

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

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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

RELATED CASES

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

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

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

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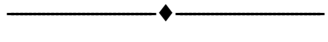
The August 13, 2019 opinion of United States Court of Appeals for the Third Circuit in Case No. 19-1775 is reported at 934 F.3d 283 and reproduced in the Appendix at App. 1-23. The April 4, 2019 opinion of the United States District Court for the Middle District of Pennsylvania dismissing Petitioners'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

JURISDICTION

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

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

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



CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

U.S. Const. art. I, § 8, cl. 3

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

23 U.S.C. § 129(a)

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

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

STATEMENT OF THE CASE

I. Parties

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

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

II. Claims and Defenses

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

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

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

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

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

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

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

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

III. Opinions Below

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

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

generate excess toll revenues free from dormant Commerce Clause limitations.

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

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

REASONS FOR GRANTING THE WRIT

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

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

Congressional Authorization

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

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

infrastructure projects unrelated to their use of the Pennsylvania Turnpike.

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

Constitutional Right to Travel

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

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

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

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

I. PTC's Tolls Violate The Commerce Clause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Courts of Appeals Are Divided.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

relation to the cost of operating or maintaining the Turnpike.

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1775

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.; NATIONAL MOTORIST ASSOCIATION; MARION L. SPRAY; B.L. REEVER TRANSPORT, INC.; FLAT ROCK TRANSPORTATION, LLC; MILLIGAN TRUCKING, INC.*; FRANK SCAVO; LAURENCE G. TARR,

Appellants

v.

PENNSYLVANIA TURNPIKE COMMISSION; LESLIE S. RICHARDS, in her individual capacity and her official capacities as Chair of the PTC and Secretary of the Department of Transportation; WILLIAM K. LIEBERMAN, in his individual capacity and his official capacity as Vice Chair of the PTC; BARRY T. DREW, in his individual capacity and his official capacity as Secretary-Treasurer of the PTC; PASQUALE T. DEON, SR., in his individual capacity and his official capacity as Commissioner of the PTC; JOHN N. WOZNIAK, in his individual capacity and his official capacity as Commissioner of the PTC; MARK P. COMPTON, in his individual capacity and his official capacity as Chief Executive Officer of the PTC; CRAIG R. SHUEY, in his individual capacity and his official capacity as Chief Operating Officer

of the PTC; TOM WOLF, Governor of the Commonwealth of Pennsylvania, in his individual capacity and his official capacity as Governor

*(Amended as per the Clerk's 04/25/19 Order)

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-18-cv-00608)
District Judge: Hon. Yvette Kane

Argued July 9, 2019

Before: SHWARTZ, KRAUSE, and FUENTES, Circuit Judges.

(Filed: August 13, 2019)

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OPINION

SHWARTZ, Circuit Judge.

Plaintiffs are individuals and members of groups who pay tolls to travel on the Pennsylvania Turnpike.[1] They allege that Pennsylvania state entities and officials ("Defendants") have violated the dormant Commerce Clause and their right to travel.[2] Specifically,

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[1] Plaintiffs are Owner Operator Independent Drivers Association, Inc.; National Motorist Association; Marion L. Spray; B.L. Reever Transport, Inc.; Flat Rock Transportation, LLC; Milligan Trucking, Inc.; Frank Scavo; and Laurence G. Tarr.

[2] Defendants are the Pennsylvania Turnpike Commission ("PTC"), William K. Lieberman, Vice Chair of the PTC; Barry Drew, Secretary-Treasurer of the PTC; Pasquale T. Deon, Sr., and John N. Wozniak, Commissioners of the PTC; Mark P. Compton, Chief Executive Officer of the PTC; Craig R. Shuey, Chief Operating Officer of the PTC; Pennsylvania Governor Tom Wolf; and

Plaintiffs assert that Defendants have set exorbitantly high tolls for use of the Pennsylvania Turnpike and that the amounts collected exceed the costs to operate the Turnpike. They contend the extra funds are being used for projects that disproportionately benefit local interests and that the high tolls deter non-Pennsylvanians from using the Turnpike.

Because Congress has permitted state authorities, such as Defendants, to use the tolls for non-Turnpike purposes, the collection and use of the tolls do not implicate the Commerce Clause. Moreover, because Plaintiffs have not alleged that their right to travel to, from, and within Pennsylvania has been deterred, their right to travel has not been infringed. Therefore, we will affirm the District Court's order dismissing the complaint.

I

A

The Pennsylvania Turnpike is part of a 552-mile highway system that crosses Pennsylvania from New Jersey to Ohio. The Pennsylvania Turnpike Commission ("PTC") sets and collects Turnpike tolls.

In 2007, the Pennsylvania legislature enacted Act 44, which, among other things, permitted the PTC to increase tolls and required the PTC to make annual payments for a fifty-year period to the Pennsylvania

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Leslie S. Richards, who is both the Chair of the PTC and Secretary of the Pennsylvania Department of Transportation.

Department of Transportation ("PennDOT") Trust Fund. See 75 Pa. Cons. Stat. § 8915.3. In 2013, Act 89 amended Act 44, as amended "Act 44/89." Act 89 continued to permit toll increases but lowered the annual payments to the PennDOT Trust Fund.

After Act 44 went into effect, the PTC announced a 25% toll increase and from 2009 through 2016, tolls were increased annually by more than 10% for cash customers and 5.75% for customers using an electronic toll transmitter known as an EZ-Pass. Plaintiffs assert that since the enactment of Act 44, tolls have increased more than 200% and that the current cost for the heaviest vehicles to cross the 359-mile portion of the Pennsylvania Turnpike that spans from New Jersey to Ohio exceeds $1800. Pennsylvania's Auditor General found that PTC's annual "costly toll increases place an undue burden" on Pennsylvanians, opined that "the average turnpike traveler will be deterred by the increased cost and seek alternative toll-free routes," App. 88 (emphasis omitted) (quoting September 2016 Performance Audit of the PTC), and recommended that the PTC seek legislative relief from its Act 44/89 payment obligations.

Tolls are PTC's largest revenue source and amount to 166-215% of the costs to maintain and operate the Turnpike. Simply put, the amount of the tolls collected exceeds the amount it costs to run the Turnpike. The excess tolls are deposited into the PennDOT Trust Fund, which are, in turn, transferred to four different programs: (1) operating programs under 74 Pa. Cons. Stat. § 1513, which include asset maintenance

costs and expenses for public passenger transport; (2) the multimodal transportation fund under 74 Pa. Cons. Stat. § 2104, which covers aviation, freight and passenger rail, and port and waterway projects; (3) the asset improvement program under 74 Pa. Cons. Stat. § 1514 for financial assistance for the improvement, replacement, or expansion of capital projects; and (4) programs of statewide significance under 74 Pa. Cons. Stat. § 1516, which include disability programs, rail and bus services, community transportation, Welfare-to-Work programs, and research projects. Act 44/89 is designed to generate $450 million annually for PennDOT from 2011 through 2022.[3] More than ninety percent of Act 44/89 payments—approximately $425 million annually—benefit "non-Turnpike road and bridge projects and transit operations." App. 78. Plaintiffs allege that many of these "programs have no functional relationship to the Pennsylvania Turnpike," including, for instance, the "[c]onstruction of an underpass" and a "[s]idewalk installation."[4] App. 81-82.

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[3] Act 44/89 payments will generate $50 million annually for PennDOT from 2023 through 2057.

[4] Plaintiffs allege that Act 44/89 funds have been used for various programs across the state including:

> a. Development of Three Crossings, 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 (Allegheny County);
>
> b. Construction of an underpass under U.S. 22, connecting the Lower Trail with Canoe Creek State Park (Blair County);

c. Rehabilitation of nine stone-arch bridges along the SEPTA regional railway line (Regional project);

d. Replacement of the roof at Collier Bus Garage (Allegheny County);

e. Sidewalk installation along North Main Street in Yardley (Bucks County);

f. Installation of approximately 1,800 feet of ADA-compliant sidewalk along the south side of Union Deposit Road between Shield Street and Powers Avenue at the Union Square Shopping Center in Susquehanna (Dauphin County);

g. Extension of internal road, including final design, survey, permit modifications, bid documents, construction, storm water, street lights, project administration, legal expenses, audit expenses, and contingencies in Windy Ridge Business and Technology Park (Indiana County);

h. Improvements to roadways in 12,000 acres of parks, including widening shoulders, paving, signage installation, and bicycle marking in the Allegheny County Parks;

i. Addition of eight curb ramps, new asphalt, four decorative crosswalks and a surface sign at an intersection in Latrobe (Westmoreland County);

j. Phase II Construction of Erie Metropolitan Transportation Authority's Maintenance and Paratransit Bus Storage Facility (Erie County);

k. Improvements to the Erie International Airport terminal building (Erie County);

l. Creation of a multi-use trail and installing associated signage from the West End neighborhood linking existing bike routes to a multiuse path that connects to The Pennsylvania State University (Centre County);

m. Creation of a pedestrian island at the intersection of Park Avenue and McKee Street in State College to provide a safer crossing for pedestrians and cyclists

Plaintiffs concede that a federal statute, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in scattered titles), authorizes these types of projects. Nonetheless, they assert that the toll costs burden interstate commerce and "discourag[e] both business and private travelers from using the Turnpike." App. 99.

B

Plaintiffs brought suit on behalf of a putative class alleging violations of the dormant Commerce Clause and their right to travel.[5] Defendants moved to dismiss

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> and accommodate the accessibility needs of vision-impaired residents (Centre County);
>
> n. Construction of a new two-way industrial access road, realigning a portion of the Nittany & Bald Eagle Railroad Main Line to accommodate the access road, and constructing new sidings and operating tracks for First Quality Tissue's two existing facilities and a proposed new facility (Clinton County);
>
> o. Construction of an 85-car unit train loop track in the Keystone Regional Industrial Park to connect with an existing Norfolk Southern main line track and serve a Deerfield Farms Service grain elevator facility in Greenwood (Crawford County).

App. 81-84.

[5] The Complaint seeks (1) a declaratory judgment that PTC's tolls and the provisions of Act 44/89 that direct the PTC to make payments to PennDOT violate the dormant Commerce Clause and the constitutional right to travel, (2) a preliminary and permanent injunction enjoining both the excess tolls and payments under Act 44/89, and (3) a judgment against Defendants ordering the refund of excess toll payments.

and Plaintiffs moved for partial summary judgment on the issue of liability.

The District Court granted Defendants' motions to dismiss[6] and denied Plaintiffs' motion for summary judgment. See generally Owner Operator Indep. Drivers Ass'n v. Pa. Tpk. Comm'n, No. 1:18-cv-00608, ___ F.Supp. 3d ___, 2019 WL 1493182 (M.D. Pa. Apr. 4, 2019). The Court applied the test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), and held that, because the alleged burdens from the tolls are equally imposed on both in- and out-of-state drivers, they are general burdens on commerce that do not violate the dormant Commerce Clause, Owner Operator, 2019 WL 1493182, at *22. The Court also held that Plaintiffs failed to state a claim that their right to interstate travel was infringed because they asserted only that the toll structure deterred Turnpike travel. Id. at *24.

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[6] Certain Defendants also moved in the alternative for summary judgment. Although the District Court outlined the legal standards for both Federal Rules of Civil Procedure 12(b)(6) and 56, Owner Operator Indep. Drivers Ass'n v. Pa. Tpk. Comm'n, No. 1:18-cv-00608, ___ F.Supp. 3d ___, 2019 WL 1493182, at *8-9 (M.D. Pa. Apr. 4, 2019), and, at the outset of its dormant Commerce Clause analysis, referenced "undisputed" facts, id. at *18, it applied the Rule 12(b)(6) standard, concluding that Plaintiffs' "factual allegations do not support a claim for violations of the dormant Commerce Clause or the constitutional right to travel," and granting "the PTC Defendants' and Commonwealth Defendants' motions to dismiss," id. at *24. We therefore review the District Court's opinion granting a motion to dismiss. See infra note 7.

II[7]

A

1

The Commerce Clause confers upon Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. By negative implication, Congress's authority to regulate commerce prohibits the states from enacting "laws that unduly restrict interstate commerce." Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019). This "dormant Commerce Clause" bars states from discriminating against or unduly burdening interstate commerce, for instance by enacting protectionist regulations that give in-state businesses an advantage over out-of-state businesses, see, e.g., Pike, 397 U.S. at 144-45, or by assessing fees that "threaten the free movement of commerce by placing a financial barrier around the [s]tate," Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 284 (1987).

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[7] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291.

Our review of the District Court's dismissal of Plaintiffs' complaint is plenary. Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220 (3d Cir. 2011). To withstand a motion to dismiss, a complaint must allege a claim "that is plausible on its face" when accepting all the factual allegations as true and drawing every reasonable inference in favor of the nonmoving party. Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 & n.2 (3d Cir. 2016) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In reviewing a complaint, we disregard conclusory assertions and bare recitations of the elements. Id. at 786 n.2.

Congress, however, may authorize a state to take actions that burden interstate commerce. S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018). "[W]hen Congress exercises its power to regulate commerce by enacting legislation, the legislation controls." Id. Thus, where Congress has spoken and state or local governments take actions that are "specifically authorized by Congress," those actions are "not subject to the Commerce Clause even if [they] interfere[] with interstate commerce."[8] White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 213 (1983) (citation omitted). In short, as applied here, if Congress authorizes an action, such as using tolls for non-toll road purposes, then "no dormant Commerce Clause issue is presented." Id.

To determine whether Congress has authorized such action and thereby "removed [it] from the reach of the dormant Commerce Clause," we must consider whether its intent is "unmistakably clear." S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984); see Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."). While "congressional intent and policy to insulate state legislation from Commerce Clause attack [must be] 'expressly stated,'" "[t]here is no talismanic significance to the phrase 'expressly stated.'"

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[8] Absent such legislation, "Congress has left it to the courts to formulate the rules to preserve the free flow of interstate commerce." Wayfair, 138 S. Ct. at 2090 (internal quotation marks and citations omitted).

S.-Cent. Timber, 467 U.S. at 90-91. " 'Expressly stated' . . . merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." Id. at 91. That is, Congress "need not expressly state that it is authorizing a state to engage in activity that would otherwise violate the [d]ormant Commerce Clause." Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth., 886 F.3d 238, 245 (2d Cir. 2018). Rather, Congress "need only clearly allow the state to engage in such activity." Id.

2

Defendants contend that Congress, through ISTEA, specifically authorized states to enact legislation that allocates highway tolls for purposes unrelated to the toll road. If a state's actions fall within the scope of Congress's authorization, then the dormant Commerce Clause does not apply. We therefore begin by analyzing whether ISTEA authorizes Defendants' conduct.[9]

Under ISTEA, "Congress sought to foster a National Intermodal Transportation System, consisting

[9] Principles of constitutional avoidance counsel us to first address whether a statutory ground resolves the case, and thereby renders unnecessary the need to answer the "constitutional question" here of whether the Defendants' toll collection and allocation place an undue burden on interstate commerce in violation of the dormant Commerce Clause. Slack v. McDaniel, 529 U.S. 473, 485 (2000) (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

of all forms of transportation in a unified, interconnected manner." Am. Trucking, 886 F.3d at 242 (internal quotation marks omitted). Before ISTEA, "Congress enacted the Surface Transportation Assistance Act ('STAA')," which provided "federal financial support" for toll roads. Id. at 241. STAA required that for state public authorities maintaining highways "to receive federal financial aid," they "had to discontinue levying tolls once they had collected sufficient revenues to retire outstanding bonds" that funded the highways. Id. "If those authorities failed to make a toll road free once they had collected sufficient tolls to retire those bonds, STAA required them to repay the federal government for the financing it had provided them." Id. at 241-42. ISTEA, however, "freed states from their obligation under the STAA to repay the federal government should they continue to collect tolls after retiring outstanding debts, and granted them greater flexibility to operate toll facilities and use toll revenues for a variety of transportation projects." Id. at 242. To that end, ISTEA "broadened the list of purposes for which states could use federal funds." Id.

ISTEA regulates the use of "toll revenues" by "[a] public authority," such as the PTC,[10] and enumerates the categories for which toll revenues may be used. 23 U.S.C. § 129(a)(3)(A). ISTEA provides that the public

[10] A "public authority" includes a state "instrumentality with authority to finance, build, operate or maintain toll . . . facilities." 23 U.S.C. § 101(a)(21).

authority "shall ensure that all toll revenues received from operation of the toll facility are used only for":

- debt service;
- "a reasonable return on investment of any private person financing the project";
- "any costs necessary" to improve, operate, and maintain the toll facility; and
- payments to private parties (where applicable) "if the toll facility is subject to a public-private partnership agreement."

Id. § 129(a)(3)(A)(i)-(iv). In addition, if "the public authority certifies annually that the tolled facility is being adequately maintained," ISTEA permits the public authority to use toll revenues for "any other purpose for which Federal funds may be obligated by a State under [title 23]." Id. § 129(a)(3)(A)(v). In short, ISTEA allows a public authority to use toll revenues for non-toll road projects.

Pursuant to title 23, federal funds "may be obligated" for several broad categories of items, id., and at least two statutory subsections authorize expenditures unrelated to the toll road itself. For example, ISTEA authorizes states to construct, among other things, "transit capital projects eligible for assistance under chapter 53 of title 49." Id. § 133(b)(1)(C). Subject to certain conditions, capital projects may include "walkways," "pedestrian and bicycle access to [] public transportation facilit[ies]," and the "construction, renovation, and improvement of intercity bus and

intercity rail stations and terminals." 49 U.S.C. § 5302(3)(G)(v)(VI)-(VIII).

Title 23 also authorizes states to build "[a]ny type of project eligible under this section as in effect on the day before the date of enactment of the [Fixing America's Surface Transportation] Act, including projects described under [§] 101(a)(29) as in effect on such day." 23 U.S.C. § 133(b)(15). Before Congress enacted the Fixing America's Surface Transportation Act in 2015, § 101(a)(29) listed various projects under the phrase "[t]ransportation alternatives," including the

> [c]onstruction . . . of on-road and off-road trail facilities for pedestrians, bicyclists, and other nonmotorized forms of transportation, including sidewalks, bicycle infrastructure, pedestrian and bicycle signals . . . to achieve compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. [§] 12101 et seq.).

23 U.S.C. § 101(a)(29)(A) (2012). "Transportation alternatives" also include the "[c]onstruction of turnouts, overlooks, and viewing areas." Id. § 101(a)(29)(D) (2012).

Through ISTEA, Congress expressed its "unmistakably clear" intent that the Defendants could use toll revenues for non-toll road projects. S.-Cent. Timber, 467 U.S. at 91. Congress's authorization that toll revenues be used for purposes other than maintaining and operating the toll road, and servicing its debt, necessarily envisions that a public authority can collect funds that exceed a toll road's costs before it can spend

them. See 23 U.S.C. § 129(a)(3)(A)(v). Thus, ISTEA contemplated that tolls exceeding the amount needed to fund a toll road would be collected and spent on non-toll road projects.

Plaintiffs argue that Congress could not have contemplated that a state would increase its tolls by over 200% to fund non-toll road projects. Plaintiffs ignore the text of ISTEA. Nowhere in the statute, including § 129(a)(3)(A)(v), did Congress cap the amount of toll money a state could raise. See Am. Trucking, 886 F.3d at 246 (holding that "a plain reading of [ISTEA] reveals that Congress meant to permit [a public authority] to continue collecting tolls of whatever amount without having to repay federal funds—something that it was previously barred from doing once it satisfied its debt obligations" (emphasis omitted)). As we already noted, the fact that Congress allowed states to use toll money on non-toll road projects presupposes that funds exceeding the amount needed for the toll road would be collected.

Nor is there merit to Plaintiffs' argument that ISTEA speaks only to "use" of excess toll revenue, not to "collection" or "generation" of toll revenue. As a matter of common sense, however, Congress's authorization of "use" assumes there is toll revenue collected in the first place to be used, and contrary to Plaintiffs' suggestion that Congress was speaking only to "nickels and dimes" left over each year due to fluctuating Turnpike costs, Oral Arg. Tr. at 18, 77, Congress identified a host of big-ticket items that excess tolls could be spent to construct, including "highways, bridges, tunnels, . . .

ferry boats[,] and [ferry] terminal facilities." 23 U.S.C. § 133(b)(1). This further shows that ISTEA did not limit the amount of funds the PTC could collect and spend on non-Turnpike projects.

Plaintiffs concede that the non-Turnpike related projects listed in their complaint for which toll funds were used fall within ISTEA's scope, but contend that Defendants failed to satisfy one of ISTEA's conditions for using the toll funds for non-toll road purposes. As noted earlier, ISTEA requires that the public authority "certif[y] annually that the toll facility is being adequately maintained" before any excess funds may be used for non-toll road projects. 23 U.S.C. § 129(a)(3)(A)(v). Defendants conceded before the District Court that they did not submit the required annual certifications. Their failure to comply with this condition, however, does not diminish the fact that Congress has legislated in the area of interstate commerce at issue and blessed the use of tolls for non-toll road purposes.[11] In other words, the presence or

[11] Moreover, Plaintiffs' attempt to preclude Defendants from relying on § 129(a)(3)(A)(v)'s spending authority because they did not fulfill the statute's certification requirements also fails because the statute does not provide a private right of action. See Endsley v. City of Chicago, 230 F.3d 276, 280 (7th Cir. 2000). Not only is there no private right of action, but Congress specified its own remedy here for the failure to abide by this condition. That remedy is vested in the Secretary of Transportation, who "may require the public authority to discontinue collecting tolls" if she "concludes that a public authority has not complied with the limitations on the use of revenues described in [§ 129(a)(3)(A)]." 23 U.S.C. § 129(a)(3)(C). As it is Congress's prerogative to authorize

absence of the annual certification does not otherwise affect Congress's "unambiguous intent to authorize [a state authority, such as the PTC,] to allocate excess toll funds" to non-toll road projects. Am. Trucking, 886 F.3d at 247.

In sum, "[t]he text is clear": Congress has authorized the states, including the Commonwealth of Pennsylvania, to generate and use such tolls to fund the type of projects listed in Plaintiffs' complaint.[12] Id. As a result, the collection and use of the tolls to fund the challenged expenditures does not violate the dormant Commerce Clause, and the District Court properly dismissed Plaintiffs' dormant Commerce Clause claim.[13]

B

Plaintiffs' claim that the tolls violate their right to travel also fails. "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate

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the use of funds at issue and it has done so, we need not adjudicate the consequence for the failure to certify.

[12] Because we hold that Congress has authorized Defendants to engage in the challenged activity, we need not decide whether Pike, 397 U.S. 137, or Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972), or some other test applies to a dormant Commerce Clause challenge to a toll.

[13] Although the District Court declined to decide whether "Congress has specifically authorized the expenditure of toll revenues contemplated by Act 44/89," Owner Operator, 2019 WL 1493182, at *22 n.23, we may affirm its order dismissing Plaintiffs' complaint "on any ground supported by the record," Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999).

commerce in doing so, occupies a position fundamental to the concept of our Federal Union." United States v. Guest, 383 U.S. 745, 757 (1966). We have observed that the right to travel includes "the right of a citizen of one State to enter and to leave another State," Connelly v. Steel Valley Sch. Dist., 706 F.3d 209, 213 (3d Cir. 2013), as amended (May 10, 2013) (quoting Saenz v. Roe, 526 U.S. 489, 500 (1999)), as well as a right to intrastate travel, see Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990), though the exact "contours" of that right remain elusive, see United States v. Baroni, 909 F.3d 550, 588 (3d Cir. 2018), cert. granted Kelly v. United States, No. 18-1059, 2019 WL 588845 (U.S. June 28, 2019).

To determine whether a state law "sufficiently impinges upon the right to travel or migrate to trigger strict scrutiny, [we look] to see whether the challenged law's [1] 'primary objective' is to impede interstate travel; [2] whether it 'penalize[s] the exercise of that right;' or [3] whether it 'actually deters such travel.'" Maldonado v. Houstoun, 157 F.3d 179, 186 (3d Cir. 1998) (fourth alteration in original) (quoting Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (plurality opinion)).

Plaintiffs do not assert that the toll penalizes or impedes travel. Rather, Plaintiffs allege that "the average turnpike traveler will be deterred by the increased cost and seek alternative toll-free routes[,]" App. 88 (quotation marks and citation omitted), and that the tolls "discourag[e] both business and private travelers from using the Turnpike," App. 99. Thus, we must decide whether Plaintiffs have stated a claim that the

tolls "actually deter[]" interstate or intrastate travel. Soto-Lopez, 476 U.S. at. 903.

"[B]urdens on a single mode of transportation do not implicate the right to interstate travel."[14] Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999). Moreover, "[b]urdens placed on travel generally, such as gasoline taxes, or minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of" the right to travel. Id. Put differently, "[m]inor restrictions on travel," including delays and costs, "simply do not amount to the denial of a fundamental right that can be upheld only if the Government has a compelling justification." Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991); see also Lutz, 899 F.2d at 269 ("[T]he right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel."). "A law does not actually deter travel merely because it makes it somewhat less attractive for a person to travel interstate," Pollack v. Duff, 793 F.3d 34, 46 (D.C. Cir. 2015) (internal quotation marks omitted), or it is not "the most convenient form of travel," Town of Southold v. Town of E. Hampton, 477 F.3d 38, 54 (2d Cir. 2007) (internal quotation marks omitted); see Kansas v. United States, 16 F.3d 436, 442 (D.C. Cir. 1994) (holding that law channeling interstate air travel

[14] States may not impose burdens on all modes of interstate travel. See Crandall v. Nevada, 73 U.S. 35, 39-40, 46 (1867) (holding unconstitutional a state tax imposed on all persons exiting the state or passing through its borders).

through new airport requiring a longer drive had at most "negligible" or "trivial" effect on right to travel).

Because Plaintiffs allege only that the increased tolls have caused and will continue to cause Turnpike users to switch to non-toll roads in the future,[15] and not that interstate or intrastate travel has been or will be deterred,[16] they have not stated a claim that their right to travel has been infringed. Therefore, the District Court properly dismissed Plaintiffs' right to travel claim.

III

For the foregoing reasons, we will affirm.

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[15] In Wallach v. Brezenoff, we applied Evansville to evaluate plaintiffs' assertion that an increase in tolls on all of the bridges and tunnels from New Jersey to New York City violated their right to travel. 930 F.2d 1070, 1072 (3d Cir. 1991). The Evansville Court observed that "facilit[ies] provided at public expense [such as highways] aid[ ] rather than hinder[ ] the right to travel," and therefore requiring users to "pay a reasonable fee" is constitutional. 405 U.S. at 714. We need not engage in such analysis or determine, as Plaintiffs urge us to do, whether Evansville supplies the exclusive test of constitutionality for certain right to travel claims because Plaintiffs here acknowledge that there are non-toll routes to travel in and out of Pennsylvania.

[16] Plaintiffs seek to rely on Defendant Wolf's statements on the radio that the tolls deter travel on the Turnpike, but those statements are outside of the pleadings and thus are irrelevant to whether the complaint states a claim.

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

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al.,	:	**No. 1:18-cv-00608**
Plaintiffs	:	**(Judge Kane)**
v.	:	
PENNSYLVANIA TURNPIKE COMMISSION, et al.,	:	
Defendants	:	

MEMORANDUM

(Filed Apr. 4, 2019)

In this action members of the motoring public who routinely access the Pennsylvania Turnpike (the "Turnpike") for business and personal travel have joined together in challenging Turnpike tolls that are alleged to be increasingly disproportionate to services rendered. Plaintiffs allege that the Pennsylvania statutory scheme permitting this inequity ("Act 44/89"), first enacted in 2007, violates the dormant Commerce Clause of the United States Constitution and their constitutional right to travel. Specifically, Plaintiffs complain that in violation of the Constitution, Act 44/89 authorizes and directs the Pennsylvania Turnpike Commission ("PTC") to collect user fees with no regard to Turnpike operating costs and to redistribute those funds to the Pennsylvania Department of Transportation ("PennDOT") for projects across the Commonwealth that are of no benefit to the paying Turnpike motorist.

Plaintiffs in this case are: Owner Operator Independent Drivers Association, Inc. ("OOIDA"), National Motorists Association ("NMA"), Marion L. Spray ("Spray"), B.L. Reever Transportation, LLC ("B.L. Reever"), Flat Rock Transportation, LLC ("Flat Rock"), Milligan Trucking, Inc. ("Milligan Trucking"), Frank Scavo ("Scavo"), and Laurence G. Tarr ("Tarr"), consisting of organizations, businesses, and individuals who are required to pay and have paid tolls to the PTC for their use of the Turnpike (collectively, "Plaintiffs"). (Doc. No. 1 ¶¶ 9-18.) Defendants are the PTC, William K. Lieberman, Vice Chair of the PTC, Barry T. Drew, Secretary Treasurer of the PTC, Pasquale T. Deon, Sr., Commissioner of the PTC, John N. Wozniak, Commissioner of the PTC, Mark P. Compton, Chief Executive Officer of the PTC, Craig R. Shuey, Chief Operating Officer of the PTC (collectively, the "PTC Defendants"), Tom Wolf, Governor of the Commonwealth of Pennsylvania, and Leslie S. Richards, Chair of the PTC and Secretary of PennDOT (collectively, the "Commonwealth Defendants"). (Id. ¶¶ 19-28.)

Before the Court are four motions to dismiss Plaintiffs' complaint filed by the PTC Defendants,[1] the Commonwealth Defendants, individual defendant Shuey, and individual defendant Lieberman. (Doc. Nos. 49, 50, 52, and 53.) Also before the Court is Plaintiffs' Motion for Partial Summary Judgment on the issue of liability. (Doc. No. 84.) The motions have been fully briefed and

[1] The PTC Defendants' motion is styled as a "Motion to Dismiss for Failure to State a Claim or, in the Alternative, Motion for Summary Judgment." (Doc. No. 52.)

are ripe for disposition.[2] For the reasons that follow, the PTC and Commonwealth Defendants' motions to dismiss will be granted, the motions filed by individual defendants Shuey and Lieberman will be denied as moot, and Plaintiffs' motion for partial summary judgment on the issue of liability will be denied.[3]

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[4]

A. Act 44/89

The Turnpike is a toll road operated by the PTC, running for 359 miles across the Commonwealth, beginning at the Ohio state line in Lawrence County and ending at the New Jersey border at the Delaware River Bridge in Bucks County. (Doc. No. 1 ¶ 41.) Including the Northeastern Extension and Western Extension, the Turnpike covers 552 miles. (Id.) Plaintiffs challenge

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[2] With the permission of the Court, the Pennsylvania Public Transportation Association, Southeastern Pennsylvania Transportation Authority, and Port Authority of Allegheny County filed a Brief Amicus Curiae in support of the Defendants' motions. (Doc. Nos. 57-1, 63.)

[3] Plaintiffs also filed a "Motion to Certify Class and Appoint Class Counsel" (Doc. No. 73), with supporting exhibits (Doc. No. 74), and brief (Doc. No. 75). By Order dated June 25, 2018, the Court stayed all additional briefing on the motion until the Court's resolution of the pending dispositive motions. (Doc. No. 83.) In light of the Court's resolution of the pending dispositive motions, Plaintiffs' "Motion to Certify Class and Appoint Class Counsel" will be denied as moot.

[4] The following factual background is taken from the allegations of Plaintiffs' complaint (Doc. No. 1), as well as provisions of the relevant statutes.

the constitutionality of "excessive" tolls charged to named Plaintiffs and members of a putative class of motor carriers, drivers, and motorists by the PTC for travel on the Turnpike. (Doc. No. 1 ¶ 1.) The PTC is "an instrumentality of the Commonwealth." 36 P.S. § 652d; Doc. No. 1 ¶ 32. Pennsylvania law authorizes the PTC to fix and adjust tolls to generate funds for services and facilities provided by the Commonwealth of Pennsylvania, as follows:

> (a) Establishment and changes in toll amounts. –
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> . . .
>
> > Tolls shall be fixed and adjusted as to provide funds at least sufficient with other Revenues of the Pennsylvania Turnpike System, if any, to pay all of the following:
> >
> > . . .
> >
> > (3) Amounts due to the department under 75 Pa. C.S. Ch. 89 (relating to Pennsylvania Turnpike) and pursuant to the lease agreement under 75 Pa. C.S. § 8915.3 (relating to lease of Interstate 80; related agreements).
> >
> > . . .
> >
> > (5) Any other amounts payable to the Commonwealth or to the department.

74 Pa. C.S. § 8116(a); Doc. No. 1 ¶ 40. Plaintiffs' complaint alleges that the PTC obtains almost the entirety of its operating revenue from tolls. (Doc. No. 1 ¶ 86.)

Plaintiffs allege that prior to the enactment of Act 44, the PTC raised tolls on the Turnpike only five times in the 64-year history of the Turnpike. (Id. ¶ 87.) Plaintiffs allege that in fiscal year ending May 31, 2015, 192 million vehicles traveled on the Turnpike, consisting of approximately 166 million Class 1 Passenger vehicles and 26 million Class 2-9 commercial vehicles. (Id. ¶ 42.) Plaintiffs' complaint estimates that trucks provide for about half of the annual toll revenues generated by the Turnpike, producing $443 million in toll revenues for PTC in the 2016 fiscal year. (Id. ¶ 43.)

In 2007, the Pennsylvania General Assembly enacted a statute known as Act 44, amending portions of the Pennsylvania Public Transportation Law (Title 74) and the Vehicle Code (Title 75). See Act of July 18, 2007, P.L. 169, No. 44; Doc. No. 1 ¶ 44. Pursuant to the statute, the PTC and PennDOT entered into a Lease and Funding Agreement ("LAFA"), for a term of fifty years. See 75 Pa. C.S. § 8915.3(1); Doc. No. 1 ¶ 45. Act 44, as originally enacted, required the PTC to make a "[s]cheduled annual commission contribution" to PennDOT in the following amounts:

TABLE 1

Amount	**Fiscal Year**
$750,000,000	2007-2008
$850,000,000	2008-2009
$900,000,000	2009-2010
Annual Increases of 2.5%	2010-End

75 Pa. C.S. § 8901; Doc. No. 1 ¶ 52. As alleged in Plaintiffs' complaint, on December 4, 2008, the 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."

(Doc. No. 1 ¶ 72.) In a December 30, 2008 press release by the PTC, the PTC's CEO stated that "[i]n fact, more than 90 percent of the toll-increase proceeds will benefit non-Turnpike road and bridge projects and transit operations." (Id. ¶ 73.)

In 2013, the General Assembly again amended the Public Transportation Law and Vehicle Code through legislation known as Act 89. See Act of Nov. 25, 2013, P.L. 974, No. 89; Doc. No. 1 ¶ 46. Act 89 amended the PTC's annual payment obligations to PennDOT. (Doc. No. 1 ¶ 53.) Pursuant to Act 89, the PTC and PennDOT amended the LAFA in 2014, entering into an Amended Funding Agreement scheduled to terminate in October of 2057. (Doc. No. 1 ¶ 47.)

The statutory scheme established by Act 44/89 provides for annual payments made by the PTC to PennDOT that currently total $450 million annually through fiscal year 2022 and reduce to $50 million annually through 2057. See 75 Pa. C.S. §§ 8901; Doc. No. 1 ¶¶ 51-54. Under Act 44/89, the PTC's annual payments to PennDOT through fiscal year 2057 will total $9.65 billion. (Doc. No. 1 ¶ 55.) The PTC obtains the funds necessary to make the annual Act 44/89 payments from Turnpike tolls and from bonds it issues, the interest and principal of which are paid from tolls. (Id. ¶¶ 59-61.) Plaintiffs' complaint alleges that the PTC's Act 44/89 payments to PennDOT, interest, and bond expenses are classified by the PTC as "non-operating expenses." (Id. ¶ 62.) As alleged by Plaintiffs, the largest portion of PTC's revenues derive from tolls, which are pledged to secure the PTC's outstanding Senior Revenue Bonds, also known as Turnpike Revenue Bonds. (Id. ¶ 63.) Plaintiffs' complaint alleges that, according to the Commonwealth of Pennsylvania Auditor General's 2016 Performance Audit of PTC ("2016 Performance Audit"), beginning in 2015, the PTC's Act 44/89 payments have been solely dedicated to "non-highway purposes," including transit. (Id. ¶ 69.) The PTC Act 44 Financial Plan Fiscal Year 2018 ("Act 44 Plan FY2018"), dated June 1, 2017, describes the change in funding obligations imposed by Act 89 as follows:

> 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.

(Doc. No. 1 ¶ 70) (quoting Act 44 Plan FY2018).

Pursuant to Act 44/89, PennDOT deposits the annual payments from the PTC into the Public Transportation Trust Fund ("PTTF"). See 74 Pa. C.S. § 1506(b)(1). Monies from that fund are then distributed among four programs: the "operating program," the "asset improvement program," the Multimodal Transportation Fund ("MTF"), and "programs of statewide significance." See 74 Pa. C.S. §§ 1506(e)(1)-(3), (6); Doc. No. 1 ¶ 71. The statute directs that of the $450 million transferred to the PTTF, $30 million must be deposited in the MTF. 74 Pa. C.S. § 1506(b)(1), (e)(6). The statute further provides that 95% of the funds transferred to the PTTF annually from PennDOT, after the transfer of $30 million to the MTF, are utilized in connection with the "asset improvement program." Id. §§ 1514, 1506(e)(2). Funds expended in connection with the "asset improvement program" are used for "improvement, replacement or expansion of capital projects" related to public transportation. Id. § 1514(a)(1). The relevant statute provides that southeastern Pennsylvania's public transportation agency, ("SEPTA"), and the Port Authority of Allegheny County receive the majority of such funds, with other mass transit agencies in the Commonwealth receiving the remaining funds. See id. § 1514(e.1). The statute provides that as to the "asset improvement

program," "[e]ligible applicants . . . may apply for financial assistance for improvement, replacement or expansion of capital projects." Id. § 1514. Such applicants may include "[a] local transportation organization," Commonwealth agencies and instrumentalities, and any "person responsible for coordinating community transportation program services." Id. § 1514(a). A "capital project" is defined as:

> A system or component of a system for the provision of public passenger transportation. The term includes vehicles; infrastructure power; passenger amenities; storage and maintenance buildings; parking facilities; the land on which any capital project is situated and the land needed to support it, whether owned in whole or in part; overhaul of vehicles; debt service; and the cost of issuance of bonds, notes and other evidences of indebtedness which a local transportation organization or transportation company is permitted to issue under any law of this Commonwealth.

Id. § 1503. A significantly smaller amount of the funds transferred from the PTC to PennDOT and deposited in the PTTF is dedicated to the "operating program"[5] and "programs of statewide significance."[6] Id. §§ 1513, 1516, 1506(e)(1), (3).

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[5] The "operating program" funds "operating expenses," defined as including expenses "for any purpose in furtherance of public passenger transportation, including all state asset maintenance costs." 74 Pa. C.S. §§ 1513(a)(2), 1503.

[6] "Programs of statewide significance" encompass "public transportation programs, activities and services not otherwise fully

The $30 million deposited in the MTF finances transportation improvement programs including those related to bicycle and pedestrian safety, aviation, rail freight, passenger rail, and ports and waterways. Id. § 2104(a). "Eligible program[s]" under the MTF include: "(1) A project which coordinates local land use with transportation assets to enhance existing communities[,] (2) A project related to streetscape, lighting, sidewalk enhancement and pedestrian safety[,] (3) A project improving connectivity or utilization of existing transportation assets[, and] (4) A project related to transit-oriented development[.]" Id. § 2101.

Plaintiffs' complaint alleges that some of the projects approved under these statutory provisions (and funded with Act 44/89 toll revenues) include the following:

a. Development of Three Crossings, 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 (Allegheny County);

b. Construction of an underpass under U.S. 22, connecting the Lower Trail with Canoe Creek State Park (Blair County);

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funded through the operating program, capital program or asset improvement program," specifically including the persons with disabilities program, intercity passenger rail and bus services, and community transportation capital and service stabilization, among other items. Id. § 1516(a)(1)-(8).

c. Rehabilitation of nine stone-arch bridges along the SEPTA regional railway line (Regional project);

d. Replacement of the roof at Collier Bus Garage (Allegheny County);

e. Sidewalk installation along North Main Street in Yardley (Bucks County);

f. Installation of approximately 1,800 feet of ADA-compliant sidewalk along the south side of Union Deposit Road between Shield Street and Powers Avenue at the Union Square Shopping Center in Susquehanna (Dauphin County);

g. Extension of internal road, including final design, survey, permit modifications, bid documents, construction, storm water, street lights, project administration, legal expenses, audit expenses, and contingencies in Windy Ridge Business and Technology Park (Indiana County);

h. Improvements to roadways in 12,000 acres of parks, including widening shoulders, paving, signage installation, and bicycle marking in the Allegheny County Parks;

i. Addition of eight curb ramps, new asphalt, four decorative crosswalks and a surface sign at an intersection in Latrobe (Westmoreland County);

j. Phase II Construction of Erie Metropolitan Transportation Authority's Maintenance

and Paratransit Bus Storage Facility (Erie County);

k. Improvements to the Erie International Airport terminal building (Erie County);

l. Creation of a multi-use trail and installing associated signage from the West End neighborhood linking existing bike routes to a multi-use path that connects to The Pennsylvania State University (Centre County);

m. Creation of a pedestrian island at the intersection of Park Avenue and McKee Street in State College to provide a safer crossing for pedestrians and cyclists and accommodate the accessibility needs of vision-impaired residents (Centre County);

n. Construction of a new two-way industrial access road, realigning a portion of the Nittany & Bald Eagle Railroad Main Line to accommodate the access road, and constructing new sidings and operating tracks for First Quality Tissue's two existing facilities and a proposed new facility (Clinton County);

o. Construction of an 85-car unit train loop track in the Keystone Regional Industrial Park to connect with an existing Norfolk Southern main line track and serve a Deer field Farms Service grain elevator facility in Greenwood (Crawford County).

(Doc. No. 1 ¶ 84.)

Plaintiffs assert that these funded programs have "no functional relationship to the Pennsylvania Turnpike," and that the PTC does not possess the financial resources to make the Act 44/89 payments currently and in the future without continually increasing toll rates and debt. (Id. ¶¶ 84-85, 88.) Plaintiffs' complaint sets forth "Actual (through 2016) and Expected Toll Increase Resulting from Act 44/89" as contained in an Auditor General Performance Audit as follows:

TABLE 2

Actual (through 2016) and Expected Toll Increase Resulting from Act 44/89 Calendar Year 2009 through 2044

Year	Cash	E-Z Pass		Cash	E-Z Pass
2009	25.0%	25.0%	**2027**	3.5%	3.5%
2010	3.0%	3.0%	**2028**	3.0%	3.0%
2011	10.0%	3.0%	**2029**	3.0%	3.0%
2012	10.0%	-	**2030**	3.0%	3.0%
2013	10.0%	2.0%	**2031**	3.0%	3.0%
2014	12.0%	2.0%	**2032**	3.0%	3.0%
2015	5.0%	5.0%	**2033**	3.0%	3.0%
2016	6.0%	6.0%	**2034**	3.0%	3.0%
2017	6.0%	6.0%	**2035**	3.0%	3.0%
2018	6.0%	6.0%	**2036**	3.0%	3.0%
2019	6.0%	6.0%	**2037**	3.0%	3.0%
2020	6.0%	6.0%	**2038**	3.0%	3.0%
2021	5.0%	5.0%	**2039**	3.0%	3.0%
2022	5.0%	5.0%	**2040**	3.0%	3.0%
2023	5.0%	5.0%	**2041**	3.0%	3.0%
2024	5.0%	5.0%	**2042**	3.0%	3.0%
2025	5.0%	5.0%	**2043**	3.0%	3.0%
2026	4.0%	4.0%	**2044**	3.0%	3.0%

(Id. ¶ 90.) Plaintiffs' complaint alleges that between 2006 and 2018, tolls paid by cash have increased over 200% for all classes of vehicles as follows:

TABLE 3

2006-2018 Increase in Tolls Mainline Roadway East to West Complete Trip Delaware River Bridge (NJ Border) to Gateway (Ohio Border)

Vehicle Toll Class	Gross Vehicle Wt. (1000 lb.)	2006 Toll	2018 Toll (Cash)	Increase
1	1-7	$21.25	$47.55	223%
2	7-15	$31.25	$69.85	223%
3	15-19	$39.00	$84.35	216%
4	19-30	$45.25	$101.15	223%
5	30-45	$63.75	$141.85	222%
6	45-62	$80.75	$177.90	220%
7	62-80	$115.25	$254.70	220%
8	80-100	$150.75	$333.85	221%
9	Over 100	$861.00	$1,836.40	213%

(Id. ¶ 93.) Plaintiffs' complaint further alleges that each year since 2011, the PTC's toll revenues have consisted of an amount over 200% of the cost to operate, maintain, and upgrade the Turnpike as follows:

TABLE 4

PTC	Cost of Turnpike Services	Gross Toll Revenue	Toll Revenue as a % of Cost of Services
2007	$369,855,000	$617,616,000	166.99%
2008	$372,959,000	$619,150,000	166.01%
2009	$393,364,000	$638,244,000	162.25%

2010	$378,426,000	$718,038,000	189.74%
2011	$359,870,000	$763,856,000	212.26%
2012	$387,506,000	$797,779,000	205.88%
2013	$412,484,000	$821,740,000	199.22%
2014	$438,981,000	$866,066,000	197.29%
2015	$459,780,000	$934,252,000	203.20%
2016	$471,132,000	$1,031,620,000	218.97%
2017	$517,103,000	$1,114,976,000	215.62%

(Doc. No. 1 ¶ 95.)

Based on these alleged numbers, Plaintiffs contend that Turnpike tolls do not represent a "fair approximation of the use of the Turnpike facilities provided, they are excessive in relation to the benefits conferred, and they significantly exceed the costs incurred by PTC to operate and maintain the Pennsylvania Turnpike System." (Id. ¶ 96.) Further, Plaintiffs maintain that "PTC's tolls unduly burden interstate commerce by causing the Pennsylvania Turnpike System to be used as a revenue-generating facility designed to underwrite expenses incurred by PennDOT in providing services and facilities throughout the Commonwealth that have no functional relationship to the Pennsylvania Turnpike System." (Id. ¶ 97.)

Plaintiffs' complaint cites the 2016 Performance Audit, which states that "[a]nnual costly toll increases place an undue burden on Pennsylvanians." (Id. ¶ 98.) Plaintiffs' complaint also cites the 2016 Performance Audit's statement that at some point "the average turnpike traveler will be deterred by the increased cost and seek alternative toll-free routes," as well as its

conclusion that "[t]he toll prices potentially are already nearing the point where certain consumers will find it too costly and avoid using the Pennsylvania Turnpike." (Id. ¶ 99.) Plaintiffs' complaint notes that the 2016 Performance Audit recommended that the PTC "[s]eek immediate relief from the legislature to further reduce or eliminate Act 44/89 required payments to PennDOT." (Id. ¶ 100.)

Plaintiffs' complaint further alleges that the enforcement of Act 44/89 "is an official state action that impedes travelers' use of the Pennsylvania Turnpike System," asserting that the right to move freely by automobile "is implicit in the concept of ordered liberty and finds ample support in the Commerce Clause, the Privileges and Immunities Clause, and the Due Process Clause of the Fourteenth Amendment," and that the economic burdens of Act 44/89 payments fall "exclusively on travelers paying the toll," while the economic benefits from Act 44/89 payments "fall substantially on others who do not pay the toll." (Id. ¶¶ 101-04.) Plaintiffs' complaint concludes that the PTC's "imposition of a toll inflated to guarantee the Act 44/89 payments to PennDOT to support facilities and services having no functional relationship to use of the Turnpike impairs Plaintiffs' and potential class members' constitutional right to travel." (Id. ¶ 105.)

Plaintiffs' complaint alleges a violation of the Commerce Clause of the United States Constitution, asserting that the Clause "prohibits state actions that unduly burden interstate commerce," and "requires that user fees like tolls: (1) may not discriminate against interstate

commerce and travel; (2) must reflect a fair approximation of the use of facilities for whose benefit they are imposed; and (3) may not be excessive in relation to costs incurred by the imposing authority." (Id. ¶¶ 120-21.) Plaintiffs' complaint maintains that:

> PTC's imposition of tolls for use of the Pennsylvania Turnpike constitutes an undue burden on interstate commerce in violation of the Commerce Clause because: a. the tolls do not reflect a fair approximation of the use of Pennsylvania Turnpike facilities by those upon whom the tolls are imposed; b. the annual toll revenues collected by PTC are excessive and currently represent over 200 percent of the actual cost of making the Pennsylvania Turnpike System available to users; and c. more than half of the annual toll revenues [collected] by PTC [ ] are used to pay for services and facilities having no functional relationship to the operation and maintenance of the Pennsylvania Turnpike System.

(Id. ¶ 122.) Plaintiffs' complaint further alleges that the provisions of Act 44/89 are unconstitutional facially or as applied, and that Defendants, "acting under color of state law, have deprived and continue to deprive Plaintiffs and putative class members of the right to engage in interstate commerce in violation of their rights under the Commerce Clause." (Id. ¶¶ 123-24.)

Plaintiffs' complaint also alleges a violation of the constitutional right to travel, asserting that the "U.S. Constitution protects individuals' right to travel,"

which Plaintiffs allege Defendants are impairing, in that the imposition of an "excessive" toll:

> a. unconstitutionally limits travelers' access to the Pennsylvania Turnpike; b. unduly burdens and impedes motorists' right to travel freely through the Commonwealth; and c. is currently discouraging both business and private travelers from using the Turnpike.

(Id. ¶¶ 127-28.) Plaintiffs' complaint alleges that Defendants, "acting under color of state law, have imposed and continue to impose tolls that act as an unconstitutional impediment to Plaintiffs' and class members' right to travel." (Id. ¶ 129.)

As relief for these alleged constitutional violations, Plaintiffs seek a declaratory judgment holding that:

> (1) the PTC's imposition of excessive tolls for the use of the Pennsylvania Turnpike by motor carriers engaged in interstate commerce in amounts specifically calculated to provide funds to support facilities and services having no functional relationship to the operation and maintenance of the Pennsylvania Turnpike System constitutes an undue burden on commerce in violation of the Commerce Clause; . . . [and] an unjustified impairment on their constitutional right to travel; [and]
>
> (2) the provisions of Act 44, as amended by Act 89, that direct the PTC to: (a) make payments to PennDOT to support facilities

> and services provided by the Commonwealth of Pennsylvania having no functional relation to the operation and maintenance of the Pennsylvania Turnpike, and (b) fund those payments with sums generated through the imposition of tolls upon users of the Pennsylvania Turnpike that do not represent a fair approximation of the use of Turnpike facilities, violate the Commerce Clause of the United States Constitution, both facially or as applied.

(Id. at 38-40.) Plaintiffs' complaint also seeks a permanent injunction enjoining "Defendants PTC, its Commissioners, and its Executive Officers from imposing constitutionally excessive tolls upon users of the Pennsylvania Turnpike System;" the "PTC from issuing any further bonds or incurring any additional debt for the purpose of making Act 44/89 payments;" the "PTC from using toll revenues to make payments of interest or principal on outstanding bonds issued for the purpose of meeting its Act 44/89 obligations;" and "Defendants Leslie S. Richards, in her official capacity as Secretary of PennDOT, and Tom Wolf, Governor of Pennsylvania, from enforcing Act 44/89 and from demanding or receiving Act 44/89 payments." (Id. at 41-42.) Plaintiffs' complaint further seeks a judgment against Defendants PTC and its Commissioners and Executive Officers in favor of Plaintiffs that awards "them refunds of all payments of tolls imposed upon their use of the Pennsylvania Turnpike System in excess of what was reasonably necessary to pay for the cost of operating

and maintaining the Pennsylvania Turnpike." (Id. at 42.) Finally, Plaintiffs seek an order certifying this proceeding as a class action and an award of reasonable attorneys' fees and costs. (Id.)

B. Procedural History

On March 15, 2018, Plaintiffs filed this putative class action complaint against the PTC Defendants and the Commonwealth Defendants in their individual and official capacities. (Doc. No. 1.) On April 2, 2018, Plaintiffs filed a Motion for Preliminary Injunction with supporting brief (Doc. Nos. 19, 20), in connection with their complaint. Shortly thereafter, Plaintiffs filed a Motion for Expedited Hearing on Plaintiff's Motion for Preliminary Injunction with supporting brief, (Doc. Nos. 22, 23), to which Defendants objected (Doc. No. 25). On April 13, 2018, the Court denied Plaintiffs' Motion for Expedited Hearing on Plaintiffs' Motion for Preliminary Injunction. (Doc. No. 33.) At the same time, the Court issued an Order to Show Cause why a hearing on Plaintiffs' Motion for Preliminary Injunction should not be consolidated with the trial on the merits of this action pursuant to Federal Rule of Civil Procedure 65(a)(2). (Doc. No. 34.) Plaintiffs subsequently filed a Motion to Withdraw Motion for Preliminary Injunction (Doc. No. 40), which the Court granted by Order dated April 24, 2018 (Doc. No. 42).

On May 15, 2018, three separate motions to dismiss Plaintiffs' Complaint were filed by certain Defendants: (1) Craig Shuey, Chief Operating Officer of

the PTC (Doc. No. 49); (2) the Commonwealth Defendants (Doc. No. 50); and (3) William K. Lieberman, Vice Chair of the PTC (Doc. No. 53). On the same date, the PTC Defendants filed a motion to dismiss or, in the alternative, for summary judgment (Doc. No. 52). The motions have been fully briefed. (Doc. Nos. 51, 54, 55, 56, 66, 70, 71, 72, 76-80).

On May 15, 2018, the Pennsylvania Public Transportation Association, Southeastern Pennsylvania Transportation Authority, and the Port Authority of Allegheny County filed a Motion for Leave to File an Amicus Curiae Brief in Support of Defendants (Doc. No. 57), with three supporting Declarations (Doc. Nos. 58-60). The Court granted the Motion by Order dated May 22, 2018. (Doc. No. 63.)

Subsequently, on June 13, 2018, Plaintiffs filed a Motion to Certify Class and Appoint Class Counsel (Doc. No. 73), with a supporting Declaration (Doc. No. 74), and brief (Doc. No. 75). On June 21, 2018, the Commonwealth Defendants filed a Motion to Stay briefing on the Motion to Certify Class and Appoint Class Counsel until the Court's disposition of the pending motions to dismiss (Doc. No. 81), with a brief in support (Doc. No. 82). The Court granted the Motion to Stay briefing and consideration of the Motion to Certify Class by Order dated June 25, 2018. (Doc. No. 83.)

On June 28, 2018, Plaintiffs filed a Motion for Partial Summary Judgment on the Issue of Liability (Doc. No. 84), with a brief in support thereto (Doc. No. 85), and a statement of facts (Doc. No. 86), with supporting

Declaration (Doc. No. 87). On July 20, 2018, Defendants Shuey and Lieberman filed briefs in opposition to Plaintiff's motion (Doc. Nos. 93, 94). On the same date, the PTC Defendants filed a brief in opposition to the motion (Doc. No. 88), as well as an answer to statement of facts (Doc. No. 89). The Commonwealth Defendants also filed a brief in opposition (Doc. No. 90), an answer to statement of facts (Doc. No. 91), and a supporting Declaration (Doc. No. 92), on the same date. On August 3, 2018, Plaintiffs filed a reply brief in further support of their motion (Doc. No. 97), as well as responses to the answers to statement of facts filed by the Defendants (Doc. Nos. 98, 99).

On November 28, 2018, the PTC Defendants and the Commonwealth Defendants filed a Notice of Supplemental Authority. (Doc. No. 102.) On November 29, 2018, Plaintiffs filed Objections to the Notice (Doc. No. 103), as well as a Supplement to their Statement of Material Facts in support of their Motion for Partial Summary Judgment (Doc. No. 104). The Commonwealth Defendants filed an Answer to Plaintiffs' Supplement to their Statement of Material Facts on December 10, 2018. (Doc. No. 105.)

II. LEGAL STANDARDS

A. Motion to Dismiss

Federal notice and pleading rules require the complaint to provide the defendant notice of the claim and the grounds upon which it rests. Phillips v. Cty. Of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008). The plaintiff

must present facts that, accepted as true, demonstrate a plausible right to relief. Fed. R. Civ. P. 8(a). Although Federal Rule of Civil Procedure 8(a)(2) requires "only a short and plain statement of the claim showing that the pleader is entitled to relief," a complaint may nevertheless be dismissed under Federal Rule of Civil Procedure 12(b)(6) for its "failure to state a claim upon which relief can be granted." See Fed. R. Civ. P. 12(b)(6).

When ruling on a motion to dismiss under Rule 12(b)(6), the Court must accept as true all factual allegations in the complaint and all reasonable inference that can be drawn therefrom, viewed in the light most favorable to the plaintiff. See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 314 (3d Cir. 2010). The Court's inquiry is guided by the standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Under Twombly and Iqbal, pleading requirements have shifted to a "more heightened form of pleading." See Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). To avoid dismissal, all civil complaints must set out "sufficient factual matter" to show that the claim is facially plausible. Id. The plausibility standard requires more than a mere possibility that the defendant is liable for the alleged misconduct. As the Supreme Court instructed in Iqbal, "where the well-pleaded facts do not permit the [C]ourt to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.' " Iqbal, 556 U.S. at 679 (citing Fed. R. Civ. P. 8(a)(2)).

Accordingly, to determine the sufficiency of a complaint under Twombly and Iqbal, the United States Court of Appeals for the Third Circuit has identified the following steps a district court must take when determining the sufficiency of a complaint under Rule 12(b)(6): (1) identify the elements a plaintiff must plead to state a claim; (2) identify any conclusory allegations contained in the complaint "not entitled" to the assumption of truth; and (3) determine whether any "well-pleaded factual allegations" contained in the complaint "plausibly give rise to an entitlement to relief." See Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (citation and quotation marks omitted).

In ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, "a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)). A court may also consider "any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.'" Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006) (quoting 5B Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2004)).

B. Motion for Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is material if it might affect the outcome of the suit under the applicable law, and it is genuine only if there is a sufficient evidentiary basis that would allow a reasonable fact-finder to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). At summary judgment, the inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law. Id. at 251-52. In making this determination, the Court must "consider all evidence in the light most favorable to the party opposing the motion." A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 794 (3d Cir. 2007).

The moving party has the initial burden of identifying evidence that it believes shows an absence of a genuine issue of material fact. Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 145-46 (3d Cir. 2004). Once the moving party has shown that there is an absence of evidence to support the non-moving party's claims, "the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Berckeley Inv. Grp. Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006); accord Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). If the non-moving

party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment is warranted. Celotex, 477 U.S. at 322. With respect to the sufficiency of the evidence that the non-moving party must provide, a court should grant a motion for summary judgment when the non-movant's evidence is merely colorable, conclusory, or speculative. Anderson, 477 U.S. at 249-50. There must be more than a scintilla of evidence supporting the non-moving party and more than some metaphysical doubt as to the material facts. Id. at 252; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Further, a party may not defeat a motion for summary judgment with evidence that would not be admissible at trial. Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 387 (3d Cir. 1999).

C. Facial Versus As-Applied Constitutional Challenges

"A party asserting a facial challenge 'must establish that no set of circumstances exists under which [an act] would be valid.'" Heffner v. Murphy, 745 F.3d 56, 65 (3d Cir. 2014) (quoting United States v. Mitchell, 652 F.3d 387, 405 (3d Cir. 2011)). "This is a particularly demanding standard and is the 'most difficult challenge to mount successfully.'" Id. (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). "By contrast, '[a]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a

particular person under particular circumstances deprived that person of a constitutional right." Id. (alterations in original) (quoting United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010)). The United States Supreme Court "typically disfavor[s] facial challenges" because "[t]hey 'often rest on speculation,' can lead courts unnecessarily to anticipate constitutional questions or formulate broad constitutional rules, and may prevent governmental officers from implementing laws 'in a manner consistent with the Constitution.'" See John Doe No. 1 v. Reed, 561 U.S. 186, 230 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, (2008)). "If a litigant decides to bring both types of challenge, a court's ruling on one might affect the other." Knick v. Twp. of Scott, 862 F.3d 310, 321 (3d Cir. 2017) (citing Heffner, 745 F.3d at 65 n.7), cert. granted in part, Knick v. Twp. of Scott, ___ U.S. ___ (2018). "But if a litigant loses an as-applied challenge because the [C]ourt rules as a matter of law that the statute or ordinance was constitutionally applied to her, it follows a fortiori that the law is not unconstitutional in all applications." Id. at 321 (citing Dickerson v. Napolitano, 604 F.3d 732, 741 (2d Cir. 2010)).

III. DISCUSSION

As noted above, Plaintiffs' complaint asserts that Act 44/89 violates both (1) the dormant Commerce Clause of the United States Constitution, and (2) the constitutional right to travel. The Commonwealth Defendants and the PTC Defendants' motions to dismiss

both argue that Plaintiffs' complaint fails to state a claim on either ground. The Court first addresses Defendants' challenges to Plaintiffs' dormant Commerce Clause claim.

A. Plaintiffs' Claim that Act 44/89 Violates the dormant Commerce Clause

1. Applicable Legal Standard

The Commerce Clause of the United States Constitution grants Congress the authority to "regulate Commerce . . . among the several States." U.S. CONST. ART. I, § 8, cl. 3. The Commerce Clause also contains an implied requirement, known as the "dormant" Commerce Clause, that "states not 'mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 261 (3d Cir. 2006) (quoting Granholm v. Heald, 544 U.S. 460, 472 (2005)).

The Supreme Court recently discussed the two principles that govern the authority of a State to regulate interstate commerce: "[f]irst, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090-91, ___ U.S. ___ (2018). The Court stated that laws "that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'" Id. at 2091 (quoting Granholm, 544 U.S. at 470). However, "[s]tate laws that 'regulat[e] even-handedly to

effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). As the Supreme Court noted, "these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause." Id.

Further, the Supreme Court has recognized that "[w]here state or local government action is specifically authorized by Congress, it is not subject to the [dormant] Commerce Clause even if it interferes with interstate commerce." White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 213 (1983). In making such an authorization, "Congress must manifest its unambiguous intent." Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992). Stated differently, congressional "'intent and policy' to sustain state legislation from attack under the Commerce Clause" must be "'expressly stated.'" Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, 960 (1982) (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982)). However, "[t]here is no talismanic significance to the phrase 'expressly stated,'" as it "merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the [d]ormant Commerce Clause congressional intent must be unmistakably clear." South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

2. Arguments of the parties

a. Commonwealth Defendants

In arguing that Plaintiffs' complaint fails to state a claim that Act 44/89 violates the dormant Commerce Clause, the Commonwealth Defendants maintain that: (1) Congress has specifically authorized state transportation authorities to use toll revenues for any purpose for which federal transportation funds may be used; and (2) even in the absence of specific congressional authorization, Act 44/89 does not impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits" such that Act 44/89 violates the dormant Commerce Clause. (Doc. No. 51 at 17-30.)

In arguing that Congress has specifically authorized the state statutory scheme such that Act 44/89 is invulnerable to constitutional attack on dormant Commerce Clause grounds, the Commonwealth Defendants point to the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), federal legislation that permits public transportation authorities to use toll revenues from toll facilities initially for debt service on bonds and for operation and maintenance of the toll facilities, and secondarily (to the extent additional funds are available) for "any other purpose for which Federal funds may be obligated by a State" under Title 23 of the U.S. Code. (Doc. No. 51 at 18-19) (citing 23

U.S.C. § 129(a)(3)(A).)[7] Pursuant to ISTEA and a 2015 amendment through the Fixing America's Surface Transportation ("FAST") Act,[8] the Commonwealth Defendants argue that, under Section 1109(b) of the

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[7] 23 U.S.C. § 129(a)(3) provides as follows:

> (3) Limitations on the use of revenues. –
>
> (A) In general. – A public authority with jurisdiction over a toll facility shall use all toll revenues received from operation of the toll facility only for –
>
> (i) debt service with respect to the projects on or for which the tolls are authorized, including funding of reasonable reserves and debt service on refinancing;
>
> (ii) a reasonable return on investment of any private person financing the project, as determined by the State or interstate compact of States concerned;
>
> (iii) any costs necessary for the improvement and proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation;
>
> (iv) if the toll facility is subject to a public-private partnership agreement, payments that the party holding the right to toll revenues owes to the other party under the public-private partnership agreement; and
>
> (v) if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under this title.

23 U.S.C. § 129(a)(3).

[8] Pub. L. No. 114-94, 129 Stat. 1311 (2015).

FAST Act, codified at 23 U.S.C. § 133(b), Congress has specifically authorized Turnpike toll revenues to be used for: (1) any of fourteen categories of projects described in 23 U.S.C. § 133(b); (2) any of the categories of projects described in pre-FAST Act § 133(b); and (3) any of the broad categories of transportation alternatives set forth in pre-FAST Act § 101(a)(29). (Id. at 20-21.)

The Commonwealth Defendants maintain that the projects that Plaintiffs assert should not be funded with Turnpike toll revenues (as described in paragraph 84 of their complaint) are all projects that fit within the broad authorization of ISTEA, as amended by the FAST Act. (Id. at 21-22.) The Commonwealth Defendants admit that two projects cited by Plaintiffs – airport terminal improvements and construction of a train track in an industrial park – may not be covered by Section 133(b), but maintain, however, that Plaintiffs allege only that these projects can receive funds from the MTF (Doc. No. 1 ¶ 79), not that the projects were paid for with funds transferred from the PTC and PennDOT, as the MTF receives, in addition to the $30 million from the PTC transfer to PennDOT, funds from vehicle and driver fees (Doc. No. 51 at 22) (citing 74 Pa. C.S. § 1904(b)(3)); 2018-19 GOVERNOR'S EXECUTIVE BUDGET at H49 (Feb. 6, 2018) (indicating that $74-$80 million is deposited in the MTF annually from driver and vehicle fees).[9] Similarly, the Commonwealth Defendants

[9] The Commonwealth Defendants correctly note that the Court may consider "matters of public record" when deciding a motion to dismiss, including administrative agency filings, "materials like

argue that, as to Plaintiffs' apparent challenge to the use of Act 44/89 funds to pay for programs of statewide significance such as intercity passenger rail and bus services (Doc. No. 1 ¶ 83), even if such programs are not authorized to receive funds under Title 23, the programs receive the majority of their funding from sales tax funds, as opposed to Act 44/89 transfer payments (Doc. No. 51 at 23).[10] In sum, the Commonwealth Defendants maintain that given the multiple sources of funding for the projects mentioned by Plaintiffs, even if Section 133(b) does not authorize any of those projects, Plaintiffs have not and cannot plead that Act 44/89 toll revenues are utilized for such programs. (Id.)

In further support of their position, the Commonwealth Defendants point to a relatively recent opinion from the United States Court of Appeals for the Second Circuit in American Trucking Associations, Inc. v. New York State Thruway Authority, 886 F.3d 238 (2d Cir. 2018) (hereafter "ATA II"), which held that ISTEA foreclosed a dormant Commerce Clause challenge to the use of toll revenues for transportation purposes unrelated to the tolling facilities that generated those

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decision letters of government agencies and published reports of administrative bodies," and other "records of a government agency." Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014).

[10] On this point, the Commonwealth Defendants cite 74 Pa. C.S. §§ 1506(c)(1) and (e)(3)(i), which provide that 13.24% of sales tax revenues deposited in the PTTF are allocated to programs of statewide significance, as well as the 2018-19 Governor's Executive Budget at H67.

revenues on the ground that Congress expressly authorized that use in ISTEA. (Doc. No. 51 at 23-24.)

The Commonwealth Defendants further argue that, even if the Court should find that Congress did not expressly authorize the challenged use of Turnpike toll revenues, removing them from potential dormant Commerce Clause attack, Plaintiffs' dormant Commerce Clause claim still fails because Act 44/89 does not impose "discriminatory burdens on interstate commerce." (Id. at 25.) In so arguing, the Commonwealth Defendants maintain that the applicable standard for evaluating any potential burden imposed by Act 44/89 on interstate commerce is provided by Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), which states that in determining if a challenged statutory scheme violates the dormant Commerce Clause, the Court is to assess "whether the [state statute] imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (quoting Pike, 397 U.S. at 142). The Commonwealth Defendants maintain that, when analyzed under the Pike test, the facts alleged in Plaintiffs' complaint do not support a reasonable inference that the usage of Turnpike tolls for other Commonwealth transportation projects burdens interstate commerce. (Doc. No. 51 at 26.) The Commonwealth Defendants argue that in crafting the allegations of their complaint and their dormant Commerce Clause challenge, Plaintiffs impermissibly rely on Supreme Court jurisprudence relating to user fees,

as set forth in Northwest Airlines v. Kent, 510 U.S. 355 (1994), as opposed to the Pike test. (Id. at 26-27.)

Nevertheless, the Commonwealth Defendants maintain that even when analyzed under the jurisprudence relied on by Plaintiffs, Plaintiffs' complaint still fails to state a claim for a violation of the dormant Commerce Clause. (Id. at 27.) In Northwest Airlines, the Supreme Court stated that a "levy is reasonable . . . 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 (quoting Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17 (1972)).[11] The Commonwealth Defendants argue that, in evaluating "fair approximation of use" and relationship to benefits conferred, Plaintiffs improperly focus narrowly on the Turnpike while ignoring the fact that the Turnpike is part of a larger transportation system in Pennsylvania, and that "[t]hose who pay tolls to use the Turnpike benefit from not only access to the Turnpike itself but from the maintenance, operation, and improvement of the entire transportation system, of which the Turnpike is only one part." (Doc. No. 51 at 27.) The Commonwealth Defendants point to Supreme Court precedent that they maintain has upheld fees imposed for the use of a state's highways, even when those "fees do not 'reflect with exact precision every gradation in use' of those highways." (Id. at 28-29)

[11] The Court refers to this test as the "Evansville/Northwest Airlines" test.

(quoting Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs, 332 U.S. 495, 504 (1947), overruled on other grounds, Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990)). Accordingly, the Commonwealth Defendants argue that Plaintiffs' focus on the cost of Turnpike tolls as compared to the cost of operating and maintaining the Turnpike is impermissibly narrow, maintaining that "the fact that plaintiffs (or other putative class members) might not use other state transportation facilities funded with Turnpike toll revenues does not render the tolls they pay unconstitutionally excessive." (Id. at 29-30.) For all of these reasons, the Commonwealth Defendants maintain that the Plaintiffs' complaint fails to state a claim for a violation of the dormant Commerce Clause.

b. PTC Defendants

The PTC Defendants similarly argue that Plaintiffs' complaint fails to state a claim for a violation of the dormant Commerce Clause because Plaintiffs rely on the Evansville/Northwest Airlines test, as opposed to the Pike test, which the PTC Defendants maintain is the correct test for evaluating whether the allegations of Plaintiffs' complaint state a claim for violation of the dormant Commerce Clause. (Doc. No. 56 at 13-22.) Second, the PTC Defendants maintain that, assuming arguendo that Plaintiffs' complaint states a claim for violation of the dormant Commerce Clause, because Congress has specifically authorized the PTC to collect toll revenues in excess of those needed to operate the Turnpike, the PTC Defendants are entitled

to summary judgment on Plaintiffs' dormant Commerce Clause claim. (Id. at 23-30.)[12]

As to their first argument, the PTC Defendants maintain that the correct test in the Third Circuit for evaluating dormant Commerce Clause challenges is that set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). (Id. at 11-12.) The PTC Defendants argue that the Evansville/Northwest Airlines test is inapplicable to this case, as Northwest Airlines is a case primarily concerning statutory interpretation, or whether certain user fees are prohibited by a particular statute. (Id. at 13-14.) Moreover, the PTC Defendants point out that at the conclusion of the Supreme Court's opinion in Northwest Airlines, the Court addressed whether the fees at issue also violated the dormant Commerce Clause, and concluded that they did not because express congressional authorization insulated the particular state statute from dormant Commerce Clause attack. (Id. at 14-15.) The PTC Defendants note that at the same time, the Supreme Court concluded that, even if its determination as to congressional authorization was incorrect, any dormant Commerce Clause challenge to the user fees at issue failed based on the test first articulated in Evansville-Vanderburgh. (Id. at 15.) However, the PTC Defendants maintain that the Supreme Court has never treated that conclusion as the holding of the case, and, therefore, there is no basis

[12] As noted above, the PTC Defendants' motion is framed as a motion to dismiss or, in the alternative, for summary judgment.

to expand the Evansville-Vanderburgh analysis beyond the scope of that case. (Id. at 15-16.)

In support of their argument that Pike provides the correct test against which to measure the allegations of Plaintiffs' complaint, the PTC Defendants note that Pike has been recently applied by the Supreme Court in dormant Commerce Clause cases, pointing to Department of Revenue of Kentucky v. Davis, 553 U.S. 328, 353 (2008) and United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 346 (2007). (Id. at 16.) The PTC Defendants quote a Second Circuit case, Selevan v. New York Thruway Authority, 584 F.3d 82, 96 (2d Cir. 2009), which acknowledged that "the [Supreme] Court has not used the Northwest Airlines test to evaluate the constitutionality of a highway toll," and further note that the Third Circuit has similarly never utilized the Evansville/Northwest Airlines test to evaluate a dormant Commerce Clause challenge to a highway toll, but instead has utilized variants of Pike's balancing test. (Id. at 15-16) (citing Wallach v. Brezenoff, 930 F.2d 1070 (3d Cir. 1991) and Yerger v. Mass. Tp. Auth., 395 F. App'x 878 (3d Cir. 2010)).

The PTC Defendants then turn to an analysis of the allegations of Plaintiffs' complaint under the Pike test.[13] They note that in Pike, the Supreme Court

[13] The PTC Defendants first note that heightened scrutiny is inapplicable to any review of the challenged tolling scheme, as Act 44/89 does not on its face discriminate against interstate commerce in favor of in-state interests in that both in-state and out-of-state drivers are charged identical tolls and Plaintiffs'

explained that "where the statute addresses a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (Doc. No. 56 at 18) (quoting Pike, 397 U.S. at 142). The PTC Defendants argue that the benefits of Act 44/89 to Pennsylvania citizens, as expressed in Act 89 itself, are significant, citing the findings of the General Assembly in enacting Act 89.[14] The PTC Defendants maintain

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complaint does not allege otherwise. (Doc. No. 56 at 17-18.) On this point, the PTC Defendants refer to Heffner v. Murphy, 745 F.3d 56, 72 (3d Cir. 2014), where the Third Circuit stated that a "dormant Commerce Clause inquiry only considers whether the imposition of the limitation falls equally upon in-state and out-of-state [residents]; if so, there is clearly no discrimination in favor of Pennsylvania [residents]," and therefore "we do not subject it to heightened scrutiny under dormant Commerce Clause analysis." Id. In Heffner, the Third Circuit further stated that "[i]f we determine that heightened scrutiny is inapplicable because the [statute's] provisions do not discriminate in favor of in-state interests, we then must balance interests pursuant to Pike[.]" Id. at 70. On this basis, the PTC Defendants maintain that in the absence of any allegations of discriminatory purpose or effect, the Court should properly apply the Pike balancing test when analyzing the challenged statute. (Doc. No. 56 at 18.)

[14] In the Preamble to Act 89, the General Assembly found:

> The Commonwealth's transportation system provides access to employment, educational services, medical care and other life-sustaining services for all residents of this Commonwealth, including senior citizens and persons with disabilities.
>
> . . .
>
> There is urgent public need to reduce congestion, increase capacity, improve safety and promote economic

that this "multi-faceted funding assistance" provided by Act 44/89 to various transportation programs in the Commonwealth of Pennsylvania promotes the health, safety and welfare of Pennsylvania citizens. (Id. at 21.)

As to the second part of the Pike balancing test – whether the burden imposed on interstate commerce by the statute is "clearly excessive" in relation to local benefits conferred by the statute – the PTC Defendants argue that Plaintiffs' complaint fails to "identify any differential burden placed on interstate commerce by

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> efficiency of transportation facilities throughout this Commonwealth.
>
> The Commonwealth has limited resources to fund the maintenance and expansion of its transportation facilities. . . . the Commonwealth's transportation system is underfunded by $3,500,000,000 and [it is] projected that amount will grow to $6,700,000,000 by 2030 without additional financial investment by the Commonwealth.
>
> To ensure the needs of the public are adequately addressed, funding mechanisms must be enhanced to sustain the Commonwealth's transportation system in the future.
>
> The utilization of user fees establishes a funding source for transportation needs that spreads the costs across those who benefit from the Commonwealth's transportation system.
>
> . . .
>
> In order to ensure a safe and reliable system of public transportation, aviation, ports, rail and bicycle and pedestrian facilities, other transportation-related user fees must be deposited in the Public Transportation Trust Fund and the Multimodal Transportation Fund.

(Doc. No. 55-4 at 3, Preamble to Act of Nov. 25, 2013, P.L. 974, No. 89 at ¶¶ (3), (5)-(9), (11).)

the [PTC's] toll practices." (Id. at 21-22.) On this point, the PTC Defendants quote Norfolk Southern Corporation v. Oberly, 822 F.2d 388, 406 (3d Cir. 1987), where the Third Circuit stated that "[t]he 'incidental burden on interstate commerce' appropriately considered in Commerce Clause balancing is the degree to which state action incidentally discriminates against interstate commerce relative to intrastate commerce. It is a comparative measure." Id. The PTC Defendants maintain that where tolls equally burden intrastate and interstate commerce (or, in other words, in-state and out-of-state drivers are charged identical tolls), no differential burden exists for purposes of Pike balancing. (Doc. No. 56 at 22.) Accordingly, for these reasons, the PTC Defendants argue that Plaintiffs' complaint fails to set forth facts that support a reasonable inference that Act 44/89 violates the dormant Commerce Clause. (Id. at 22.)[15]

As noted above, the PTC Defendants argue that, in the event that Plaintiffs' complaint is not dismissed for failure to state a claim under the dormant Commerce Clause, they are entitled to summary judgment on Plaintiffs' dormant Commerce Clause claim

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[15] The PTC Defendants further maintain that, even assuming that the Act 44/89 tolling structure could be viewed as imparting some burden on interstate commerce, by statute, much of the Act 44/89 funds benefit entities acting in interstate commerce, such as SEPTA and the Port Authority of Allegheny County, and, therefore, "toll revenues are diverted from one channel of interstate commerce for the benefit of another. Thus, there is no net non-incidental burden on interstate commerce." (Doc. No. 56 at 22 n.3.)

because Congress has specifically authorized the PTC's toll structure as established in Act 44/89. (Id. at 23.) Like the Commonwealth Defendants, they analogize the instant case to American Trucking Associations, Inc. v. New York State Thruway Authority, 886 F.3d 238 (2d Cir. 2018) ("ATA II"), where the Second Circuit held that Congress – through ISTEA – authorized the New York State Thruway to collect and expend toll revenue on non-Thruway-related projects. Similar to the Commonwealth Defendants, the PTC Defendants point to ISTEA as the source of congressional authorization for the PTC's toll structure, as established in Act 44/89, arguing that, as the Second Circuit stated in ATA II, "ISTEA freed states from their obligation . . . to repay the federal government should they continue to collect tolls after retiring outstanding debts, and granted them greater flexibility to operate toll facilities and use toll revenues for a variety of transportation projects." ATA II, 886 F.3d at 242 (footnotes omitted).

In concluding that ISTEA specifically authorized a toll structure that permitted the expenditure of toll revenues on non-tolled road projects, the Second Circuit in ATA II described ISTEA's departure from the prior statutory framework as follows:

> [S]ection 1012(a) authorized state public authorities to collect highway tolls without repaying the federal government, so long as those funds "will be used first for debt service, for reasonable return on investment of any private person financing the project, and for

> the costs necessary for the proper operation and maintenance of the toll facility." Once a state certified adequate maintenance, it could use any excess toll revenues "for any purpose for which Federal funds may be obligated by a State under [Title 23]."

Id. at 242 (quoting § 1012(a)(3), 105 Stat. at 1936-37).

The PTC Defendants point to record evidence of the PTC's entry into an agreement with the Federal Highway Administration ("FHWA Agreement") pursuant to ISTEA permitting the PTC to use "toll revenues resulting from the operation of the toll facility" – defined as the entire Pennsylvania Turnpike System, including "any future system extensions" – "first for debt service," and further providing that "the [PTC] is entitled to use any toll revenues in excess of amounts required under [ISTEA, § 1012(a)], for any purpose for which [f]ederal funds may be obligated by a State under Title 23, United States Code." (Doc. No. 55 ¶ 24.) Thus, the PTC Defendants maintain that based on ISTEA § 1012(a) and the FHWA Agreement negotiated pursuant to it, Congress has expressly authorized the PTC to utilize toll revenues on (1) debt service and (2) for "any purpose for which [f]ederal funds may be obligated by a State under Title 23, United States Code."[16] (Doc. No. 56 at 25-26.)

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[16] The PTC Defendants point out that in 2012, an amendment to Section 129(a)(3) expanded the categories of expenses to which toll revenues could be dedicated in the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub. L. No. 112-141, Div. A, Title I, § 1512, 126 Stat. 405, 568-69 (2012). The PTC

The PTC Defendants maintain that the PTC's use of toll revenues to satisfy Act 44/89 obligations is fully compliant with this authorization. (Doc. No. 56 at 26.) The PTC Defendants explain that the PTC makes its annual $450 million payment to PennDOT by "(1) transferring $50 million in funds from operating revenues and (2) incurring 30-year subordinated debt to fund the remaining $400 million due." (Id.) (citing Doc. No. 55 ¶ 12). The PTC Defendants note that the PTC "makes debt service payments of principal and interest to subordinated bondholders, also out of operating revenue" to service that debt. (Id.) (citing Doc. No. 55 ¶¶ 13-14).

The PTC Defendants maintain that both uses of funds are expressly authorized and constitutionally permissible under the FHWA Agreement. (Doc. No. 56 at 27.) Pointing to record evidence, the PTC Defendants maintain that "[a]ll but $50 million in annual Act 44/89-related toll revenue expenditures are for service on the [PTC]'s subordinated debt obligations," (Id. at 27) (citing Doc. No. 55 at ¶ 12), a purpose permitted by the plain language of the FHWA Agreement entered into pursuant to ISTEA Section 1012(a), which does not restrict the types of "debt service" for which toll

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Defendants note that subsequent to this amendment, the FHWA issued interpretive guidance providing that "[f]or toll facilities that have executed Section 129 tolling agreements prior to October 1, 2012, the terms of those agreements will continue in force." (Doc. No. 56 at 26 n.4) (citing Doc. No. 55 ¶ 34). Accordingly, the PTC Defendants maintain that the PTC "continues to act under this prior congressional authorization." (Doc. No. 56 at 26 n.4) (citing Doc. No. 55 ¶ 25).

revenues can be dedicated (Id. at 27). As to the remaining $50 million transferred annually from the PTC to PennDOT, the PTC Defendants maintain that Section 1012(a) of ISTEA, as well as the FHWA Agreement, permit the PTC to utilize toll revenues for "any purpose for which [f]ederal funds may be obligated by a State under Title 23, United States Code," providing that the "State certifies annually that the tolled facility is being adequately maintained." (Id. at 27) (quoting ISTEA § 1012(a)).

The PTC Defendants point to record evidence that they maintain supports their position that the PTC has made the necessary certifications of adequate maintenance to the FHWA for the period ending May 31, 2016. (Id. at 27-28) (citing Doc. No. 55 ¶ 27). The PTC Defendants admit that the certifications have not been made on a yearly basis due to the limited capacity of the Commonwealth of Pennsylvania's Bureau of Audits, but argue that nothing in ISTEA or the FHWA Agreement sets a date by which audits must be performed, and moreover, the Secretary of Transportation, the individual "charged with enforcement of 'the limitations on the use of revenues described in' Section 129(a)," has not found the PTC in non-compliance with those limitations. (Id. at 28) (citing Doc. No. 55 ¶ 30). Therefore, the PTC Defendants maintain that they are "entitled 'to allocate excess toll revenues . . . for any project eligible to receive federal assistance under Title 23.'" (Id. at 28) (quoting ATA II, 886 F.3d at 246).

Accordingly, the PTC Defendants maintain that the issue of express congressional authorization turns

on whether the funds transferred from the PTC to PennDOT pursuant to Act 44/89 are "expended on a 'project eligible to receive federal assistance under Title 23.'" (Id. at 29) (citing ATA II, 886 F.3d at 246). The PTC Defendants argue that all but one of the expenditures of toll revenues identified by Plaintiffs in their complaint are facially authorized under Title 23, with the possible exception of the Erie International Airport terminal building, for which the PTC Defendants maintain that authorization is unclear "because of Plaintiffs' vague description in the [c]omplaint." (Id. at 29 & n.6.) As to that project, the PTC Defendants point to record evidence seeking to demonstrate that the project constituted only $700,000 in expenditures, an amount which they argue, even if not congressionally authorized, is de minimis. (Id. at 29) (citing Doc. No. 55 ¶ 33). For all of these reasons, the PTC Defendants maintain that, assuming arguendo that Plaintiffs' complaint states a dormant Commerce Clause claim, congressional authorization bars Plaintiffs' dormant Commerce Clause challenge to Act 44/89. (Id.)

c. Plaintiffs

In response to the arguments of the Commonwealth Defendants and the PTC Defendants, Plaintiffs argue first that their complaint states a claim for violation of the dormant Commerce Clause under the Evansville/Northwest Airlines test, which they maintain is the standard that governs in a dormant Commerce Clause challenge to allegedly excessive tolls or user fees. (Doc. No. 70 at 24-35.) Second, Plaintiffs

argue that through ISTEA, Congress has not authorized states to impose turnpike tolls free of limitations imposed by the dormant Commerce Clause. (Id. at 41-53.) In addition, Plaintiffs maintain that even if Congress did authorize states to utilize excess toll revenues on unrelated transportation projects, Defendants have not complied with the limitation placed on the exercise of that authority by failing to certify annually that the Turnpike is adequately maintained. (Id. at 53-63.)

As to the correct standard applicable to Plaintiffs' dormant Commerce Clause challenge, Plaintiffs maintain that various Circuit Courts of Appeal have applied the Evansville/Northwest Airlines test to the evaluation of tolls and other user fees, and argue that this Court (and the Third Circuit) should do likewise. (Id. at 24-26.) Under the Evansville/Northwest Airlines test, tolls are reasonable if they "(1) [are] based on some fair approximation of use of the facilities, (2) [are] not excessive in relation to the benefits conferred, and (3) [do] not discriminate against interstate commerce." Northwest Airlines, 410 U.S. at 369 (citing Evansville, 405 U.S. at 716-17). Plaintiffs' dormant Commerce Clause claim is based on their argument that Act 44/89's toll structure violates prongs (1) and (2) of the Evansville/Northwest Airlines test. (Doc. No. 70 at 25.)

In support of their argument, Plaintiffs point to a non-precedential 2010 Third Circuit opinion in Yerger v. Massachusetts Turnpike Authority, 395 F. App'x 878 (3d Cir. 2010), as well as a 1991 Third Circuit opinion in Wallach v. Brezenoff, 930 F.2d 1070 (3d Cir. 1991).

Plaintiffs note that in Yerger, after conducting an analysis under Pike to determine whether a program requiring out-of-state turnpike users to sign up for a state discount program violated the dormant Commerce Clause, the Court examined the toll amount and cited the Evansville/Northwest Airlines test in concluding that the tolls were "'assessed uniformly in direct proportion to the use of the toll facilities and ha[d] not been shown to be excessive.'" (Doc. No. 70 at 27) (quoting Yerger, 395 F. App'x at 884 n.3). Plaintiffs maintain that in Wallach, the court determined that the tolls at issue "represented a fair approximation of the use conferred" and the tolling authority expended toll revenue on projects "functionally related" to the toll system, echoing the Evansville/Northwest Airlines standard. (Id. at 27) (citing Wallach, 930 F.2d at 1071-72). Accordingly, Plaintiffs maintain that Evansville/Northwest Airlines, not Pike, sets forth the appropriate test for analyzing allegedly excessive user fees and tolls under the dormant Commerce Clause. (Id. at 27.)

Plaintiffs maintain that the Supreme Court has recognized that the Pike test is appropriate for laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." (Doc. No. 70 at 28) (citing United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007)). Plaintiffs point out that Evansville and Northwest Airlines were decided after Pike, but in neither case did the Supreme Court use the Pike test to evaluate the user fees at issue in those cases. (Id. at

29.) Plaintiffs further argue that no court has utilized Pike to evaluate whether tolls are excessive and therefore violative of the dormant Commerce Clause. (Id.)

Plaintiffs then turn to an analysis of Act 44/89's tolling structure under the Evansville/Northwest Airlines test, and argue that toll receipts, which they allege have exceeded 200 percent of the cost to maintain and operate the Turnpike, are not based on some fair approximation of the use of the Turnpike and are excessive in relation to the benefits conferred. (Id. at 30-34.) Plaintiffs point to the allegations of their complaint regarding the non-highway purposes to which Act 44/89 revenues are dedicated and argue that it is not sufficient for the Commonwealth Defendants to assert that providing "access to an extensive and well-maintained transportation system in the Commonwealth" justifies the wide-ranging expenditure of Act 44/89 toll revenues and confers a benefit on all users of the Turnpike that fairly approximates their use of the same. (Id. at 30) (quoting Doc. No. 51 at 22). In sum, Plaintiffs maintain that the allegations of their complaint support a reasonable inference that the Pennsylvania Turnpike tolls (and the Act 44/89 toll structure that governs them) are not based on some fair approximation of the use of the Turnpike and are excessive under the Evansville/Northwest Airlines standard.

As noted above, Plaintiffs urge the Court to reject Defendants' claim of congressional authorization because Congress has not unambiguously authorized States to impose highway tolls free of dormant Commerce

Clause limitations. (Id. at 41.) Plaintiffs maintain that "for Congress to approve State action that would otherwise violate the Commerce Clause, Congress must 'affirmatively contemplate otherwise invalid state legislation' and express an unmistakably clear, unambiguous intent to approve such legislation in the text of a federal statute." (Id. at 43) (quoting Wunnicke, 467 U.S. at 91). Further, Plaintiffs point out that the State "carries the 'burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit' behavior that would otherwise be unconstitutional under the dormant Commerce Clause." (Id.) (quoting Wyoming, 502 U.S. at 458).

Plaintiffs maintain that there exists an "historic animus" against federal funding of toll roads, and argue that while "States are free to build, operate or regulate toll facilities largely as they see fit," practically, "the flexibility of State and local governments to deal with toll facilities is constrained by two factors at the federal level." (Id. at 45.) Plaintiffs describe those two factors as follows: (1) the dormant Commerce Clause, which "restricts States from imposing undue burdens upon interstate commerce by means of toll facilities;" and (2) "if States wish to participate in federal highway funding programs, they are required to conform to federal requirements and operate tolled facilities in conformity with federal standards." (Id.)

Plaintiffs argue that Section 1012(a) of ISTEA, the statute upon which Defendants rely for congressional authorization of the Act 44/89 toll structure, established certain conditions that States were required to

satisfy in order to qualify for federal funds for state-tolled facilities, but did not "authorize States or state-tolling authorities to do anything." (Id. at 46.) Plaintiffs discuss the origins of ISTEA and specifically, Section 1012(a)(1), maintaining that the provision "authorized the U.S. Secretary of Transportation to make federal funds available for certain limited types of state-tolled facilities," while Section 1012(a)(3) "established conditions that States were required to satisfy in order to qualify for federal funds."[17] (Id.) Plaintiffs maintain that while Section 1012(a)(1) "continues to limit the use of revenue" on the part of States, it did not and does not "authorize[] States to operate their tolling facilities in a manner that violates the dormant Commerce Clause." (Id. at 47.)

Plaintiffs further argue that the Defendants' reliance on the Second Circuit decision in ATA II as authority for the proposition that Section 1012(a) of ISTEA expressly authorized Act 44/89's toll structure is inapposite because that case analyzed and relied on a separate section of ISTEA – Section 1012(e), not Section 1012(a). (Id.) Plaintiffs maintain that Section 1012(e), originally enacted as a Note to Section 129 but never codified, was specific to New York State in authorizing tolls from the New York Thruway to be utilized to support the New York Canal System, which was "functionally unrelated to the Thruway." (Id. at 48.) Accordingly, Plaintiffs argue that ATA II "says nothing about whether Congress authorized – in the entirely

[17] Section 1012(a)(3) is codified at 23 U.S.C. § 129(a)(3). See supra note 7.

independent Section 1012(a) – any State or local entity in the country to remedy its local budget shortfalls through unlimited, unconstitutionally-excessive tolls." (Id. at 49.)

In further disputing Defendants' argument that Section 1012(a) constitutes express congressional authorization insulating the Act 44/89 toll structure from dormant Commerce Clause attack, Plaintiffs maintain that Defendants "place undue emphasis on their twenty-year-old agreement with the [FHWA]." (Id. at 51.) Plaintiffs maintain that the FHWA Agreement "goes no further" than Section 129(a)(3) in its purpose to "govern[ ] the use of federal funds received by PTC and PennDOT," and because the FHWA "cannot authorize a violation of the Commerce Clause," it "provides [no] independent justification for [Defendants'] actions." (Id. at 52.)

Finally, in disputing Defendants' argument that Congress expressly authorized States to expend toll revenues in the manner contemplated by Act 44/89, Plaintiffs argue that even assuming arguendo that Congress did so authorize States in Section 129(a), Defendants have failed to comply with the statutory limitations placed on the exercise of that authority. (Id. at 53.) Specifically, Plaintiffs point to Section 129(a)(3)(A)(v) and argue that a State can use toll revenues for "projects for which federal funds may otherwise be obligated" only "if the public authority certifies annually that the tolled facility is being adequately maintained." (Id. at 53) (citing 23 U.S.C. § 129(3)(A)(v)). Plaintiffs maintain that in its alternative motion for summary

judgment, the PTC Defendants fail to point to sufficient evidence of record "supporting its contention that it has made any certifications as required under subparagraph (A)(v) of Section 129(a)(3)." (Id. at 53-57.) Accordingly, Plaintiffs maintain that even assuming that Section 129 permits Defendants to expend toll revenues in the manner contemplated by Act 44/89's toll structure, the PTC Defendants have failed to meet their burden to produce admissible evidentiary materials demonstrating their entitlement to summary judgment on this ground. (Id. at 57.)

As it relates to their constitutional challenge to Act 44/89's tolling structure Plaintiffs argue in sum that:

> there is a huge difference between "excess toll revenues" that could have been the subject of Section 1012(a)(3) and "excessive tolls" collected to fund a wide array of state-wide projects that are authorized, administered, and controlled by PennDOT, not PTC. Even if Congress had opened the door for States to use toll revenues left over after the repayment of debt borrowed for the construction, operation, and maintenance of Turnpike (Senior Revenue Bonds), there is no support for the proposition that Congress ever envisioned that any State would fabricate a statutory scheme that requires a turnpike authority to raise toll rates with no limit to their amount or the time period they could be imposed to support the transfer of billions of dollars to State transportation departments (here PennDOT) to

> support projects with no functional relation to the tolled facility.

(Id. at 61-62.)[18]

3. Analysis

The Court has carefully considered the detailed and well-documented allegations of Plaintiffs' complaint, as well as the extensive briefing and legal arguments of the parties. As outlined fully above, the factual predicates for Plaintiffs' claim are for the most part undisputed, as the PTC tolls and expenditures are a matter of public record, as are the statutory origins of the PTC's scheme for collecting toll revenues and transferring funds to PennDOT. What is in dispute is how five decades of slowly evolving federal law related to the dormant Commerce Clause informs this Court's analysis of whether Plaintiffs' challenge to excessive tolls represents a constitutional injury that this Court is empowered to rectify, or a matter for legislative overhaul.

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[18] Plaintiffs reference the distinction between Senior Revenue Bonds and Subordinate Revenue Bonds, as alleged in paragraphs 59-64 of their complaint, and maintain that Turnpike tolls expressly support only Senior Revenue Bonds, while Subordinate Revenue Bonds are issued for the purpose of fulfilling the PTC's statutorily-mandated Act 44/89 payments to PennDOT, arguing that there is "no support in any statute or statutory history . . . that suggests a 'clear and unmistakable' authorization for PTC to cripple itself financially or to burden future generations with debt incurred for purposes that are entirely unrelated to the Turnpike." (Doc. No. 70 at 63.)

The Court notes that the parties maintain wholly different legal analyses of Plaintiffs' dormant Commerce Clause claim. It is no wonder. Even the legitimacy and parameters of the dormant Commerce Clause are the subject of continuous vigorous debate.[19] The application of the case law implementing the doctrine is no more conclusive. As explained previously, Plaintiffs urge this Court to invoke the analysis articulated by the United States Supreme Court in Evansville/Northwest Airlines (see Doc. No. 70 at 27) (maintaining that "Evansville stands as the appropriate test for analyzing excessive user fees and tolls"), while Defendants maintain that the standard set forth in the earlier Pike decision is the appropriate standard to apply to Plaintiffs' dormant Commerce Clause claim (see Doc. No. 76 at 17) (maintaining that in the Third Circuit, "Pike governs challenges to the constitutionality of highway toll programs"). Consequently, the parties in this case have characterized these tests as separate, competing standards within the world of dormant Commerce Clause jurisprudence, rather than two analytical frameworks that may complement, rather than replace, one another. No definitive controlling precedent supports

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[19] See Wayfair, 138 S. Ct. at 2100-01 (Gorsuch, J., concurring) ("The Commerce Clause is found in Article I and authorizes Congress to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III courts may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by stare decisis, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day.").

either side. The Third Circuit has never specifically evaluated Evansville and Pike as competing tests in any Commerce Clause challenge to highway tolls, nor has the United States Supreme Court. For the reasons that follow, upon review of all persuasive and controlling law, this Court finds that the relevant authority renders Pike the appropriate test for examining Plaintiffs' dormant Commerce Clause challenge.

Only two relevant cases in the Third Circuit address the applicability of Evansville or Pike to a dormant Commerce Clause challenge to a highway toll, Wallach v. Brezenoff, 930 F.2d 1070 (3d Cir. 1991), and Yerger v. Massachusetts Turnpike Authority, 395 F. App'x 878 (3d Cir. 2010). First, in Wallach, the Third Circuit considered a challenge to a 50% toll increase on Port Authority of New York and New Jersey bridges and tunnels. The New Jersey citizen plaintiffs brought a dormant Commerce Clause challenge asserting that "no toll increase was necessary to finance the maintenance or costs of the Port Authority's bridges and tunnels." Wallach, 930 F.2d at 1072. The Third Circuit affirmed the district court's dismissal of Plaintiffs' claim. In so doing, the court looked to a similar challenge to the very same toll increase analyzed in Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey, 706 F.Supp. 264 (S.D.N.Y. 1989), aff'd, 887 F.2d 417 (2d Cir. 1989). Specifically, the Third Circuit affirmed the Automobile Club court's use of a three-part test derived from Hughes v. Oklahoma, 441 U.S. 322 (1979), to evaluate undue burdens imposed on interstate commerce by the toll increase, which was

derived from Pike. See Wallach, 930 F.2d at 1072; see also Hughes, 441 U.S. at 336 (assessing "the burden imposed on interstate commerce" under the "general rule" established in Pike). Although the Third Circuit resolved Wallach without a detailed analysis as to the issue of the governing test for assessing an undue burden claim under the dormant Commerce Clause, the case was decided using the Pike analysis. See Wallach, 930 F.2d at 1072 (rejecting argument that the "toll increase is an unconstitutional tax on interstate commerce" for the "reasons given by the district court in the Automobile Club case," where the court applied the three-part test from Hughes in addressing a challenge to a toll increase under the dormant Commerce Clause, and analyzed "(1) whether the challenged toll increase had only incidental effects on interstate commerce, or discriminated against interstate commerce on its face or in practical effect, (2) whether the toll increase serves a legitimate local purpose, and (3) whether alternative means were available to promote this purpose without discriminating against interstate commerce"). As Plaintiffs note, the Wallach court cited Evansville, but only with regard to the plaintiffs' constitutional right to travel claim.[20] See Wallach, 930 F.2d at 1072 (stating that "[t]he Court in Evansville devised a three-prong test for determining when a user fee impermissibly burdens a citizen's constitutionally protected right to travel"). Indeed, Wallach does not reference the applicability of Evansville as to a dormant Commerce

[20] As to Evansville's potential applicability to Plaintiffs' constitutional right to travel claim, see infra note 24.

Clause challenge, thus calling into question the applicability of Evansville to the case at bar.

Second, in Yerger v. Massachusetts Turnpike Authority, 395 F. App'x 878 (3d Cir. 2010), the Third Circuit, in a non-precedential opinion, affirmed the dismissal of a dormant Commerce Clause challenge to a discount toll program that offered toll discounts to subscribers of the Massachusetts Turnpike Authority ("MTA")'s electronic toll program, but not to users of competing systems in other states. The court first concluded that the program did not discriminate against interstate commerce on its face or in effect in that: it was available on equal terms to motorists regardless of residence; it incorporated no distinctions based on residence; and participation in the program was open to everyone, and that when a toll program does not discriminate against interstate commerce on its face or in effect, Pike articulates the appropriate standard for assessing any "undue burden" on interstate commerce. Id. at 882-84. While the court acknowledged in a footnote that "the [challenged toll discount] also passes the Evansville test for determining the validity of a levy or toll," id. at 884 n.3, the court ultimately applied Pike to the challenged tolls in finding that there was no dormant Commerce Clause violation. Because this reference to Evansville was not necessary to the court's reasoning, and, therefore, constitutes dicta, this Court finds that Yerger provides no additional clarity regarding the potential interplay between the Pike and Evansville tests with regard to the dormant Commerce Clause challenge presently before this Court.

In addition, it is noteworthy that Plaintiffs generally rely on case law from the First and Second Circuits to support their argument as to the applicability of Evansville to their dormant Commerce Clause challenge. This Court, however, finds that those decisions do not adequately explain the relationship between Pike and Evansville for purposes of Plaintiffs' claim. In Doran v. Massachusetts Turnpike Authority, 348 F.3d 315 (1st Cir. 2003), the First Circuit examined the constitutionality of a discount tolling program and affirmed the district court's grant of the defendant's motion to dismiss, finding no dormant Commerce Clause violation. In Doran, the plaintiffs made four arguments: "(1) [t]hat the [discount toll program] imposes a nonuniform and noncompensatory user fee unrelated to actual highway usage; (2) [t]hat it is discriminatory on its face or in practical effect; (3) [t]hat it does not serve a legitimate local interest unrelated to economic protectionism; and (4) [t]hat its cumulative effects on commerce, by shifting highway costs to nonresidents, are excessive." Id. at 318. In support of their first argument, the plaintiffs relied primarily on American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987), where the Supreme Court examined the validity of a flat tax imposed by Pennsylvania on trucks that varied according to whether the trucks were registered in-state or out-of-state, and described the pertinent inquiry as whether the taxes discriminated against some participants in interstate commerce, holding that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents

who also engage in commerce among States." Scheiner, 483 U.S. at 282. In addressing plaintiffs' first argument regarding the tolling program as a user fee, the Doran court applied Evansville in concluding that there was no violation of the dormant Commerce Clause, and as to the plaintiffs' third and fourth arguments, the Doran court stated that Pike is inapposite where there is no showing that a non-resident pays a "disproportionate share of the state's highway costs" compared to a resident. Doran, 348 F.3d at 322. The court stated, however, that in the event Pike applied, the tolling structure also passed constitutional muster under the associated inquiry. Id.

Importantly, one district court in the First Circuit has described Doran as recognizing the Pike and Evansville tests as "alternate tests, not substitutes for one another," and noted that "[t]he Northwest Airlines test is applied when reviewing the constitutionality of a tax or penalty imposed directly on interstate commerce. The Pike test, on the other hand, is the test to be applied when a concessionary benefit that incidentally impacts interstate commerce is granted to in-state residents." See Surprenant v. Mass. Tpk. Auth., No. 09-cv-10428-RGS, 2010 WL 785306, at *6 n.11 (D.R.I. Mar. 4, 2010).[21] In addition, in Cohen v. Rhode Island Turnpike and Bridge Authority, 775 F.Supp.2d

[21] In Surprenant, the plaintiffs challenged on dormant Commerce Clause and right to travel grounds certain bridge and tunnel tolls that included discount programs that varied according to resident or non-resident status. See Surprenant, 2010 WL 785306, at *3.

439 (D.R.I. 2011), the district court emphasized that because the First Circuit in Doran applied Evansville/ Northwest Airlines to a challenge to a discount toll program under the dormant Commerce Clause, the court was "not free to apply any other test to this case. However, it must be noted that state and federal courts in Massachusetts have applied alternative tests in assessing similar challenges to the constitutionality of highway tolls." Id. at 446 n.6. In Cohen, after qualifying its use of Evansville, the district court ultimately concluded that under Evansville, the discount toll program did not violate the dormant Commerce Clause. Id. at 450.

Further, in Selevan v. New York Thruway Authority, 584 F.3d 82 (2d Cir. 2009) ("Selevan I"), the Second Circuit vacated the dismissal of a challenge to the New York Thruway Authority ("NYTA")'s toll discount program that charged non-residents of Grand Island tolls eight times greater than those charged to residents of Grand Island, concluding that the plaintiffs had established both Article III and prudential standing as to their dormant Commerce Clause claim. Specifically, the Court of Appeals noted that the district court, after determining that plaintiffs failed to allege that the NYTA policy "discriminated" against interstate commerce, failed to inquire if the policy otherwise violated the Commerce Clause under Pike. See Selevan I, 584 F.3d at 95. The Second Circuit remanded the matter to the district court with instructions that the district court evaluate the tolls under the standard articulated in Evansville. Id. at 96. The Second Circuit acknowledged

that "the [Supreme] Court has not used the Northwest Airlines test to evaluate the constitutionality of a highway toll nor has it indicated whether the Pike test or the Northwest Airlines test should apply when highway tolls are challenged." Id. The Court of Appeals further stated that it viewed "factors one and two of the Northwest Airlines test [as] achiev[ing] the same end as Pike – the invalidation of state policies that impose an undue burden on interstate commerce – inasmuch as they require the court to consider whether the fee supplies a benefit to users of a facility that is at least roughly commensurate with the burden it imposes on them." Id. at 97. Accordingly, the court held that Evansville/Northwest Airlines governed the analysis of the constitutionality of a highway toll under the dormant Commerce Clause. Id. at 98.[22]

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[22] The court acknowledged that the Second Circuit previously applied the Northwest Airlines test to assess the constitutionality of a ferry passenger fee in Bridgeport & Port Jefferson Steamboat Company, 567 F.3d 79 (2d Cir. 2009). Following remand, the district court ultimately granted summary judgment in favor of defendants, finding no violation of the dormant Commerce Clause, and the Second Circuit affirmed this decision. Selevan v. N.Y. State Thruway Auth., 711 F.3d 253 (2d Cir. 2013) ("Selevan II"); see also Am. Trucking Assn's, Inc. v. N.Y. State Thruway Auth., 199 F.Supp.3d 855 (S.D.N.Y. 2016) ("ATA I") (following Selevan I and applying the Evansville/Northwest Airlines test to a dormant Commerce Clause challenge to a trucking toll), order vacated on other grounds, 238 F.Supp.3d 527 (S.D.N.Y. 2017), aff'd, 886 F.3d 238 (2d Cir. 2018) ("ATA II") (finding that toll structure was expressly authorized by congressional legislation and therefore invulnerable to dormant Commerce Clause attack).

Finally, in assessing the unsettled landscape against which this Court is asked to make a determination as to whether Pike or Evansville/Northwest Airlines applies to Plaintiffs' dormant Commerce Clause claim, the Court notes that in neither Doran nor in Selevan I did the parties characterize these tests as competing analyses from which the Court must select the more appropriate standard to apply, as the parties do here. (Doc. No. 70 at 74) ("Evansville, not Pike, is the proper standard."); (Doc. No. 56 at 11) ("[T]he correct test in the Third Circuit is the one laid out in Pike."). In Doran, as noted above, the parties (and the court) treated the tests as potential alternative analyses, and in Selevan I, while the Second Circuit directed the district court to apply Evansville on remand, there is no indication that the issue was actively litigated at the trial court level, ostensibly because the district court opinion focused almost entirely on the issue of standing. Accordingly, the Court finds that neither the First nor the Second Circuit was faced with the same issue confronting this Court, rendering Selevan I and Doran only somewhat persuasive authority with questionable applicability to the precise question presented in the case at bar.

Moreover, during the pendency of this case, the United States Supreme Court announced "the analytical framework that now prevails for Commerce Clause cases" in South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090, ___ U.S. ___ (2018). In this case, which, importantly, did not involve a dormant Commerce Clause challenge to a toll or fee, the Court reiterated that the

"two primary principles" governing a State's authority to regulate interstate commerce are that: "[f]irst, state regulations may not discriminate against interstate commerce, and second, States may not impose undue burdens on interstate commerce." Id. at 2090-91. As to "undue burdens," the Court stated that Pike sets down the appropriate standard for evaluating the existence of such a burden on interstate commerce imposed by law, providing that "[s]tate laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" See Wayfair, 138 S. Ct. at 2091 (quoting Pike, 397 U.S. at 142); see also Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008) ("Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in Pike, that even non-discriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice."). While the Supreme Court recently emphasized the applicability of Pike generally, this emphasis has generally appeared in the Third Circuit's recent dormant Commerce Clause jurisprudence where a challenged law or program does not discriminate so as to favor in-state residents or interests, as well. See, e.g., Heffner v. Murphy, 745 F.3d 56, 72 (3d Cir. 2014) (stating that in connection with a dormant Commerce Clause challenge "[i]f we determine that heightened scrutiny is inapplicable

because the [statute's] provisions do not discriminate in favor of in-state interests, we then must balance interests pursuant to Pike").

Upon consideration of all of the above authorities, and noting the Supreme Court's recent articulation of Pike as the standard governing dormant Commerce Clause challenges on undue burden grounds, which comports with the limited precedent in the Third Circuit on this issue in the context of highway tolls, the Court is persuaded that, as between Evansville/Northwest Airlines and Pike, for purposes of the specific issue raised by the parties here, Pike provides the appropriate test against which to assess the allegations of Plaintiffs' complaint in the context of a dormant Commerce Clause challenge.

Having concluded that Pike governs Plaintiffs' dormant Commerce Clause claim, the Court is required to assess, with regard to "[s]tate laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest,' " whether " 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " Wayfair, 138 S. Ct. at 2090-91 (quoting Pike, 397 U.S. at 142). As noted above, this inquiry is appropriate where, as here, plaintiffs do not allege that the challenged statute discriminates against interstate commerce, but rather allege that the challenged statute imposes undue burdens on interstate commerce. Pike balancing requires a determination of "whether the [statute's] burdens on interstate commerce substantially outweigh the putative local benefits." Heffner, 745 F.3d at 71 (internal quotation

marks omitted). The Third Circuit has described "[t]he 'incidental burdens' that we must assess under Pike" as "consist[ing] of 'the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce.'" Id. at 73 (quoting Norfolk S. Corp. v. Oberly, 822 F.2d 388, 406 (3d Cir. 1987)). Accordingly, the Court examines the relative burdens on in-state and out-of-state interests, and where the challenged statute "imposes the very same burdens" on both sets of interests, it is a "burden on commerce without discriminating against interstate commerce." Id. (citing Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 826-27 (3d Cir. 1994)).

Assessed against the above standard, the Court agrees with the PTC and Commonwealth Defendants that the tolls complained of (and governed by Act 44/89), alleged to burden in-state and out-of-state drivers on the Turnpike equally by charging them identical tolls, impose a burden on commerce as opposed to a burden on interstate commerce. This effectively disposes of Plaintiffs' dormant Commerce Clause challenge under Pike. See Instructional Sys., Inc., 35 F.3d at 827 (reversing district court decision and holding that state statute did not impose a burden on interstate commerce under Pike's balancing test because "although [the relevant statute] may burden commerce, it creates no incidental burdens on interstate commerce for purposes of Pike balancing," and "[i]n the absence of such a burden, an analysis of the 'putative local benefits' of [the relevant statute] is unnecessary").

Accordingly, the Court will grant the Commonwealth and PTC Defendants' motions to dismiss Plaintiffs' dormant Commerce Clause challenge.[23]

B. Plaintiffs' Claim that Act 44/89 Violates the Constitutional Right to Travel

1. Applicable Legal Standard

While the right to "travel" is not explicitly found in the Constitution, the United States Supreme Court has stated that the "'constitutional right to travel from one State to another' is firmly embedded in our

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[23] The application of the Pike standard forecloses at this stage this Court's review of the substantial question as to whether Congress has specifically authorized the expenditure of toll revenues contemplated by Act 44/89, raised by the PTC and Commonwealth Defendants as an alternative basis for the dismissal of Plaintiffs' dormant Commerce Clause challenge. As detailed above, the parties agree that, even where challenged state action might otherwise violate the dormant Commerce Clause, if state action is specifically authorized by Congress, it is insulated from dormant Commerce Clause attack. Following this principle, in American Trucking Associations, Incorporated v. New York State Thruway Authority, 238 F.Supp.3d 527 (S.D.N.Y. 2017), aff'd, 886 F.3d 238 (2d Cir. 2018), the district court, having previously found that a toll violated the dormant Commerce Clause, readily dismissed the challenge when presented with specific congressional authorization for the funding scheme. Id. at 540-41. Here, Plaintiffs test Defendants' blanket claim of congressional authorization, questioning whether Defendants have complied with the limitations placed on the exercise of that alleged authority, along with the source of congressional authorization itself. However, as noted above, the Court's conclusion that Plaintiffs' complaint fails to state a dormant Commerce Clause claim under Pike renders the Court's resolution of this substantial question unnecessary at this time.

jurisprudence." Saenz v. Roe, 526 U.S. 489, 498 (1999) (quoting U.S. v. Guest, 383 U.S. 745, 757 (1966)). That right "embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Id. at 500. State laws implicate the right to travel (1) when such laws actually deter travel; (2) when impeding travel is the primary objective of the law; or (3) when the law uses a classification that penalizes travel. See Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (internal quotations and citations omitted).

In United States v. Baroni, 909 F.3d 550 (3d Cir. 2018), the Third Circuit recently acknowledged that while the Supreme Court has not recognized a constitutional right to "intrastate" travel, this Circuit recognized such a right in Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990), where the court located a constitutional right to intrastate travel in the substantive due process clause of the United States Constitution and held that a local ordinance outlawing "cruising" was a reasonable time, place, and manner restriction on the right of localized intrastate travel. (Id. at 268-70.) In Baroni, the Third Circuit noted that the First, Second, and Sixth Circuits have also recognized a right to intrastate travel; however, the court stated that "there is hardly a 'robust consensus' that the right exists, let

alone clarity as to its contours." Baroni, 909 F.3d at 587-88.

2. Arguments of the parties

a. Commonwealth Defendants

At the outset, the Commonwealth Defendants highlight that, of the three recognized components of a constitutional right to travel, only the "right of a citizen of one State to enter and to leave another State" could "possibly be implicated" by the allegations in Plaintiffs' complaint. (Doc. No. 51 at 31.) Therefore, the Commonwealth Defendants characterize Plaintiffs' claim as asserting that "Act 44/89, by allegedly requiring Turnpike tolls above the level necessary to fund Turnpike operations, actually deters interstate travel." (Id. at 32.) The Commonwealth Defendants argue that paragraph 128 of Plaintiffs' complaint asserts only a conclusory allegation to this effect without any factual support, and maintain that "the Supreme Court has rejected the notion that a state-imposed fee on the use of interstate travel facilities impermissibly burdens the constitutional right to travel," citing Evansville-Vanderburgh, 405 U.S. at 711-14. (Id. at 33.) Finally, the Commonwealth Defendants maintain that even assuming that "the level of Turnpike tolls did somehow deter travelers from using the Turnpike, this would not mean that the tolls (or Act 44/89) actually deter interstate travel in or through Pennsylvania," because the "right to interstate travel does not mean a traveler has a constitutional right to the most convenient form of

travel." (Id.) (citing Town of Southold v. Town of E. Hampton, 477 F.3d 38, 54 (2d Cir. 2007) (stating that "travelers do not have a constitutional right to the most convenient form of travel" (internal quotation marks omitted))). The Commonwealth Defendants argue that in light of the availability of "alternative toll-free routes" acknowledged by Plaintiffs in their complaint (Doc. No. 1 ¶ 99), the allegations of Plaintiffs' complaint fail to support a reasonable inference that Act 44/89 violates the constitutional right to travel (Doc. No. 51 at 34).

b. PTC Defendants

The PTC Defendants similarly argue that a "non-discriminatory burden like a highway toll does not deter interstate travel in a constitutional sense," pointing out that Plaintiffs' complaint indicates that alternative toll-free highways exist. (Doc. No. 56 at 33) (citing Doc. No. 1 ¶ 99). Along those lines, the PTC Defendants maintain that while drivers might prefer to use the "convenient and more direct Turnpike," the imposition of " 'burdens on a single mode of transportation do not implicate the right to interstate travel.' " (Doc. No. 56 at 33) (quoting Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999) (stating that "[b]urdens placed on travel generally, such as gasoline taxes, or minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of" the right to travel)). The PTC Defendants argue that "[a]t most, Plaintiffs have alleged a burden on traveling their chosen route through Pennsylvania, not on their right to travel generally."

(Doc. No. 76 at 24.) Accordingly, the PTC Defendants maintain that the allegations of Plaintiffs' complaint fail to support a reasonable inference that the toll structure imposed by Act 44/89 violates the constitutional right to travel.

c. Plaintiffs

In opposition to the arguments of the Commonwealth and PTC Defendants as to any alleged violation of the constitutional right to travel resulting from Turnpike toll structure established by Act 44/89, the Plaintiffs rely largely on Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), in which the Supreme Court invalidated a Nevada statute levying a "tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." Crandall, 73 U.S. at 36. Plaintiffs argue that here, as in Crandall, the relevant issue is whether the toll levied is in any way comparable to the benefit provided, and that if it is not, "the constitutional violation is self-evident." (Doc. No. 70 at 38-39.) Plaintiffs maintain that the Evansville/Northwest Airlines test is the relevant standard for determining "[i]f fees or tolls charged for use of a state-provided facility are reasonable and not excessive in comparison to the benefits provided to the payers for use of the facility" – or in other words, if they do not "offend the Constitution." (Id. at 39.)

3. Analysis

Upon careful consideration of the arguments of the parties, the relevant authorities, and the allegations of Plaintiffs' complaint, this Court is unpersuaded by Plaintiffs' argument that the allegations set forth in their complaint support a reasonable inference that the provisions of Act 44/89 constitute a violation of the constitutional right to travel. As all parties appear to agree, the only component of the constitutional right to travel recognized by the Supreme Court ostensibly implicated by Plaintiffs' allegations is the "right of a citizen of one State to enter and to leave another State." See Saenz, 526 U.S. at 500. Further, as all parties similarly appear to agree, because Plaintiffs' complaint makes no allegations that impeding travel is the primary objective of Act 44/89, or that Act 44/89 utilizes a classification that penalizes travel, Plaintiffs' claim is properly viewed as alleging that Act 44/89 actually deters travel. However, as Defendants note, Plaintiffs' complaint does not allege that any traveler has been deterred from traveling through Pennsylvania by Turnpike tolls, but instead points to comments by the Pennsylvania Auditor General to the effect that travelers may seek alternative, toll-free routes through the Commonwealth to avoid the payment of Turnpike tolls. (Doc. No. 1 ¶ 99.) Assuming the truth of those allegations, the Court concludes that they do not amount to facts supporting a reasonable inference that the constitutional right to travel has been burdened by the toll structure imposed by Act 44/89; rather, they support a reasonable inference that the right to travel a

particular route through Pennsylvania (i.e., the Turnpike) may at some point be deterred by the cost of Turnpike tolls. See Town of Southold, 477 F.3d at 54 (stating that a burden on the most convenient form of travel is not a burden on the constitutional right to travel); Miller, 176 F.3d at 1205 (stating that "burdens on a single mode of transportation do not implicate the right to interstate travel").

The Court is also unpersuaded by Plaintiffs' reliance on Crandall v. Nevada to support their right to travel claim because in that case, as noted above, the Supreme Court struck down a statute that levied a fee on every person leaving the state by way of a common carrier and articulated its concern that, if the levy were permitted, "[s]tates covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other." Crandall, 73 U.S. at 46. In contrast, Plaintiffs' complaint does not allege that the Turnpike is "the only practicable route[] of travel" through Pennsylvania. Moreover, based on subsequent case law, the Court finds that a narrow construction of Crandall is appropriate. See Lutz, 899 F.2d at 264-65 (noting that Crandall simply "recognized a right to travel insofar as travel is necessary for the transaction of business between the national government and its citizenry," and that the Supreme Court has declined to extend "Crandall into a generalized right of free movement throughout the United States"). The Court finds that the allegations in Plaintiffs' complaint fail to

support a reasonable inference that the constitutional right to travel is burdened by the toll structure of Act 44/89.[24] Accordingly, the Court will grant the Commonwealth and PTC Defendants' motions to dismiss Plaintiffs' constitutional right to travel claim.

IV. CONCLUSION

The Court has carefully reviewed Plaintiffs' complaint and the legal authority submitted in support of the complaint. Plaintiffs' complaint credibly alleges that Pennsylvania's policy decisions related to transportation have resulted in a statutory scheme that disproportionately burdens Turnpike travelers with the costs of a state-wide transportation system that is of no direct benefit to them. Evaluating Plaintiffs' well-articulated complaint applying established Supreme Court and Third Circuit precedent that limits the breadth of the constitutional claims asserted here, this Court is constrained to find that Plaintiffs' factual allegations do not support a claim for violations of the dormant Commerce Clause or the constitutional right

[24] Assuming Plaintiffs' complaint alleged a burden that implicated the constitutional right to travel, the Court is similarly unpersuaded by Plaintiffs' argument that Evansville/Northwest Airlines provides the appropriate test for evaluating any such burden. As noted by Defendants, that test preceded the Supreme Court's decision in Saenz v. Roe, which articulated the elements of a constitutional right to travel claim. See Ullmo v. Ohio Tpk. & Infrastructure Comm'n, 126 F. Supp. 3d 910, 918 n.4 (N.D. Ohio 2015) (rejecting the argument that "the test set forth in Northwest Airlines applies to [the] right to travel claim," and distinguishing Wallach's use of that test in that context on the basis that it "predates" the Supreme Court's decision in Saenz).

to travel. Accordingly, for all of the reasons stated herein, the Court will grant the PTC Defendants' and Commonwealth Defendants' motions to dismiss. In light of the Court's determination that Plaintiffs' complaint fails to state a claim upon which relief may be granted for violations of the dormant Commerce Clause or constitutional right to travel, the Court need not address the various immunity issues raised by individual defendants Shuey's and Lieberman's motions to dismiss, and, therefore, those motions will be denied as moot. Plaintiffs' motion for partial summary judgment will also be denied. An appropriate Order follows.

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

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al., Plaintiffs	:	**No. 1:18-cv-00608**
	:	**(Judge Kane)**
v.	:	
PENNSYLVANIA TURNPIKE COMMISSION, et al., Defendants	:	

ORDER

(Filed Apr. 4, 2019)

AND NOW, on this 4th day of April 2019, upon consideration of: (1) Defendant Craig R. Shuey's Motion to Dismiss (Doc. No. 49); (2) Defendants Tom Wolf, Governor of the Commonwealth of Pennsylvania, and Leslie S. Richards, Chair of the Pennsylvania Turnpike Commission and Secretary of the Pennsylvania Department of Transportation (collectively, the "Commonwealth Defendants")' Motion to Dismiss (Doc. No. 50); (3) the Pennsylvania Turnpike Commission (the "PTC"), William K. Lieberman, Vice Chair of the PTC, Barry T. Drew, Secretary Treasurer of the PTC, Pasquale T. Deon, Sr., Commissioner of the PTC, John N. Wozniak, Commissioner of the PTC, Mark P. Compton, Chief Executive Officer of the PTC, and Craig R. Shuey, Chief Operating Officer of the PTC (collectively, the "PTC Defendants")' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Doc. No.

52); (4) Defendant William K. Lieberman's Motion to Dismiss (Doc. No. 53); (5) Plaintiffs' Motion to Certify Class and Appoint Class Counsel (Doc. No. 73); and (6) Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 84), **IT IS ORDERED THAT**:

1. The Commonwealth Defendants' and PTC Defendants' Motions to Dismiss (Doc. Nos. 50 and 52), are **GRANTED**;

2. Defendants Shuey's and Lieberman's Motions to Dismiss (Doc. Nos. 49 and 53), are **DENIED AS MOOT**;

3. Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 84), is **DENIED**;

4. Plaintiffs' Motion to Certify Class and Appoint Class Counsel (Doc. No. 73), is **DENIED AS MOOT**; and

5. The Clerk of Court is directed to **CLOSE** this case.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1775

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.; NATIONAL MOTORIST ASSOCIATION; MARION L. SPRAY; B.L. REEVER TRANSPORT, INC.; FLAT ROCK TRANSPORTATION, LLC; MILLIGAN TRUCKING, INC.*; FRANK SCAVO; LAURENCE G. TARR,

Appellants

v.

PENNSYLVANIA TURNPIKE COMMISSION; LESLIE S. RICHARDS, in her individual capacity and her official capacities as Chair of the PTC and Secretary of the Department of Transportation; WILLIAM K. LIEBERMAN, in his individual capacity and his official capacity as Vice Chair of the PTC; BARRY T. DREW, in his individual capacity and his official capacity as Secretary-Treasurer of the PTC; PASQUALE T. DEON, SR., in his individual capacity and his official capacity as Commissioner of the PTC; JOHN N. WOZNIAK, in his individual capacity and his official capacity as Commissioner of the PTC; MARK P. COMPTON, in his individual capacity and his official capacity as Chief Executive Officer of the PTC; CRAIG R. SHUEY, in his individual capacity and his official capacity as Chief Operating Officer of the PTC; TOM WOLF, Governor of the Commonwealth of Pennsylvania, in his individual capacity and his official capacity as Governor

*(Amended as per the Clerk's 04/25/19 Order)

(D.C. No. 1-18-cv-00608)

SUR PETITION FOR REHEARING

(Filed Sep. 12, 2019)

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and *FUENTES, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: September 12, 2019
Lmr/cc: Melissa A. Chapaska
Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
Kathleen B. Havener
Kevin J. McKeon

* Hon. Julio M. Fuentes vote is limited to panel rehearing only.

Charles R. Stinson
Dennis Whitaker
Robert L. Byer
Leah A. Mintz
Lawrence H. Pockers
Brian J. Slipakoff
Arleigh P. Helfer, III
Bruce P. Merenstein
Alex M. Lacey
Robert M. Linn
Thomas M. Fisher
Miguel A. Estrada

Act 44*

GENERAL LOCAL GOVERNMENT CODE (53 PA.C.S.), TRANSPORTATION (74 PA.C.S.) AND VEHICLE CODE (75 PA.C.S.) – OMNIBUS AMENDMENTS

Act of Jul. 18, 2007, P.L. 169, No. 44 Cl. 53

Session of 2007
No. 2007-44

HB 1590

AN ACT

Amending Titles 53 (Municipalities Generally), 74 (Transportation) and 75 (Vehicles) of the Pennsylvania Consolidated Statutes, providing for minority and women-owned business participation; authorizing local taxation for public transportation assistance; repealing provisions relating to public transportation assistance; providing for transportation issues and for sustainable mobility options; consolidating the Turnpike Organization, Extension and Toll Road Conversion Act; providing for Turnpike Commission Standards of Conduct; in provisions on the Pennsylvania Turnpike, further providing for definitions, for authorizations and for conversion to toll roads and providing for conversion of Interstate 80, for application, for lease of Interstate 80, for payments, for other interstate highways, for fund distribution, for impact, for financial plan and for nonperformance; in taxes for highway maintenance and construction, providing for definitions; further providing for

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* A complete version of this document is available at: http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2007&s essInd=0&act=44#

imposition and for allocation of proceeds; providing for special revenue bonds, for expenses, for application of proceeds of obligations, for trust indenture, for exemption, for pledged revenues, for special revenue refunding bonds, for remedies, for Motor License Fund proceeds, for construction and for funding; and making related repeals.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 53 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 86
TAXATION FOR PUBLIC TRANSPORTATION

Sec.
8601. Scope of chapter.
8602. Local financial support.

§ 8601. Scope of chapter.

This chapter relates to local funding for sustainable mobility options.

§ 8602. Local financial support.

(a) Imposition. – Notwithstanding any other provision of law, a county of the second class may obtain financial support for transit systems by imposing one or more of the taxes under subsection (b). Money obtained from the imposition shall be deposited into a restricted account of the county.

(b) Taxes. –

(1) A county of the second class may, by ordinance, impose any of the following taxes:

(i) A tax on the sale at retail of liquor and malt and brewed beverages within the county. The ordinance shall be modeled on the act of June 10, 1971 (P.L.153, No.7), known as the First Class School District Liquor Sales Tax Act of 1971, and the rate of tax authorized under this subparagraph may not exceed the rate established under that act.

(ii) An excise tax on each renting of a rental vehicle in the county. The rate of tax authorized under this subparagraph may not exceed the rate established under section 2301(e) of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971. As used in this subparagraph, the term "rental vehicle" has the meaning given to it in section 1601-A of the Tax Reform Code of 1971.

(2) (Reserved).

(c) Definition. – For purposes of this section, the term "county of the second class" shall not include a county of the second class A.

Section 1.1. Title 74 is amended by adding a section to read:

§ 303. Minority and women-owned business participation.

(a) General rule. – In administering the provisions of this title, the department and any local transportation organization

* * *

(2) The act of June 25, 1982 (P.L.633, No.181), known as the Regulatory Review Act.

Section 4. Section 8901 of Title 75 is amended to read:

§ 8901. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"**Annual additional payments." As follows:**

(1) During the conversion period and after the conversion date, an amount equal to the scheduled annual commission contribution, minus the sum of:

(i) $200,000,000 paid as annual base payments;

(ii) any Interstate 80 savings for that fiscal year.

(2) If the conversion period has expired and a conversion notice has not been received by the secretary, in each subsequent fiscal year until the end of the term of the lease agreement, the annual additional payments shall be $250,000,000.

"Annual base payments." An amount equal to the sum of the following:

(1) Annual debt service on outstanding bonds issued under section 9511.2 (relating to special revenue bonds) payable as required pursuant to the bonds.

(2) Two hundred million dollars payable annually in four equal installments each due the last business day of each July, October, January and April.

"Annual surplus payments." An amount equal to the general reserve fund surplus payable for each fiscal year until the end of the term of the lease agreement.

"Auditor General's certificate." The certificate issued by the Auditor General within 180 days after the end of each fiscal year of the Pennsylvania Turnpike Commission certifying all of the following:

(1) The amount of the general reserve fund surplus for the fiscal year.

(2) After review of the commission's current ten-year capital plan, that the transfer of the general reserve fund surplus under section 8915.3 (relating to lease of Interstate

80; related agreements) shall not impair the ability of the commission to meet its obligations under the lease agreement or the commission's ten-year capital plan.

"Commission." The Pennsylvania Turnpike Commission.

"Conversion date." The date set forth in the conversion notice when the Pennsylvania Turnpike Commission intends to exercise its option to convert Interstate 80 to a toll road.

"Conversion notice." Written notice to the Secretary of Transportation from the Pennsylvania Turnpike Commission providing notice of its intent to exercise its options to convert Interstate 80 under section 8915.3(3) (relating to lease of Interstate 80; related agreements).

"Conversion period." A period of three years:

(1) which begins on the date of execution of the lease agreement; and

(2) during which the Pennsylvania Turnpike Commission may give the Department of Transportation conversion notice or notice that the commission has exercised its option to extend the conversion period pursuant to section 8915.3(2) (relating to lease of Interstate 80; related agreements).

"Fiscal year." The fiscal year of the Commonwealth.

"General reserve fund surplus." The amount which:

(1) is certified by the Auditor General in the Auditor General's certificate as existing in the Pennsylvania Turnpike Commission's general reserve fund on the last day of the fiscal year of the commission; and

(2) is not required to be retained in the general reserve fund pursuant to any financial documents, financial covenants, insurance policies, liquidity policies or agreements in effect at the commission.

"Interstate 80 savings." An amount equal to the following:

(1) Prior to the conversion date, the amount shall be zero.

(2) In the first fiscal year, including the conversion date, the amount shall be a pro rata share of $116,985,856 calculated using the number of calendar days in the year after the conversion date divided by 365 days.

(3) In the fiscal year succeeding the year, including the conversion date, the amount shall be $121,665,290.

(4) In subsequent fiscal years, the amount shall be the amount calculated for the previous year increased by 4%.

"Lease agreement." A lease agreement between the Department of Transportation and the Pennsylvania Turnpike Commission which shall include provisions setting forth

the terms of the conversion of Interstate 80 to a toll road.

"Scheduled annual commission contribution." The following amounts:

(1) $750,000,000 in fiscal year 2007-2008.

(2) $850,000,000 in fiscal year 2008-2009.

(3) $900,000,000 in fiscal year 2009-2010.

(4) For fiscal year 2010-2011 and each fiscal year thereafter, the amount shall be the amount calculated for the previous year increased by 2.5%, except that the amount shall be equal to the annual base payments plus $250,000,000 if the conversion notice is not received by the secretary prior to the expiration of the conversion period.

Section 5. Section 8911 introductory paragraph of Title 75 is amended and the section is amended by adding a paragraph to read:

§ 8911. Improvement and extension authorizations.

In order to facilitate vehicular traffic within and across this Commonwealth, the commission is hereby authorized and empowered to construct, operate and maintain turnpike extensions and turnpike improvements at such specific locations and according to such schedule as shall be deemed feasible and approved by the commission, together with connecting roads, storm water management systems, **interchanges, slip ramps,** tunnels and bridges, subject to the waiver of

the Federal toll prohibition provisions where applicable, as follows:

* * *

(10) Other slip ramps and interchanges as the commission may determine.

Section 6. Section 8915 introductory paragraph of Title 75 is amended to read:

§ 8915. Conversion to toll roads.

In order to facilitate vehicular traffic within and across this Commonwealth, and [after] **to facilitate the** completion of the turnpike extensions and improvements authorized in section 8911 (relating to improvement and extension authorizations), and subject to prior legislative approval by the General Assembly and the United States Congress, the commission is hereby authorized and empowered to convert to toll roads such portions of Pennsylvania's interstate highway system as may [be required in order to] facilitate the completion of the turnpike extensions and improvements authorized in sections 8912 (relating to subsequent extension authorizations), 8913 (relating to additional subsequent extension authorizations) and 8914 (relating to further subsequent authorizations) and to operate and maintain such converted interstates as toll roads upon the approval by the Congress of the United States of America and the General Assembly of this Commonwealth of legislation expressly permitting the conversion of such interstates to toll roads. Such conversions shall take place at a time and manner set forth in the plan for the

conversion prepared by the **commission with the cooperation of the** department. The provisions authorizing the commission to construct, operate and maintain the turnpike routes in sections 8911, 8912 and 8913 shall be subject to:

* * *

Section 7. Title 75 is amended by adding sections to read:

§ 8915.1. Conversion of Interstate 80.

In order to facilitate vehicular traffic across this Commonwealth, the commission is authorized and empowered to do all of the following:

(1) Convert Interstate 80 to a toll road and maintain and operate it as a toll road.

(2) Construct, reconstruct, widen, expand, extend, maintain and operate Interstate 80 from a point at or near the Ohio border to a point at or near the New Jersey border, together with connecting roads, interchanges, slip ramps, tunnels and bridges.

(3) Issue turnpike revenue bonds, notes or other obligations, payable solely from revenues of the commission, including tolls, or from funds as may be available to the commission for that purpose, to pay the cost of constructing, reconstructing, widening, expanding or extending Interstate 80 or any other costs of Interstate 80 and the Pennsylvania Turnpike.

(4) Provide quarterly reports and periodic updates regarding significant developments with respect to the conversion of Interstate 80 to the chairman and minority chairman of the Transportation Committee of the Senate and the chairman and minority chairman of the Transportation Committee of the House of Representatives. These reports shall include, at a minimum, the status of outstanding discussions with the United States Department of Transportation regarding Interstate 80, the location and construction of tolling-related equipment for Interstate 80, planned capital improvements for Interstate

* * *

(2) Except as set forth in paragraph (3), any difference in language between 74 Pa.C.S. Ch. 81 and the Turnpike Organization, Extension and Toll Road Conversion Act is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration and implementation of the Turnpike Organization, Extension and Toll Road Conversion Act.

(3) Paragraph (2) shall not apply to any of the following:

(i) In section 8102:

(A) Paragraphs (1), (6) and (7) of the definition of "cost of the turnpikes."

(B) Paragraph (2) of the definition of "turnpikes."

(C) The definitions of "auditor general's certificate," "cost of the department," "general reserve fund surplus," "public passenger transportation," "rural State highway system," "secretary," "State highway," and "system of public passenger transportation."

(ii) Section 8105(b) (2).

(iii) Section 8107(a)(9) and (10).

(iv) Section 8112(a)(1)(iii), (2) and (4), (b)(2) and (c)(1).

(v) Section 8113.

(vi) Section 8114(c) and (d).

(vii) Section 8116.

Section 11.1. This act shall apply retroactively to July 1, 2007.

Section 12. This act shall take effect immediately.

APPROVED – The 18th day of July, A. D. 2007.

EDWARD G. RENDELL

Act 89*

TRANSPORTATION (74 PA.C.S.) AND VEHICLE CODE (75 PA.C.S.) – OMNIBUS AMENDMENTS
Act of Nov. 25, 2013, P.L. 974, No. 89 Cl. 74
Session of 2013
No. 2013-89

HB 1060

AN ACT

Amending Titles 74 (Transportation) and 75 (Vehicles) of the Pennsylvania Consolidated Statutes by:

– In Title 74:

Providing for organization.

In administrative practice and procedure, further providing for minority and women-owned business participation.

In sustainable mobility options:

further providing for definitions, for department authorization, for the Public Transportation Trust Fund, for application and approval process, for executive and legislative reports, for coordination, for asset improvement program, for Statewide programs and for capital improvements program.

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* A complete version of this document is available at: http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2013&s essInd=0&act=89#

Providing for multimodal transportation funding.

In airport operation and zoning, providing for first class city consolidated car rental facilities.

In Turnpike:

further providing for commission; and providing for annual hearing.

In Turnpike Commission standards of conduct, further providing for code of conduct.

Providing for traffic signals.

Establishing the Bridge Bundling Program.

Providing for public utility facilities.

Providing for steel painting.

In Public-Private Transportation Partnerships, further providing for applicability of other laws.

– In Title 75:

In registration of vehicles:

further providing for period of registration, for display of registration plate and for certain special plates.

Providing for report to General Assembly.

In licensing of drivers, further providing for judicial review, for occupational limited license and for probationary license.

In commercial drivers, further providing for fees. In financial responsibility, further providing for required financial responsibility.

In fees:

further providing for limitation on local license fees and taxes, for collection and disposition of fees and money, for motor homes, for annual registration fees, for trucks and truck tractors, for motor buses and limousines, for school buses and school vehicles, for trailers, for special mobile equipment, for implements of husbandry, for farm vehicles, for ambulances, taxis and hearses, for dealers and miscellaneous motor vehicle business, for farm equipment vehicle dealers, for transfer of registration, for temporary and electronically issued registration plates, for replacement registration plates, for legislative registration plates, for personal registration plates, for street rod registration plates, for duplicate registration cards and for commercial implements of husbandry;

providing for fee for local use; and

further providing for special hauling permits as to weight and size, for annual hauling permits, for mobile homes, modular housing units and modular housing undercarriages, for books of permits, for refund of certain fees, for driver's license and learner's permit, for certificate of title, for security interest, for information concerning drivers and vehicles, for certified copies of records, for uncollectible checks, for certificate of inspection, for

messenger service, for reinstatement of operating privilege or vehicle registration and for secure power of attorney.

In motor carriers road tax identification markers:

further providing for identification markers and license or road tax registration card required.

In general provisions, further providing for obedience to traffic-control devices.

In rules of the road, further providing for maximum speed limits and for alteration of maximum limits.

In size, weight and load, further providing for restrictions on use of highways and bridges, for conditions of permits and security for damages and for permit for movement during course of manufacturing.

In powers of department and local authorities:

further providing for regulation of traffic on Turnpike; and

providing for fare evasion and for municipal police officer education and training.

In penalties and disposition of fines, further providing for surcharge.

In the Pennsylvania Turnpike, further providing for definitions and for deposit and distribution of funds.

In liquid fuels and fuels tax:

further providing for definitions, for imposition, exemptions and deductions, for distributor's report and payment, for disposition and use and for refunds; and

providing for application of Prevailing Wage Act to locally funded highway and bridge projects.

In State highway maintenance, further providing for dirt and gravel road maintenance.

In supplemental funding for municipal highway maintenance, making further provisions.

In taxes for highway maintenance and construction, further providing for imposition and for allocation of proceeds.

– Providing for permits for movement of raw milk.

– Providing for amendment of lease agreements.

– Providing for authorization to incur additional debt and appropriations.

– Making an appropriation.

– Making repeals.

The General Assembly finds and declares as follows:

(1) It is the purpose of this act to ensure that a safe and reliable system of transportation is available to the residents of this Commonwealth.

(2) The Commonwealth's transportation system includes nearly 40,000 miles of roads and 25,000 bridges owned by the Commonwealth, nearly 77,000 miles of roads and 12,000 bridges owned by counties and municipal governments, 36 fixed-route public transportation agencies, 67 railroads, 133 public-use airports, the Ports of Erie, Philadelphia and Pittsburgh and numerous bicycle and pedestrian facilities.

(3) The Commonwealth's transportation system provides for access to employment, educational services, medical care and other life-sustaining services for all residents of this Commonwealth, including senior citizens and people with disabilities.

(4) The Department of Transportation of the Commonwealth has indicated that 9,000 miles of roads owned by the Commonwealth are in poor condition and that 4,400 bridges owned by the Commonwealth are rated structurally deficient. The State Transportation Advisory Committee has indicated that 2,189 bridges exceeding 20 feet in length owned by counties and municipalities are rated structurally deficient.

(5) There is urgent public need to reduce congestion, increase capacity, improve safety and

promote economic efficiency of transportation facilities throughout this Commonwealth.

(6) The Commonwealth has limited resources to fund the maintenance and expansion of its transportation facilities.

(7) The State Transportation Advisory Committee reported in 2010 that the Commonwealth's transportation system is underfunded by $3,500,000,000 and projected that amount will grow to $6,700,000,000 by 2020 without additional financial investment by the Commonwealth.

(8) To ensure the needs of the public are adequately addressed, funding mechanisms must be enhanced to sustain the Commonwealth's transportation system in the future.

(9) The utilization of user fees establishes a funding source for transportation needs that spreads the costs across those who benefit from the Commonwealth's transportation system.

(10) Pursuant to section 11 of Article VIII of the Constitution of Pennsylvania, all highway and bridge user fees must be used solely for construction, reconstruction, maintenance and repair of and safety on public highways and bridges and costs and expenses incident thereto.

(11) In order to ensure a safe and reliable system of public transportation, aviation, ports, rail and bicycle and pedestrian facilities, other transportation-related user fees must be deposited in the Public Transportation Trust Fund and the Multimodal Transportation Fund.

(12) In furtherance of the Commonwealth's energy policy, which includes becoming independent from overreliance on foreign energy sources, programs must be established to promote reliance on or conversion to alternative energy sources, including the vast natural gas supply of this Commonwealth.

(13) The Department of Transportation is responsible for the operation of the Commonwealth's transportation system, including administration, driver and vehicle services, highway administration, multimodal transportation and planning. To this end, the department is charged with the registration of vehicles, including the issuance and proper mounting of license plates and special registration plates and assessing those costs and financial impact and ensuring road safety and movement by the posting of maximum speed limits on highways.

(14) Recognition and furtherance of all these elements is essential to promoting the health, safety and welfare of the citizens of this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 74 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 2
ORGANIZATION

Sec.

§ 201. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Department." The Department of Transportation of the Commonwealth.

"Secretary." The Secretary of Transportation of the Commonwealth.

§ 202. Deputy secretaries.

(a) Appointment. – The secretary shall appoint the following deputy secretaries:

(1) Deputy Secretary for Administration.

(2) Deputy Secretary for Driver and Vehicle Services.

(3) Deputy Secretary for Highway Administration.

(4) Deputy Secretary for Multimodal Transportation.

(5) Deputy Secretary for Planning.

(b) Administration. – The Deputy Secretary for Administration has the powers and duties of

the department under law relating to all of the following:

(1) Fiscal affairs.

(2) Operations analysis and improvement.

(3) Information services.

(4) Office services.

(5) Human resources.

(6) Equal opportunity.

(c) Driver and vehicle services. – The Deputy Secretary for Driver and Vehicle Services has the powers and duties of the department under law relating to all of the following:

(1) Drivers.

(2) Vehicles.

(3) Vehicle and driver safety.

(4) Services for other modes of transportation.

(d) Highway administration. – The Deputy Secretary for Highway Administration has the powers and duties of the department under law relating to all of the following:

(1) Design of highways and bridges.

(2) Land acquisition for highways and bridges.

(3) Construction and reconstruction of highways and bridges.

(4) Maintenance and operation of highways and bridges.

(5) Highway and bridge safety.

(e) Multimodal transportation. – The Deputy Secretary for Multimodal Transportation has the powers and duties of the department under law relating to modes of transportation other than highways, except recreational boating and ferry licensing, including all of the following:

(1) Local and public transportation.

(2) Rail freight.

* * *

(8) Upon conviction, in a city of the first class, of any violation of this title, a surcharge of $10.

(9) Upon conviction of any violation of this title in a city of the second class, a surcharge of $10.

The provisions of this subsection shall not apply to any violation committed by the operator of a motorcycle, motor-driven cycle, pedalcycle, motorized pedalcycle or recreational vehicle not intended for highway use.

(b) Disposition. –

(1) Notwithstanding any other statutory provision:

(i) All surcharges levied and collected under subsection (a)(1) by any division of the unified judicial system shall

be remitted to the Commonwealth for deposit in the General Fund.

(ii) All surcharges levied and collected under subsections (a)(2), (3), (4), (5), (6) and (7) by any division of the unified judicial system shall be remitted to the Commonwealth for deposit in the Public Transportation Trust Fund.

(iii) All surcharges levied and collected under subsection (a)(8) and (9) by any division of the unified judicial system shall be remitted to the appropriate towing and storage agent as set forth in section 6309.2(e) (relating to immobilization, towing and storage of vehicle for driving without operating privileges or registration) for purposes of funding its costs associated with Subchapter A of Chapter 63 (relating to general provisions).

(iv) If the fines, fees or penalties are being paid in installments, the surcharge shall be remitted on each installment on a pro rata basis.

(2) (Reserved).

Section 36. The definitions of "annual additional payments," "annual base payments" and "scheduled annual commission contribution" in section 8901 of Title 75 are amended to read:

§ 8901. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Annual additional payments." As follows:

(1) During the conversion period and after the conversion date, an amount equal to the scheduled annual commission contribution, minus the sum of:

(i) $200,000,000 paid as annual base payments;

(ii) any Interstate 80 savings for that fiscal year.

(2) If the conversion period has expired and a conversion notice has not been received by the secretary, in each subsequent fiscal year until the end of the term of the lease agreement, the annual additional payments shall be $250,000,000. **No annual additional payments shall be due after fiscal year 2021-2022.**

"Annual base payments." An amount equal to the sum of the following:

(1) Annual debt service on outstanding bonds issued under section 9511.2 (relating to special revenue bonds) payable as required pursuant to the bonds.

(2) Two hundred million dollars payable annually **through fiscal year 2021-2022** in four

equal installments each due the last business day of each July, October, January and April.

(3) For fiscal year 2022-2023 and each fiscal year thereafter, the amount shall be $50,000,000 payable annually from then-current revenue.

* * *

"Scheduled annual commission contribution." The following amounts:

(1) $750,000,000 in fiscal year 2007-2008.

(2) $850,000,000 in fiscal year 2008-2009.

(3) $900,000,000 in fiscal year 2009-2010.

(4) For fiscal year 2010-2011 [and each fiscal year thereafter] **through fiscal year 2021-2022,** the amount shall be the amount calculated for the previous year increased by 2.5%, except that the amount shall be equal to the annual base payments plus $250,000,000 if the conversion notice is not received by the secretary prior to the expiration of the conversion period. **For fiscal year 2014-2015 and each fiscal year thereafter through fiscal year 2021-2022, at least $30,000,000 of this amount shall be paid from then-current revenue.**

(5) For fiscal year 2022-2023 and each fiscal year thereafter, the amount shall be $50,000,000 payable annually from then-current revenue.

Section 37. Section 8915.6(a) of Title 75 is amended to read:

§ 8915.6. Deposit and distribution of funds.

* * *

1961.

(6) The amendment or addition of 75 Pa.C.S. §§ 1307(g), 1332(d) and 1911 shall take effect December 31, 2016.

(7) The addition of 75 Pa.C.S. § 1332(a.1) shall take effect in 90 days.

(8) The remainder of this act shall take effect in 60 days.

APPROVED – The 25th day of November, A.D. 2013.

TOM CORBETT

23 U.S.C.A. § 129 (Current)
§ 129. Toll roads, bridges, tunnels, and ferries

(a) Basic program. –

(1) Authorization for Federal participation. – Subject to the provisions of this section, Federal participation shall be permitted on the same basis and in the same manner as construction of toll-free highways is permitted under this chapter in the –

(A) initial construction of a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel;

(B) initial construction of 1 or more lanes or other improvements that increase capacity of a highway, bridge, or tunnel (other than a highway on the Interstate System) and conversion of that highway, bridge, or tunnel to a tolled facility, if the number of toll-free lanes, excluding auxiliary lanes, after the construction is not less than the number of toll-free lanes, excluding auxiliary lanes, before the construction;

(C) initial construction of 1 or more lanes or other improvements that increase the capacity of a highway, bridge, or tunnel on the Interstate System and conversion of that highway, bridge, or tunnel to a tolled facility, if the number of toll-free non-HOV lanes, excluding auxiliary lanes, after such construction is not less than the number of toll-free non-HOV lanes, excluding auxiliary lanes, before such construction;

(D) reconstruction, resurfacing, restoration, rehabilitation, or replacement of a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel;

(E) reconstruction or replacement of a toll-free bridge or tunnel and conversion of the bridge or tunnel to a toll facility;

(F) reconstruction of a toll-free Federal-aid highway (other than a highway on the Interstate System) and conversion of the highway to a toll facility;

(G) reconstruction, restoration, or rehabilitation of a highway on the Interstate System if the number of toll-free non-HOV lanes, excluding auxiliary lanes, after reconstruction, restoration, or rehabilitation is not less than the number of toll-free non-HOV lanes, excluding auxiliary lanes, before reconstruction, restoration, or rehabilitation;

(H) conversion of a high occupancy vehicle lane on a highway, bridge, or tunnel to a toll facility; and

(I) preliminary studies to determine the feasibility of a toll facility for which Federal participation is authorized under this paragraph.

(2) Ownership. – Each highway, bridge, tunnel, or approach to the highway, bridge, or tunnel constructed under this subsection shall –

(A) be publicly owned; or

(B) be privately owned if the public authority with jurisdiction over the highway, bridge,

tunnel, or approach has entered into a contract with 1 or more private persons to design, finance, construct, and operate the facility and the public authority will be responsible for complying with all applicable requirements of this title with respect to the facility.

(3) Limitations on use of revenues. –

(A) In general. – A public authority with jurisdiction over a toll facility shall ensure that all toll revenues received from operation of the toll facility are used only for –

(i) debt service with respect to the projects on or for which the tolls are authorized, including funding of reasonable reserves and debt service on refinancing;

(ii) a reasonable return on investment of any private person financing the project, as determined by the State or interstate compact of States concerned;

(iii) any costs necessary for the improvement and proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation;

(iv) if the toll facility is subject to a public-private partnership agreement, payments that the party holding the right to toll revenues owes to the other party under the public-private partnership agreement; and

(v) if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under this title.

(B) Annual audit. –

(i) In general. – A public authority with jurisdiction over a toll facility shall conduct or have an independent auditor conduct an annual audit of toll facility records to verify adequate maintenance and compliance with subparagraph (A), and report the results of the audits to the Secretary.

(ii) Records. – On reasonable notice, the public authority shall make all records of the public authority pertaining to the toll facility available for audit by the Secretary.

(C) Noncompliance. – If the Secretary concludes that a public authority has not complied with the limitations on the use of revenues described in subparagraph (A), the Secretary may require the public authority to discontinue collecting tolls until an agreement with the Secretary is reached to achieve compliance with the limitation on the use of revenues described in subparagraph (A).

(4) Special rule for funding. –

(A) In general. – In the case of a toll facility under the jurisdiction of a public authority of a State (other than the State transportation

department), on request of the State transportation department and subject to such terms and conditions as the department and public authority may agree, the Secretary, working through the State department of transportation, shall reimburse the public authority for the Federal share of the costs of construction of the project carried out on the toll facility under this subsection in the same manner and to the same extent as the department would be reimbursed if the project was being carried out by the department.

(B) Source. – The reimbursement of funds under this paragraph shall be from sums apportioned to the State under this chapter and available for obligations on projects on the Federal-aid highways in the State on which the project is being carried out.

(5) Limitation on Federal share. – The Federal share payable for a project described in paragraph (1) shall be a percentage determined by the State, but not to exceed 80 percent.

(6) Modifications. – If a public authority (including a State transportation department) with jurisdiction over a toll facility subject to an agreement under this section or section 119(e), as in effect on the day before the effective date of title I of the Intermodal Surface Transportation Efficiency Act of **1991 (105 Stat. 1915)**, requests modification of the agreement, the Secretary shall modify the agreement to allow the continuation of tolls in accordance with paragraph (3) without repayment of Federal funds.

(7) Loans. –

(A) In general. –

(i) Loans. – Using amounts made available under this title, a State may loan to a public or private entity constructing or proposing to construct under this section a toll facility or non-toll facility with a dedicated revenue source an amount equal to all or part of the Federal share of the cost of the project if the project has a revenue source specifically dedicated to the project.

(ii) Dedicated revenue sources. – Dedicated revenue sources for non-toll facilities include excise taxes, sales taxes, motor vehicle use fees, tax on real property, tax increment financing, and such other dedicated revenue sources as the Secretary determines appropriate.

(B) Compliance with Federal laws. – As a condition of receiving a loan under this paragraph, the public or private entity that receives the loan shall ensure that the project will be carried out in accordance with this title and any other applicable Federal law, including any applicable provision of a Federal environmental law.

(C) Subordination of debt. – The amount of any loan received for a project under this paragraph may be subordinated to any other debt financing for the project.

(D) Obligation of funds loaned. – Funds loaned under this paragraph may only be obligated for projects under this paragraph.

(E) Repayment. – The repayment of a loan made under this paragraph shall commence not later than 5 years after date on which the facility that is the subject of the loan is open to traffic.

(F) Term of loan. – The term of a loan made under this paragraph shall not exceed 30 years from the date on which the loan funds are obligated.

(G) Interest. – A loan made under this paragraph shall bear interest at or below market interest rates, as determined by the State, to make the project that is the subject of the loan feasible.

(H) Reuse of funds. – Amounts repaid to a State from a loan made under this paragraph may be obligated –

(i) for any purpose for which the loan funds were available under this title; and

(ii) for the purchase of insurance or for use as a capital reserve for other forms of credit enhancement for project debt in order to improve credit market access or to lower interest rates for projects eligible for assistance under this title.

(I) Guidelines. – The Secretary shall establish procedures and guidelines for making loans under this paragraph.

(8) State law permitting tolling. – If a State does not have a highway, bridge, or tunnel toll facility as of the date of enactment of the MAP-21, before commencing any activity authorized under this section, the State shall have in effect a law that permits tolling on a highway, bridge, or tunnel.

(9) Equal access for over-the-road buses. – An over-the-road bus that serves the public shall be provided access to a toll facility under the same rates, terms, and conditions as public transportation buses.

(10) Definitions. – In this subsection, the following definitions apply:

(A) High occupancy vehicle; HOV. – The term "high occupancy vehicle" or "HOV" means a vehicle with not fewer than 2 occupants.

(B) Initial construction. –

(i) In general. – The term "initial construction" means the construction of a highway, bridge, tunnel, or other facility at any time before it is open to traffic.

(ii) Exclusions. – The term "initial construction" does not include any improvement to a highway, bridge, tunnel, or other facility after it is open to traffic.

(C) Over-the-road bus. – The term "over-the-road bus" has the meaning given the term in section 301 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181).

(D) Public authority. – The term "public authority" means a State, interstate compact of States, or public entity designated by a State.

(E) Toll facility. – The term "toll facility" means a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under this subsection.

(b) Notwithstanding the provisions of section 301 of this title, the Secretary may permit Federal participation under this title in the construction of a project constituting an approach to a ferry, whether toll or free, the route of which is a public road and has not been designated as a route on the Interstate System. Such ferry may be either publicly or privately owned and operated, but the operating authority and the amount of fares charged for passage shall be under the control of a State agency or official, and all revenues derived from publicly owned or operated ferries shall be applied to payment of the cost of construction or acquisition thereof, including debt service, and to actual and necessary costs of operation, maintenance, repair, and replacement.

(c) Notwithstanding section 301 of this title, the Secretary may permit Federal participation under this title in the construction of ferry boats and ferry terminal facilities, whether toll or free, subject to the following conditions:

(1) It is not feasible to build a bridge, tunnel, combination thereof, or other normal highway structure in lieu of the use of such ferry.

(2) The operation of the ferry shall be on a route classified as a public road within the State and which has not been designated as a route on the Interstate System or on a public transit ferry eligible under chapter 53 of title 49. Projects under this subsection may be eligible for both ferry boats carrying cars and passengers and ferry boats carrying passengers only.

(3)(A) The ferry boat or ferry terminal facility shall be publicly owned or operated or majority publicly owned if the Secretary determines with respect to a majority publicly owned ferry or ferry terminal facility that such ferry boat or ferry terminal facility provides substantial public benefits.

(B) Any Federal participation shall not involve the construction or purchase, for private ownership, of a ferry boat, ferry terminal facility, or other eligible project under this section.

(4) The operating authority and the amount of fares charged for passage on such ferry shall be under the control of the State or other public entity, and all revenues derived therefrom shall be applied to actual and necessary costs of operation, maintenance, repair, debt service, negotiated management fees, and, in the case of a privately operated toll ferry, for a reasonable rate of return.

(5) Such ferry may be operated only within the State (including the islands which comprise the State of Hawaii and the islands which comprise any territory of the United States) or between adjoining States or between a point in a State and a point in the Dominion of Canada. Except with respect to operations between the islands which

comprise the State of Hawaii, operations between the islands which comprise any territory of the United States, operations between a point in a State and a point in the Dominion of Canada, and operations between any two points in Alaska and between Alaska and Washington, including stops at appropriate points in the Dominion of Canada, no part of such ferry operation shall be in any foreign or international waters.

(6) The ferry service shall be maintained in accordance with section 116.

(7)(A) No ferry boat or ferry terminal with Federal participation under this title may be sold, leased, or otherwise disposed of, except in accordance with part 200 of title 2, Code of Federal Regulations.

(B) The Federal share of any proceeds from a disposition referred to in subparagraph (A) shall be used for eligible purposes under this title.

U.S. Code § 301.Freedom from tolls

Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds.

United States Constitution
Article I, Section 8, Clause 3
(Commerce Clause)

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

United States Constitution
Article IV, Section 2, Clause 1
(Privileges and Immunities)

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution
Amendment XIV, Section 1
(Due Process)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Excerpt from Intermodal Surface
Transportation Act of 1991
(PL 102-240, 105 Stat 1914 (1991))
Codified at 23 U.S.C. § 129

SEC. 1012. TOLL ROADS, BRIDGES, AND TUNNELS.

<< 23 USCA § 129 >>

(a) NEW PROGRAM.—Section 129(a) of title 23, United States Code, is amended to read as follows:

"(a) BASIC PROGRAM.—

"(1) AUTHORIZATION FOR FEDERAL PARTICIPATION.—Notwithstanding section 301 of this title and subject to the provisions of this section, the Secretary shall permit Federal participation in—

"(A) initial construction of a toll highway, bridge, or tunnel (other than a highway, bridge, or tunnel on the Interstate System) or approach thereto;

"(B) reconstructing, resurfacing, restoring, and rehabilitating a toll highway, bridge, or tunnel (including a toll highway, bridge, or tunnel subject to an agreement entered into under this section or section 119(e) as in effect on the day before the date of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991) or approach thereto;

"(C) reconstruction or replacement of a toll-free bridge or tunnel and conversion of the bridge or tunnel to a toll facility;

"(D) reconstruction of a toll-free Federal-aid highway (other than a highway on the Interstate System) and conversion of the highway to a toll facility; and

"(E) preliminary studies to determine the feasibility of a toll facility for which Federal participation is authorized under subparagraph (A), (B), (C), or (D);

on the same basis and in the same manner as in the construction of free highways under this chapter.

"(2) OWNERSHIP.—Each highway, bridge, tunnel, or approach thereto constructed under this subsection must—

"(A) be publicly owned, or

"(B) be privately owned if the public authority having jurisdiction over the highway, bridge, tunnel, or approach has entered into a contract with a private person or persons to design, finance, construct, and operate the facility and the public authority will be responsible for complying with all applicable requirements of this title with respect to the facility.

"(3) LIMITATIONS ON USE OF REVENUES.—Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department) having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any

private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the tolled facility is being adequately maintained, the State may use any toll revenues in excess of amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title.

"(4) SPECIAL RULE FOR FUNDING.—In the case of a toll highway, bridge, or tunnel under the jurisdiction of a public authority of a State (other than the State transportation department), upon request of the State transportation department and subject to such terms and conditions as such department and public authority may agree, the Secretary shall reimburse such public authority for the Federal share of the costs of construction of the project carried out on the toll facility under this subsection in the same manner and to the same extent as such department would be reimbursed if such project was being carried out by such department. The reimbursement of funds under this paragraph shall be from sums apportioned to the State under this chapter and available for obligations on projects on the Federal-aid system in such State on which the project is being carried out.

"(5) LIMITATION ON FEDERAL SHARE.—Except as otherwise provided in this paragraph, the Federal share payable for construction of a highway, bridge, tunnel, or approach thereto or conversion of a highway, bridge, or tunnel to a toll facility under this subsection

shall be such percentage as the State determines but not to exceed 50 percent. The Federal share payable for construction of a new bridge, tunnel, or approach thereto or for reconstruction or replacement of a bridge, tunnel, or approach thereto shall be such percentage as the Secretary determines but not to exceed 80 percent. In the case of a toll facility subject to an agreement under section 119 or 129, the Federal share payable on any project for resurfacing, restoring, rehabilitating, or reconstructing such facility shall be 80 percent until the scheduled expiration of such agreement (as in effect on the day before the date of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991).

"(6) MODIFICATIONS.—If a public authority (including a State transportation department) having jurisdiction over a toll highway, bridge, or tunnel subject to an agreement under this section or section 119(e), as in effect on the day before the effective date of title I of the Intermodal Surface Transportation Efficiency Act of 1991, requests modification of such agreement, the Secretary shall modify such agreement to allow the continuation of tolls in accordance with paragraph (3) without repayment of Federal funds.

"(7) LOANS.—A State may loan all or part of the Federal share of a toll project under this section to a public or private agency constructing a toll facility. Such loan may be made only after all Federal environmental requirements have been complied with and permits obtained. The amount loaned shall be subordinated to other debt financing for the facility except for loans

made by the State or any other public agency to the agency constructing the facility. Funds loaned pursuant to this section may be obligated for projects eligible under this section. The repayment of any such loan shall commence not more than 5 years after the facility has opened to traffic. Any such loan shall bear interest at the average rate the State's pooled investment fund earned in the 52 weeks preceding the start of repayment. The term of any such loan shall not exceed 30 years from the time the loan was obligated. Amounts repaid to a State from any loan made under this section may be obligated for any purpose for which the loaned funds were available. The Secretary shall establish procedures and guidelines for making such loans.

"(8) INITIAL CONSTRUCTION DEFINED.—For purposes of this subsection, the term 'initial construction' means the construction of a highway, bridge, or tunnel at any time before it is open to traffic and does not include any improvement to a highway, bridge, or tunnel after it is open to traffic.".