No. 20-1445

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

ERIC HOLCOMB, individually and in his capacity as Governor of the State of Indiana, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 19-00086-RLY-MJD
The Honorable Richard L. Young

APPELLANTS' PETITION FOR REHEARING OR FOR REHEARING *EN BANC*

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March 23, 2021

RULE 26.1 DISCLOSURE STATEMENT

Plaintiffs-Appellants Owner-Operator Independent Drivers Association, Inc.; Chutka Trucking, LLC; Mark Elrod d/b/a M R Elrod; B.L Reever Transport, Inc.; David Jungeblut; and Willie W. Kaminski are represented by The Cullen Law Firm, PLLC and Hoover Hull Turner LLP, which also represented Plaintiffs-Appellants in the district court proceedings below. No Plaintiffs-Appellants have parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

/s/ Paul D. Cullen, Sr.
Paul D. Cullen, Sr.

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/s/ Kathleen B. Havener
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/s/ Charles R. Stinson
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/s/ Gregory R. Reed
Gregory R. Reed

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/s/ Michael R. Limrick
Michael R. Limrick

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/s/ Riley H. Floyd
Riley H. Floyd

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RULE 35(b) STATEMENT

In 2018, Defendant-Appellant ITR Concession Company, LLC ("ITRCC") raised—by 35%—the tolls heavy trucks must pay to travel across Indiana's section of I-90 connecting Ohio and Illinois (the Indiana Toll Road, or "Toll Road"). ITRCC, a private entity that leases the Toll Road from the Indiana Finance Authority ("IFA"), a state entity, paid IFA $1 billion for the authority to increase truck tolls on the Toll Road. The other Defendants used the money to fund various projects unrelated to the Toll Road as part of Governor Holcomb's "Next Level Connections" program. According to Governor Holcomb, the intent was to "captur[e] other people's money." ECF 87 ¶¶ 88-124, J.App. 015-019.

Plaintiffs-Appellants ("Plaintiffs") sued ITRCC, IFA, and several state officials (collectively, "Defendants") alleging that the truck tolls violated the dormant Commerce Clause because they imposed an undue burden on and discriminated against interstate commerce. ECF 87 ¶¶ 4, 143, 149, J.App. 003, 025-026. The district court granted Defendants' Rule 12(b)(6) motion based solely on its determination that the defendants were acting as a market participant in imposing highway tolls, and, therefore, the tolls are exempt from Commerce Clause limits. ECF 132, 133. The panel (Easterbrook, J., Rovner, J., and Wood, J.) affirmed the dismissal.

Plaintiffs respectfully request, pursuant to Fed. R. App. P. 35 and 40, rehearing or rehearing *en banc* of this Court's decision of March 9, 2021 ("Opinion"), on grounds that

the Opinion conflicts with Supreme Court precedent, the precedent of at least two other Circuit Courts, and this Court's own rulings; and that the appeal presents questions of exceptional importance:

1. This proceeding involves a question of exceptional importance because, in holding that the state imposition of highway tolls is "market participation" exempt from dormant Commerce Clause scrutiny, the Opinion directly conflicts with authoritative decisions of the United States Courts of Appeals for the Second and Ninth Circuits. Both courts have clearly held that the state provision of channels of interstate commerce is the performance of a core governmental function subject to dormant Commerce Clause limitations. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 93-94 (2d Cir. 2009); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056-58 (9th Cir. 1987); *W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984), *aff'd*, 471 U.S. 81 (1987) (per curium); *see also City of Portland v. United States*, 969 F.3d 1020, 1045-46 (9th Cir. 2020); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881 (9th Cir. 2006).

2. The Opinion's determination that the absence of express discrimination disposes of dormant Commerce Clause challenges directly conflicts with the Supreme Court's test for evaluating the constitutionality of user fees and other nondiscriminatory state conduct. *See Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating burdensome nondiscriminatory state

regulation). This Court and other Circuit Courts routinely examine nondiscriminatory state conduct under *Evansville* and the Supreme Court's other Commerce Clause standards.

3. The Opinion involves another question of extreme importance: Does the Constitution limit the authority of states to impose burdensome and discriminatory user fees on channels of interstate commerce? The Opinion invites the imposition of beggar-thy-neighbor tolling policies across a national network of interconnected thoroughfares of interstate commerce. It was in part to end such state practices that the Constitution was written and its dormant Commerce Clause limitation recognized. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) ("[R]emoving state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods."). The Opinion establishes an expansive construction of the market participation exception that swallows the dormant Commerce Clause's prohibition against States discriminating against and imposing unreasonable burdens on interstate commerce.

ARGUMENT

I. The Opinion conflicts with decisions of the Second and Ninth Circuits in holding that operating a toll road is proprietary "market participation" free from Commerce Clause scrutiny.

The panel held that Defendants are acting as proprietors in the operation and maintenance of the Toll Road and, "like any private proprietor, [Defendants] can turn a profit from [their] activities." Op. at 4. So "[w]hy should it matter" that Defendants charged at least $1 billion in excessive truck-only tolls "for state purposes unrelated to maintenance of the Toll Road"? *Id.* According to both the Second and Ninth Circuits, it matters because providing channels of interstate commerce, including by using state-owned land, is governmental, not proprietary, conduct subject to Commerce Clause scrutiny. Under the "market participant" exception, when a state acts solely as a private party in a particular marketplace, the dormant Commerce Clause does not restrict its conduct. But when a state acts like a government, wielding authority not available to private market participants, the Commerce Clause applies. *E.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980).

The Second Circuit explicitly rejects the panel's application of the market participant exception to highway tolling.[1] In *Selevan*, the court addressed a discount

[1] During oral argument, Defendants' counsel, responding to Judge Wood's recognition of the Second Circuit conflict, characterized the split as "shallow and longstanding." OA Audio at 23:57-24:48. Whether that was true then—Plaintiffs argued that *Endsley*'s market

tolling scheme adopted by the New York State Thruway Authority ("NYTA"). 584 F.3d at 87. Like Appellees, NYTA relied on this Court's decision in *Endsley* to argue that the plaintiffs failed to state a claim under the dormant Commerce Clause because the operation and maintenance of public bridges, including tolling, fell under the market participant exception. *Id.* at 91, 93-94 (citing *Endsley*, 230 F.3d at 283-85).

The Second Circuit disagreed. Reliance on *Endsley* "for the proposition that a state *may* 'act[] in a proprietary capacity as an entrant into the local highway transportation market'" was "misplaced." *Id.* at 94 (quoting appellees' brief). While the court recognized that there may be a market of private entities competing for government contracts, there was no evidence that NYTA "competes with other entities that are also seeking to build and maintain highway systems." *Id.* at 93. The Second Circuit also considered several other indicia that NYTA was not "acting like a private business": (1) the authorizing statute describing the NYTA's as "performing a governmental function"; (2) the ability to use or possess state property; and (3) the ability to use eminent domain. *Id.* at 93-94.

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participant analysis was dicta (as noted by the Second Circuit in *Selevan*, 584 F.3d at 94)—the Opinion's holding put the split into high relief.

In *Endsley v. City of Chicago*, this Court decided the market participant question based on allegations critical to their antitrust claims—that Chicago operated in a proprietary capacity in managing the Skyway. 230 F.3d 276, 282-84 (2000). By contrast, Plaintiffs here alleged myriad facts—any one of which precludes Defendants' market participant defense—that demonstrate that Defendants' operation of the Toll Road is governmental conduct. The panel, therefore, was not bound by *Endsley* here, and the panel did not state that it was or that it relied on it. Regardless, the Opinion follows *Endsley*'s dicta and confirms the split with the Second Circuit.

The same factors exist here and were alleged by Plaintiffs, Appellants' Brief at 14-23, and consideration of this distinctly governmental conduct and exercise of exclusively government authority is required to be consistent with Supreme Court precedent. *Accord Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641, 649-51 (2013) (recognizing that certain conduct is uniquely governmental regardless of its use turn a profit); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592-94 (1997) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988) (recognizing that some conduct is uniquely governmental even it is used to incentivize social services).

Likewise, in *Shell Oil Co.*, the Ninth Circuit rejected a market participant defense of franchise fees for easements on "lands held in a sovereign capacity that are recognized transportation corridors for commerce" because "restrictions on publicly controlled transportation corridors raise the dormant commerce clause concern for impediments to the free flow of commerce." 830 F.2d at 1057. Santa Monica's argument that the market participant exception applied because it competed "with other entities that also might supply Shell's [transportation] needs"—including private landowners and other municipalities—would allow states to "allocate rights to the use of publicly held transportation corridors in a manner that discriminated against interstate commerce." *Id.* (noting that Shell conceded the existence of alternatives other than under city streets); *see also City of Portland*, 969 F.3d at 1045. The same consequence for interstate commerce the Ninth Circuit found "untenable" is constitutional under the Opinion. *Cf.* Op. at 4

(asserting that truck drivers could simply use other routes). Whether a private party can provide a farm or residential subdivision road—Op. at 4—is irrelevant. Providing a 157-mile cross-state toll road is uniquely governmental conduct of constitutional significance.

The Opinion's market participant holding, permitting uniquely governmental conduct to proceed free from constitutional limits, is squarely at odds with the Second Circuit and conflicts with the Ninth Circuit's rejection of the market participant exception to recognized transportation corridors. These conflicts created by the Opinion are ripe for *en banc* review.

II. The Opinion contradicts the Supreme Court's standard for measuring the constitutionality of user fees recognized by other Circuit Courts and prior decisions of this Court.

The panel's decision also drastically reshaped the dormant Commerce Clause. First, the panel's decision discarded *Evansville*, the Supreme Court's test for measuring user fees—including highway tolls—under the Commerce Clause. Second, the Opinion disposed of the undue burden prong of the Court's Commerce Clause framework. In so holding, the panel strayed from the Supreme Court, this Court, and other Circuit Courts, which recognize that *Evansville* applies to user fee challenges and that the dormant Commerce Clause limits nondiscriminatory burdens on interstate commerce.

A. This Court and other Circuit Courts consistently recognize that the Supreme Court's *Evansville* standard applies to Commerce Clause user fees challenges.

The Supreme Court has clearly established a specific standard to measure the constitutionality of burdens when a government imposes user fees. *See Northwest Airlines*, 510 U.S. at 368-69 (citing *Evansville*, 405 U.S. at 716-17). Relying on prior highway toll cases, the *Evansville* Court held that the standard for Commerce Clause challenges to excessive user fees is whether "the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred." *Id.* at 716-17.

The Court has repeatedly reaffirmed this standard, most recently in *Northwest Airlines*. There, the Court analyzed whether airline fees violated a federal statute or the dormant Commerce Clause. The Court applied *Evansville* to assess both claims: "a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines*, 510 U.S. at 369, 373-74; *see also Ore. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 103 n.6 (1994); *Massachusetts v. United States*, 435 U.S. 444, 464 (1978). It is clear that the *Evansville* standard, not *Pike*, applies to Commerce Clause challenges to user fees.

This Court too, in *Endsley*, noted that *Evansville* applies to a Commerce Clause challenge to the excessiveness of user fees like highway tolls. *See* 230 F.3d at 284 (quoting

Northwest Airlines, 510 U.S. at 369). Likewise, the Second Circuit in *Selevan* analyzed the various Supreme Court dormant Commerce Clause standards and determined that *Evansville* applies to highway toll challenges. 584 F.3d at 98.

Other Circuit Courts have also held that *Evansville* applies to a variety of user fees. *See Doran v. Mass. Tpk. Auth.*, 348 F.3d 315, 320-21 (1st Cir. 2003) (applying *Evansville* to toll claims); *Ctr. for Auto Safety Inc. v. Athey*, 37 F.3d 139, 142-43 (4th Cir. 1994) (recognizing *Evansville* applies to user fees); *Enter. Leasing Co. of Detroit v. County of Wayne*, 191 F.3d 451, 1999 WL 777678, at *2 (6th Cir. Sept. 14, 1999) (applying *Evansville* to airport user fees); *Western Oil*, 726 F.2d at 1344 (applying *Evansville* to fees for use of state land); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516, 518-19 (11th Cir. 1990) (applying *Evansville* to airport user fee).

The Opinion, however, does away with the *Evansville* standard—in particular, its undue burden prongs—because it "precedes the first market-participant case."[2] But the Court's 1972 *Pike* decision also precedes the Court's first market participant case, and the panel suggested that it was still bound by *Pike*. Op. at 6. Moreover, *Northwest Airlines*

[2] The Opinion also asserts that *Evansville* "does not say that the validity of the fee depended on how the money was used." Op. at 4. This belies the *Evansville* analysis and standard. Under *Evansville*, a fee must not exceed the benefit conferred to the fee payer or the payer's use of the tolled facility. 405 U.S. at 716-17. This imbalance provides the basis for Appellants' claims: The truck tolls exceed a fair approximation of truckers' use of the Toll Road and the benefits conferred on truck users. *E.g.*, ECF 87 ¶¶ 88-124, 142-44, J.App. 015-019, 025.

(1994), which expressly affirms *Evansville*, postdates *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), which first recognized the market participant exception.

Neither *Pike* nor *Evansville/Northwest Airlines* has been overruled. Both continue to have a place in undue burden challenges. The Opinion declined to apply *Pike* for lack of Supreme Court guidance in a "state-as-proprietor situation." Op. at 6. But *Pike* is irrelevant. The Supreme Court has spoken to that situation: *Evansville* applies to user fees like highway tolls. The panel's rejection of *Evansville*, as well as its statements confining the dormant Commerce Clause to only discrimination cases, demonstrate that the Opinion rejected the Commerce Clause's undue burden protections altogether.

B. The panel's decision removes an entire category of dormant Commerce Clause jurisprudence by restricting its application to only discriminatory state conduct.

"Modern [dormant Commerce Clause] precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-91 (2018). The panel's decision rejected the undue burden prong of this framework. Following that framework and applying the dormant Commerce Clause only to discriminatory state activities would all but eliminate Commerce Clause challenges to nondiscriminatory burdensome state conduct.

The Opinion premised its contradicting multiple decisions of the Supreme Court, this Court, and the other Circuit Courts primarily on the length of time since the Supreme Court has invalidated a nondiscriminatory state law. *See* Op. at 6 ("But it has been a long time since the Court used *Pike*'s approach to deem any state law invalid . . . . The prevailing approach has been to sustain neutral state laws while finding invalid those that discriminate against interstate commerce."). The Supreme Court's reaffirmation of the undue burden framework in *Wayfair* (2018) demonstrates that it does not consider the passage of time to have undone its bedrock Commerce Clause precedent.

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

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

Consistent with this undue burden analysis, the Court has developed different tests to measure whether various categories of state activities impose undue burdens beyond Commerce Clause limits. The distinctions between these tests are not arbitrary;

they reflect that states can and do impact interstate commerce through specific exercises of their sovereign authority.

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

Thus, for 50 years, the Supreme Court has recognized that burdensome nondiscriminatory state activity can run afoul of the dormant Commerce Clause and has developed specifically-tailored tests to measure such burdens.

2. Prior decisions of this Court and other Circuit Courts follow Supreme Court precedent acknowledging that the dormant Commerce Clause prohibits nondiscriminatory undue burdens on interstate commerce.

This Court on multiple occasions has acknowledged the straightforward principle that the dormant Commerce Clause applies to facially neutral laws that impose undue

burdens on interstate commerce. *See, e.g.*, *Endsley*, 230 F.3d at 284 ("[T]he dormant Commerce Clause is invoked to scrutinize state regulations that burden interstate commerce . . . .")[3]; *see also DeHart v. Town of Austin*, 39 F.3d 718, 723 (7th Cir. 1994) (quoting *Pike* and evaluating whether nondiscriminatory municipal regulations impose an unconstitutional burden on interstate commerce).

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

In short, the dormant Commerce Clause constrains states' imposition of undue burdens on interstate commerce.

[3] And the *Endsley* panel quoted *Northwest Airline*'s formulation of the *Evansville* standard for measuring user fees against the dormant Commerce Clause. *Endsley*, 230 F.3d at 284.

3. The Opinion eliminates the constitutional restriction against states' imposing undue burdens on interstate commerce.

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

Even if the "prevailing approach" has been to affirm neutral state activities and invalidate discriminatory laws, the Supreme Court has not overruled the multiple *standards* it has established and repeatedly reaffirmed—namely *Pike*, *Evansville*, or *Complete Auto*—that require an analysis of the burden imposed by neutral state conduct. *See Wayfair*, 138 S. Ct. at 2091. It is for the Supreme Court to alter standards used to evaluate dormant Commerce Clause challenges. It has not.

III. The Opinion invites governments, and future courts, to sanction unduly burdensome and discriminatory conduct in providing the very infrastructure necessary for interstate commerce.

The Opinion is more than just a departure from Supreme Court precedent and decisions of other Circuit Courts. It is a decision that threatens to upend the flow of interstate commerce. The Seventh Circuit is the first circuit to categorically insulate government-imposed user fees from Commerce Clause limits. Even Defendants did not

advocate that all toll roads are subject to the market participant exception, OA Audio at 21:47-22:24, 23:50-23:56 ("Our contention is more modest. It is that toll roads can be market activity not that they always need to be."), but the Opinion is not so limited. Wisconsin, Illinois, and Indiana are no longer limited in the toll amounts they can charge or prohibited from imposing expressly discriminatory tolls that target out-of-state residents and businesses. *See* Op. at 5 ("We have said enough to show that the toll increase is valid even if treated as discriminating against interstate commerce.").

According to the panel decision, when a government charges for access to government-owned land it is "like any private proprietor" and is free to "turn a profit." Op. at 4. And the Opinion invites governments, and future courts, to apply a newly-expansive market participant exception to other "frequently used avenues of transportation" such as "oil and gas pipelines," "electrical distribution grids," "canals," "airports," "bridges," "ferries," "ports and harbors," and "railroads" all because these too can be privately run. Op. at 4.

While courts have grappled with the "precise contours of the market-participant doctrine," *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality opinion), the Supreme Court has been clear that market participation is a narrow exception to dormant Commerce Clause limits. *See, e.g., id.* at 96 ("[T]he doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon

someone with whom it is in contractual privity."); *Camps Newfound*, 520 U.S. at 594 (emphasizing the narrowness of the market participant exception in *Alexandria Scrap* and *Reeves* in rejecting a "radical effort to expand the market-participant doctrine"). But the Opinion authorizes states to do what the dormant Commerce Clause generally prohibits: unduly burden or discriminate against interstate commerce. The Seventh Circuit should not wait until Indiana's effort to capture "other people's money" on the "Main Street of the Midwest" inspires more beggar-thy-neighbor tolling policies before it reviews the practical consequences of the panel decision.

CONCLUSION

For the reasons set forth above, Plaintiffs request that the Court grant their petition for rehearing or rehearing *en banc*.

Respectfully submitted,

/s/ Paul D. Cullen, Sr.

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March 23, 2021

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and 40(b)(1) in that the brief contains 3,829 words excluding those parts exempted by Fed. R. App. P. 32(f).

The undersigned hereby certifies that this petition complies with Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionately spaced 12-point Palatino Linotype typeface using Microsoft Word for Microsoft 365 MSO.

Dated: March 23, 2021

/s/ Paul D. Cullen, Sr.
Paul D. Cullen, Sr.
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2021, an electronic copy of the foregoing *Petition for Rehearing and Rehearing* En Banc was electronically filed and served on all parties of record via the Court's CM/ECF system.

Dated: March 23, 2021

/s/ Paul D. Cullen, Sr.
Paul D. Cullen, Sr.
Attorney for Appellants