No. 03-1230

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The State of Michigan imposes upon all motor carriers a $100 annual fee for each vehicle that operates at least in part in intrastate transportation (*i.e.*, that performs at least one point-to-point haul within the State). Mich. Comp. Laws Ann. § 478.2(1) (West 2002). The question presented is as follows:

Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

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INTEREST OF THE UNITED STATES

At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. "The negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (citations, brackets, and internal quotation marks omitted). In *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), this Court struck down two "flat" taxes imposed by Pennsylvania as preconditions to the use of the

State's roads by commercial motor vehicles—a "marker fee" and an "axle tax," neither of which varied in amount depending on the number of miles that a particular vehicle traveled within the State. See *id.* at 273-274. The Court offered two bases for its invalidation of the taxes.

First, the Court found that the challenged flat taxes discriminated against out-of-state businesses. The Court relied in part on record evidence showing that, "[o]n the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." 483 U.S. at 276. The Court concluded that, "[a]lthough out-of-state carriers obtain a privilege to use Pennsylvania's highways that is nominally equivalent to that which local carriers receive, imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause." *Id.* at 296; see *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 198 (1995) (explaining that the taxes at issue in *Scheiner* were held to discriminate against interstate travel "by imposing a cost per mile upon out-of-state trucks far exceeding the cost per mile borne by local trucks that generally traveled more miles on Pennsylvania roads").

The Court in *Scheiner* also held (483 U.S. at 284-285) that the challenged flat taxes violated the "internal consistency" prong of the "fair apportionment" requirement that the Court has applied to state taxes levied on interstate commercial activity. See, *e.g.*, *Jefferson Lines*, 514 U.S. at 185 ("Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear."). The *Scheiner* Court ex-

plained that, "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284. *Scheiner*'s discussion of internal consistency was closely linked to its determination that the Pennsylvania flat taxes discriminated against out-of-state carriers. See *id.* at 285-286. The Court's reference to the possible cumulative impacts of multiple flat taxes, however, suggests the related but distinct concern that a proliferation of such taxes would impose increasing burdens on vehicles operating in a large number of States, thus impeding the ability of interstate carriers to engage in unfettered "travel within the free trade area" established by the Commerce Clause. *Id.* at 284; see *id.* at 285 nn.19 & 20.

2. The instant case presents a constitutional challenge to Mich. Comp. Laws Ann. (MCL) § 478.2(1) (West 2002), which imposes "an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of" a licensed motor carrier. On its face, Section 478.2(1) does not make the applicability of the fee dependent on the nature of the routes that a particular vehicle travels. It is undisputed, however, that the State assesses the fee only upon vehicles that engage at least in part in "intrastate" operations—*i.e.*, vehicles that make at least one delivery between two points within the State of Michigan. See J.A. 22-23; Pet. Br. 2. Relying substantially on this Court's decision in *Scheiner*, petitioners contend that, because MCL § 478.2(1) imposes a "flat" $100 annual fee for intrastate operations, without regard to the mileage a particular vehicle travels within the State, the provision violates the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3.[1]

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[1] Petitioners contend (Br. 3) that "a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by hauling a load between two

3. The Michigan Court of Claims upheld MCL § 478.2(1) against petitioners' Commerce Clause challenge. Pet. App. 42a-45a. The court noted that "the flat taxes in *Scheiner* applied across the board to any vehicle traveling the state's highways, whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service." *Id.* at 44a. The court further observed that the state interest served by the fee—*i.e.*, "ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with [the State's] safety and fitness norms"—"does not have a prejudicial effect on interstate commerce." *Ibid.* In its subsequent denial of reconsideration, the court stated that the "per-vehicle intrastate decal fee of $100 did not violate the dormant Commerce Clause since it could not impermissibly discriminate against interstate motor carriers where the fee is based purely on Michigan boundaries having no economic relevance for interstate traffic." *Id.* at 59a.

4. The Michigan Court of Appeals affirmed. J.A. 68-102. In holding that the fee imposed by MCL § 478.2(1) does not violate the Commerce Clause (J.A. 98-102), the court found that the challenged provision regulates licensed motor carri-

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points in the State[,] * * * is obligated to pay the full $100 Michigan tax." Petitioners further assert (Br. 3-4) that "[t]he only way for the interstate truck to avoid payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan." Those statements are incorrect. The Michigan Public Service Commission (MPSC) is authorized to issue the trucking equivalent of a pro hac vice admission—*viz.* "a temporary 72-hour permit for the operation of a vehicle subject to rules and conditions of the [MPSC] at a fee of $10.00, which is in place of any other fee otherwise required." MCL § 478.2(3); see J.A. 63 (respondents' affiant states that, under Section 478.2(3), "[w]hen an intrastate business opportunity arises, a motor carrier can obtain a $10.00 temporary permit"). The record appears to contain no evidence regarding the precise mechanism for obtaining a temporary permit or the manner in which Section 478.2(3) is administered.

ers evenhandedly and does not discriminate against interstate commerce. J.A. 99-101. The court declined to apply the four-part test articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), and subsequently applied in *Scheiner*.[2] The court stated that "this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, not regulatory statutes." J.A. 99 n.15 (citation omitted). The court's characterization of MCL § 478.2(1) as a "regulatory" fee was apparently based on the facts that (a) the fee, once collected, is used to support enforcement of the State's Motor Carrier Act, and (b) the aggregate amount of fees collected from motor carriers is roughly proportional to the cost of administering the State's regulatory program. See J.A. 83, 93-95.

With respect to the practical impact of the challenged fee, the Michigan Court of Appeals observed that petitioners had "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." J.A. 101. Applying the test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), to evaluate state statutes that regulate evenhandedly to effectuate a legitimate local public interest, the court concluded that, "[o]n the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on

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[2] Under the framework described in *Complete Auto Transit*, this Court "ha[s] sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause." J.A. 102.[3]

5. The Michigan Supreme Court denied petitioners' application for leave to appeal. Pet. App. 61a-63a.

SUMMARY OF ARGUMENT

A. This Court has long recognized the authority of States and municipalities to require payment of flat fees by commercial motor carriers that make point-to-point deliveries within the local jurisdiction. Contrary to petitioners' contention, the jurisprudential principles on which those holdings rest have not been superseded by more recent Commerce Clause decisions.

B. Although a fee imposed for permission to conduct point-to-point hauls within a State might in theory have an indirect impact upon a carrier's *interstate* operations, petitioners have offered no evidence that MCL § 478.2(1) has actually produced such consequences. This Court has identified certain events (most notably the sale of goods or services) that, even when performed in connection with interstate commerce, are sufficiently discrete and separate from

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[3] Under MCL § 478.2(2), the State also imposes "an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in [Michigan] and operating entirely in interstate commerce." In the courts below, that provision was the subject of a separate challenge brought by plaintiffs who contended that the fee is preempted by 49 U.S.C. 14504, which establishes a Single State Registration System (SSRS) for trucks operating in interstate commerce and imposes a $10-per-vehicle limit on the fee that a State may charge in connection with the SSRS program. The Michigan Court of Appeals held that Section 478.2(2) is not preempted by federal law, see J.A. 73-87, and this Court has granted certiorari to review the question. See *Mid-Con Freight Sys., Inc.* v. *Michigan Pub. Serv. Comm'n*, No. 03-1234 (Jan. 14, 2005). The brief for the United States as amicus curiae in *Mid-Con* argues that MCL § 478.2(2) is preempted by 49 U.S.C. 14504 and that the state court's judgment in the case should be reversed. See note 7, *infra*.

the interstate activity as to be fully taxable by the State in which they occur. The conduct of point-to-point transportation within a State is properly regarded as one such event. That conclusion is reinforced by the history of state regulation of intrastate shipping and by 49 U.S.C. 13501, which defines the regulatory jurisdiction of the Secretary of Transportation and the Surface Transportation Board in a way that *excludes* such intrastate motor carriage.

C. Acceptance of petitioners' constitutional theory would cast serious doubt upon a wide range of occupational licensing fees, since States and localities routinely charge flat fees for a privilege that is inherently more valuable to a full-time operator than to one who proposes to engage in the relevant business in many jurisdictions during the course of a year. In its so-called "peddler" cases, this Court has repeatedly sustained such licensing requirements against Commerce Clause attack. The instant suit, which concerns a fee for point-to-point carriage within the State of Michigan, rather than a barrier to solicitation of interstate business, is more closely analogous to those "peddler" cases than to the "drummer" cases, such as *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), on which petitioners rely.

D. This Court's decision in *Scheiner* does not require invalidation of the fee imposed by MCL § 478.2(1). Unlike the fees at issue in *Scheiner*, payment of which was a legal prerequisite to the conduct within Pennsylvania of *interstate commerce* using the covered motor vehicles, MCL § 478.2(1) applies only to vehicles used for point-to-point hauls within Michigan. Neither record evidence nor abstract logic establishes that Section 478.2(1) will impose disproportionate burdens upon interstate operators as a class. The prospect that some individual carriers might be deterred from undertaking point-to-point hauls within the State by reason of the evenhanded $100 fee is not, standing alone, a sufficient basis for declaring the law unconstitutional.

ARGUMENT

Relying primarily on this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), petitioners contend that the $100-per-vehicle annual fee imposed by MCL § 478.2(1) violates the Commerce Clause. In arguing that MCL § 478.2(1) shares the same constitutional defects as the flat fees that were struck down in *Scheiner*, petitioners contend (i) that Section 478.2(1) discriminates against interstate commerce because trucks engaged primarily in interstate deliveries are charged the same fee as vehicles engaged wholly in intrastate commerce but are likely to make fewer point-to-point hauls within Michigan during the course of a year, and (ii) that the imposition of similar charges by other States would place substantial cumulative burdens on trucks that make point-to-point hauls in many jurisdictions. See, *e.g.*, Pet. Br. 13.[4]

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[4] This Court's decisions identify two distinct senses in which a state law may be said to discriminate against interstate commerce. First, and most obviously, "States are barred from discriminating against foreign enterprises competing with local businesses." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995); see *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) (The term "discrimination" refers in this context to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). Second, the Court has held that a State impermissibly "discriminates against interstate commerce" when it "distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market," even when each of the entities involved is based in the same State. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997). Petitioners principally allege the second form of discrimination. The primary thrust of their argument is not that MCL § 478.2(1) discriminates against companies headquartered (or vehicles license-plated) outside the State of Michigan, but that it favors companies and vehicles that do a wholly intrastate business over those that also operate interstate, and places particularly severe burdens on companies and vehicles that operate in a large number of States. See, *e.g.*,

For the reasons that follow, petitioners' constitutional claim lacks merit. This Court has repeatedly sustained against Commerce Clause challenge state and local requirements, including flat licensing fees, imposed on persons engaged in intrastate carriage or other local business. Because MCL § 478.2(1) applies only to commercial trucks that make point-to-point hauls within the State of Michigan, its effect on interstate commerce is considerably more indirect and attenuated than was the case in *Scheiner*, where payment of the challenged assessments was a legal prerequisite to *any* use of Pennsylvania roads by the covered motor vehicles.[5]

A. This Court Has Upheld The Authority Of States And Localities To Impose Flat Licensing Fees For Permission To Carry Goods Or Passengers Between Points Within The Local Jurisdiction

1. This Court has previously sustained, against Commerce Clause challenge, state and local exactions not mean-

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Pet. Br. 2 (arguing that the fee imposed by MCL § 478.2(1) "necessarily applies at a much lower effective rate to trucks that confine their operations to Michigan than it does to otherwise identical vehicles that operate interstate").

[5] Although the Michigan Court of Appeals' ultimate disposition of this case was correct, one aspect of its analysis was flawed. In distinguishing this case from *Scheiner*, the court relied in part on MCL § 478.2(1)'s purported status as a "regulatory statute[]." J.A. 99 n.15. That characterization of the challenged law appears to have been based on the State's use of the collected fees to enforce Michigan's Motor Carrier Act, and on the rough correspondence between the aggregate amount of fees collected from motor carriers and the cost of administering the State's regulatory program. See J.A. 83, 93-95. Nothing in *Scheiner* suggests, however, that the propriety of a state fee or tax that would otherwise fall within the scope of that decision turns on the use to which the money is put after the fee has been collected. To the contrary, the Court in *Scheiner* noted that the flat taxes at issue were used by the State for highway-related purposes, see 483 U.S. at 270-271, yet it nevertheless held the taxes unconstitutional.

ingfully different from the fee imposed by MCL § 478.2(1). In *Osborne* v. *Florida*, 164 U.S. 650 (1897), the Court addressed a factual setting strikingly similar to the circumstances of this case. The Florida statute at issue in *Osborne* imposed a yearly license tax on "all express companies doing business in this State." *Id.* at 653. Despite the facial applicability of the tax to companies engaged solely in interstate deliveries, the Florida Supreme Court had authoritatively construed the law to apply solely to business "'local' in its character," and had held that "so long as [an] express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question." *Id.* at 654.

This Court held that the Florida statute, so construed, "does not in any manner violate the Federal Constitution." 164 U.S. at 654. The Court explained that, "[s]o long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute." *Id.* at 655. The Court distinguished prior cases in which state licensing fees on out-of-state express companies had been declared invalid, explaining that those laws "prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax," and thereby burdened the companies' interstate operations. *Ibid.*; see, *e.g.*, *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953); *Allen* v. *Pullman's Palace Car Co.*, 191 U.S. 171, 181-183 (1903); *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903).

The Court drew the same distinction in *Sprout* v. *City of South Bend*, 277 U.S. 163 (1928), though in that case the challenged assessment was held to be invalid. *Sprout* involved a $50 annual license fee imposed by South Bend, Indiana, upon the operator of a bus that carried passengers between South Bend and Niles, Michigan. *Id.* at 166-167. In

considering whether the license fee could be sustained as an "occupation tax," the Court explained:

> A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. And it may delegate a part of that power to a municipality. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

Id. at 170-171.

Because the state supreme court had construed the challenged ordinance as applicable "to busses engaged exclusively in interstate commerce," this Court held the fee to be invalid. 277 U.S. at 171. The Court's description of a permissible "occupation tax," however, unquestionably encompasses the fee imposed by MCL § 478.2(1). As construed by Michigan authorities, Section 478.2(1) applies only to vehicles that undertake point-to-point hauls within the State; the $100-per-vehicle fee that it imposes does not increase in amount by virtue of a carrier's parallel interstate operations; a carrier operating solely in interstate commerce would not be assessed the fee; and a carrier remains free under Michigan law to forgo point-to-point hauls within the State while continuing to use Michigan roads for interstate transportation.

2. Petitioners do not expressly take issue with the validity of MCL § 478.2(1) under *Osborne* or the reasoning of *Sprout*. Rather, they contend that prior decisions of this Court sustaining "flat" fees on intrastate motor carriers

rested on a since-rejected formalist mode of analysis under which "state taxation of 'local' or intrastate activities was wholly unconstrained by the Commerce Clause, while interstate commerce 'itself' was absolutely immune from state taxation." Pet. Br. 32; see *id.* at 31-38. The Court's decision in *Sprout* belies that assertion. The Court in *Sprout* recognized that a State or municipality "may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways." 277 U.S. at 170 (citations omitted). In holding that the fee imposed by South Bend on interstate carriers could not be sustained on that basis, the Court explained that "[a] flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." *Ibid.*

Thus, in analyzing the Commerce Clause issue posed by a municipality's imposition of a licensing fee upon a motor carrier's *interstate* operations, the Court in *Sprout* did not rely upon a purported absolute rule that interstate commerce is immune from state and local taxation. Rather, the Court held the challenged fee invalid as applied to such operations because the amount of the assessment was not reasonably calibrated to the individual carrier's use of city highways. That mode of analysis is fully consistent with present-day Commerce Clause jurisprudence, and particularly with this Court's decision in *Scheiner*. See pp. 1-3, *supra*; pp. 22-26 & note 13, *infra*. The *Sprout* Court's recognition that a flat licensing fee *may* be imposed for the right to perform point-to-point carriage within the local jurisdiction, and may be collected from carriers who also undertake interstate opera-

tions, therefore cannot be dismissed as the relic of a bygone constitutional era.[6]

B. The Carriage Of Goods Between Points Within The State Of Michigan May Properly Be Treated As A Distinctly Local Activity

As petitioners observe (Br. 9), the fact that MCL § 478.2(1) regulates "intrastate" conduct cannot be dispositive of the Commerce Clause question, since "[v]irtually all interstate activities can be broken down into component parts that take place entirely within one state." The axle tax and marker fee at issue in *Scheiner*, for example, were held to be invalid even though the specific conduct that triggered the assessments (use by commercial motor vehicles of Pennsylvania roads) occurred wholly within the taxing State. See Pet. Br. 33-34. But while the situs of the relevant activity is not by itself decisive, the carriage of goods between two points in Michigan has a much more distinctly local character than does the within-Michigan *segment* of an interstate journey or delivery.

1. In construing the Commerce Clause to impose an independent constitutional check on state taxation, this Court has invoked the Clause's "purpose of preventing a State from retreating into economic isolation or jeopardizing the

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[6] In any event, this Court has pointed out that even where its prior decisions on a particular dormant Commerce Clause issue applied an analysis that has since been disapproved, it does not follow that the prior cases were wrongly decided. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 614-617 & n.7 (1981). Thus, the fact that this Court's decisions may no longer regard state taxation of a wholly intrastate activity as entirely beyond Commerce Clause scrutiny does not mean that it is irrelevant for purposes of the tax's validity—*e.g.*, under the *Complete Auto* test described in note 2, *supra*—that the transaction or other event that is the incidence of the tax occurs wholly within a single State. See 453 U.S. at 617, 618-619, 623; *Jefferson Lines*, 514 U.S. at 184, 186-188, 190-191, 196, 199, 200.

welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995). As applied by Michigan authorities, MCL § 478.2(1) presents no heightened danger of such "economic Balkanization." *Jefferson Lines*, 514 U.S. at 180 (quoting *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986)). To the contrary, far from "plac[ing] burdens on the flow of commerce across [Michigan's] borders that commerce wholly within those borders would not bear," *ibid.*, Section 478.2(1) applies *only* to commercial motor vehicles that make point-to-point hauls within the State.[7]

This is not to say that fees imposed for the right to perform intrastate motor carriage will never affect interstate commerce or implicate the concerns that underlie the Court's Commerce Clause jurisprudence. At least in theory, the profitability of a particular interstate delivery could depend on the carrier's ability to supplement the income generated by the interstate shipment itself with additional money earned through intrastate point-to-point hauls during the course of the trip. Cf. J.A. 101 (petitioners' affiant explains that "mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in

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[7] A separate provision of Michigan law, MCL § 478.2(2), imposes a $100 annual fee on each motor vehicle that is "registered" (*i.e.*, license-plated) in Michigan and "operating entirely in interstate commerce." See note 3, *supra*. In our amicus brief in *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Commission*, No. 03-1234, the United States argues that the fee imposed by Section 478.2(2) is preempted by 49 U.S.C. 14504. In any event, MCL § 478.2(2) applies only to Michigan-plated vehicles. Vehicles that are license-plated in other States, as petitioners' trucks apparently are (see Pet. Br. 36 n.16), can make unlimited use of Michigan's roads in interstate commerce without being assessed a fee under MCL § 478.2(1) *or* (2).

between interstate hauls"). A state assessment that deterred carriers from undertaking intrastate hauls therefore could ultimately act as an impediment to some interstate deliveries as well, by causing such deliveries to be unremunerative. That potential effect on interstate commerce, however, is much more indirect and attenuated than when payment of a flat fee is a *legal* prerequisite to use of a State's roads even for *interstate* transit and deliveries. At least in the absence of record evidence concerning the actual impact of MCL § 478.2(1) on interstate carriage, the theoretical possibility of such effects is an insufficient basis for declaring the statute unconstitutional.[8]

2. In applying the "prohibition of multiple taxation" imposed upon the States by the Commerce Clause, see *Jefferson Lines*, 514 U.S. at 184, this Court has identified certain conduct that, even when performed in connection with interstate commerce, is sufficiently discrete and separate from the interstate activity as to be fully taxable by the State in which it occurs. Most notably, the Court has "consistently

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[8] As the Michigan Court of Appeals pointed out, "it is a matter of pure speculation" whether interstate motor carriers have actually altered their operations as a result of MCL § 478.2(1). J.A. 101. In the courts below, petitioners "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." *Ibid.* The Michigan Court of Appeals did not suggest that fees imposed for the right to conduct point-to-point transportation within a State are immune from Commerce Clause scrutiny. Rather, it stated only that, "[o]n the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." J.A. 102. Affirmance of the state court's judgment would not preclude a future constitutional challenge, based on proof of actual and substantial impairment of interstate commerce, to similar (or substantially larger) fees on intrastate carriage, especially fees not subject to any safety-valve or waiver for one-time loads along the lines allowed by Michigan, see note 1, *supra*.

approved taxation of sales without any division of the tax base among different states, and ha[s] instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Id.* at 186. That rule reflects the Court's determination that "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Ibid.*; see *id.* at 188 ("[T]he taxable event of the consummated sale of goods has been found to be properly treated as unique."). The sales price is fully subject to state taxation "even when the parties to a sales contract specifically contemplated interstate movement of the goods either before, or after, the transfer of ownership." *Id.* at 187.

The transportation of goods wholly within Michigan should similarly be regarded as a discrete event unique to that State, even when it is performed in conjunction with an interstate shipment (as when carriers "top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls," J.A. 101). Such an intrastate delivery is a distinct and independently significant commercial transaction having its locus wholly within Michigan. The fact that a particular intrastate cargo is carried on the same truck that transports *other* goods in interstate commerce is likely to be irrelevant to the shipper, if the shipper is aware of the fact at all. An intrastate shipment is for these purposes quite different from the use of Michigan's roads during one *segment* of an interstate delivery, since that nexus to the interstate transaction will (by definition) be shared with at least one other State.

3. Congress's delineation of the scope of federal regulatory jurisdiction over commercial motor carriage confirms the distinctly local character of point-to-point hauls within a single State. Under 49 U.S.C. 13501, the Secretary of Transportation and the Surface Transportation Board have juris-

diction over transportation of goods or passengers by motor carrier "between a place in * * * a State and a place in another State," or "between a place in * * * a State and another place in the same State through another State." 49 U.S.C. 13501(1)(A) and (B). The fact that the Secretary and the Board lack jurisdiction over purely intrastate motor carriage, which was traditionally subject to state regulation, see, *e.g.*, Act of Aug. 9, 1935, ch. 498, § 202(c), 49 Stat. 543 (49 U.S.C. 302(b) (1976)), reinforces the conclusion that Michigan may permissibly treat the oversight of such activities within its borders as a matter of particular state concern. Cf. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 304-305, 309-310 (1997) (in holding that Ohio's differential treatment of natural gas sales by public utilities and independent marketers did not violate the Commerce Clause, Court relied in part on Congress's longstanding recognition of state regulatory authority to create and preserve local utility monopolies).

Prior to 1995, federal law left the States free to engage in comprehensive economic regulation of intrastate carriage of goods by motor carriers, and many States did so. See H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 86 (1994). Under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, however, States and localities now are generally barred from enacting or enforcing laws "related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1); see *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429-430 (2002). State *economic* regulation of commercial motor carriage is thus preempted by statute, even insofar as such regulation pertains to point-to-point hauls within a single State. States remain free, however, to regulate such matters as safety and insurance with respect to intrastate operations. See 49 U.S.C. 14501(c)(2)(A). In light of the substantial role that States continue to possess in this area, and the absence of federal

regulatory jurisdiction over carriage of goods or passengers wholly within a single State, treatment of such carriage as a separate sphere of legitimate state concern under the Commerce Clause is consistent with the applicable statutory framework enacted by Congress in the exercise of its power over interstate commerce.

C. Acceptance Of Petitioners' Constitutional Argument Would Cast Doubt Upon Numerous Licensing Fees Imposed By States And Localities As A Condition Of Engaging In Particular Occupations Within The Relevant Jurisdiction

1. Petitioners' constitutional argument rests on the closely related propositions that (a) MCL § 478.2(1) is discriminatory because interstate trucks are charged the same fee as intrastate vehicles but are likely to make fewer point-to-point hauls in Michigan during the course of the year, and (b) if other States imposed similar charges, a truck used to make point-to-point hauls within many States during the course of a year would be subject to substantial cumulative fees. See, *e.g.*, Pet. Br. 13. Very similar arguments could be made, however, with respect to a wide range of "flat" fees charged for engaging in particular occupations within the charging State or locality. A bar admission fee, for example, confers a privilege that is more valuable to a lawyer who practices exclusively within one State than to an attorney who divides his time between several States.[9]

Examination of the D.C. Code reveals many analogous examples. See, *e.g.*, D.C. Code Ann. § 47-2808(a) (2001) ("Auc-

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[9] The disparate impact of "flat" bar admission fees is often ameliorated by the opportunity to obtain leave to appear pro hac vice, with the fee charged for such appearances set at a fraction of the standard yearly bar dues. Michigan provides a comparable opportunity to truckers by offering a 72-hour operating permit, for a fee of $10, as an alternative to payment of the full $100 annual fee. MCL § 478.2(3); see note 1, *supra*.

tioneers shall pay a license fee of $222 per annum."); *id.* § 47-2827 (schedule of licensing fees for purveyors of different varieties of food); *id.* § 47-2834(a) (varying licensing fees for persons who sell food or other goods from locations on the public streets or from door to door, or who engage in street photography or shining shoes); *id.* § 47-2836(a) ($28 annual licensing fee for any person who acts, for hire, as a guide or escort); § 47-2839(a) ($158 annual licensing fee for private detectives). Under petitioners' theory, each of those fees is at least arguably unconstitutional as applied to persons who wish to engage in a covered occupation in more than one State during the course of the year. Such persons could truthfully assert that (a) they are required to pay the same amount as is a full-time D.C. operator for a privilege that is inherently less valuable to the itinerant, and (b) the imposition of similar fees by other States and/or municipalities would create an economic disincentive to interstate travel for the purpose of performing the services for which a license is required.

Petitioners might plausibly seek to distinguish such assessments on the ground that flat fees will likely have a greater *practical* impact on an inherently mobile enterprise like trucking than on, *e.g.*, private detectives, many of whom will operate out of fixed locations regardless of a particular State's licensing rules. It is scarcely farfetched, however, to suppose that an auctioneer, or a guide, or a sidewalk vendor, or a street photographer would move from State to State during the course of a year to take advantage of seasonal opportunities. In any event, to the extent that the disposition of petitioners' constitutional challenge turns on the likely practical effects of MCL § 478.2(1) (and hypothetical similar provisions enacted by other States), rather than on a purported structural objection to flat fees generally,

petitioners' failure to introduce evidence of those effects is a serious weakness in their argument. See note 8, *supra*.[10]

2. In its so-called "peddler" cases, this Court has repeatedly sustained, against Commerce Clause challenge, nondiscriminatory state licensing requirements (including flat fees) imposed as a condition of engaging in local business, even when the licensees were also engaged in interstate commerce. See, *e.g.*, *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 539-542 (1969); *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276, 278-284 (1961); *Caskey Baking Co.* v. *Virginia*, 313 U.S. 117, 119-121 (1941); *Wagner* v. *City of Covington*, 251 U.S. 95, 100-104 (1919). The Court in *Wagner* explained:

> We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other States. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a State

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[10] The logic of petitioners' argument might also suggest that States and localities have a constitutional obligation to prorate an applicable licensing fee when a new resident seeks to engage in the relevant occupation for only a portion of the period covered by the license. Under the Privileges and Immunities Clause of the Fourteenth Amendment, a State is ordinarily prohibited from discriminating among its citizens based on length of residence within the State. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 502-504 (1999). A person who relocates in a particular State on September 1, however, and is required to pay a fixed annual fee for the right to engage in a particular trade or business during the calendar year, can be expected to derive less benefit from the fee than one who resides in the State throughout the year. If that sort of foreseeable practical disparity is regarded as a form of illicit discrimination in the Commerce Clause setting, there is no evident reason that a different rule should apply under the Privileges and Immunities Clause.

> with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the State, and does not conflict with the 'commerce clause.'

Id. at 102.

In upholding those licensing schemes, the Court expressly distinguished state regulation of "peddlers" from the "drummer" cases in which state restrictions on solicitation, as applied to solicitation of interstate business, had been declared unconstitutional. See, *e.g.*, *Wagner*, 251 U.S. at 103 ("The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized."). The Court in *Wagner* explained that "in all the 'drummer cases' the fact has appeared that there was no selling from a stock of goods carried for the purpose, but only a solicitation of sales, with or without the exhibition of samples; the goods sold to be thereafter transported from without the State." *Ibid.*[11] The fee at issue in this case, which is triggered by

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[11] *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), on which petitioners heavily rely (*e.g.*, Br. 17, 19, 30, 37-38), was a "drummer" case involving local solicitation on behalf of an out-of-state company. See 327 U.S. at 419 n.3, 420; see also *West Point Wholesale Grocery Co.* v. *City of Opelika*, 354 U.S. 390, 391 (1957) (summarizing *Nippert* as holding that "a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce"). In *Eli Lilly*, decided after *Nippert*, the Court reaffirmed that, "[u]nder the authority of the so-called 'drummer' cases, * * * Lilly is free to send salesmen into New Jersey to promote [its] interstate trade without interference from regulations imposed by the State. On the other hand, it is equally well settled that if

point-to-point carriage within the State of Michigan, is plainly more analogous to the state regulations involved in the "peddler" cases than to the solicitation restrictions that were struck down in the "drummer" cases.

D. Because The Fee At Issue In This Case Is Imposed Only On Trucks That Conduct Point-To-Point Hauls Within The State Of Michigan, This Court's Decision In *Scheiner* Is Not Controlling

The principal thrust of petitioners' argument is that the fee imposed by MCL § 478.2(1) is constitutionally indistinguishable from the assessments struck down in *Scheiner* (see pp. 1-3, *supra*), and that the ruling in that case effectively supersedes prior decisions of this Court upholding flat fees imposed by States and localities for the right to conduct intrastate carriage. That claim lacks merit.

1. Under the Pennsylvania laws at issue in *Scheiner*, motor vehicles within specified categories were required to pay the marker fee and/or the axle tax in order to make *any* use of the State's roads. See 483 U.S. at 273-274. Payment of the fees was thus a *legal prerequisite* to the conduct within the State of *interstate commerce* using the covered motor vehicles. See *id.* at 284 (noting that the "inevitable effect" of the challenged flat fees was "to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania"). The fees were imposed, moreover, even upon trucks that used Pennsylvania's roads only in the

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Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business." 366 U.S. at 278-279; see *id.* at 287-288 (Harlan, J., concurring) (rejecting the contention that the decision in *Eli Lilly* was contrary to the Court's "drummer" precedents, and explaining that the Court had "not been referred to any case in which an interstate seller has been granted an immunity from a state-license requirement where the seller has promoted or participated in transactions between a local vendor and a local purchaser involving goods already within the State").

course of delivering cargo between points in other States. Under Michigan's statutory regime, by contrast, motor vehicles can make extensive use of the State's highways in interstate commerce, either to transport goods between points inside and outside Michigan, or to pass through Michigan en route between other States, without being subject to MCL § 478.2(1)'s $100 annual fee.[12]

The Court in *Scheiner* framed the question before it as whether "the methods by which [Pennsylvania's] flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause." 483 U.S. at 282. The Court "f[ou]nd dispositive those of [its] precedents which make it clear 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." *Ibid.* The Court thus focused on the potential impact of the challenged fees on *interstate* operations. In the instant case, by contrast, any impact on interstate carriage is both attenuated and (so far as the evidentiary record is concerned) speculative. See pp. 14-15 & note 8, *supra.*

Furthermore, the incidence of the taxes and fees in *Scheiner* was on the use of the State's highways, and the Court therefore concluded that a mileage-based fee would fairly apportion those taxes and fees to carriers in the course of their interstate travels. In this case, by contrast, the fee

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[12] If interpreted in accordance with its literal terms—*i.e.*, as applicable to "each self-propelled motor vehicle operated by or on behalf of" a licensed motor carrier within the State—MCL § 478.2(1) would be constitutionally indistinguishable from the assessments struck down in *Scheiner*. Like the Florida Supreme Court in *Osborne*, however, Michigan authorities have applied a saving construction of the statute as covering only commercial motor vehicles used for intrastate carriage. Compare *Osborne*, 164 U.S. at 654; p. 10, *supra.*

is assessed for the privilege of engaging in purely intrastate transactions and services, not for the use of Michigan's highways, see *Jefferson Lines*, 514 U.S. at 198-199, and the fee is not assessed for the portion of a vehicle's operations that are in interstate commerce. There accordingly is no basis in the Commerce Clause for requiring that the fee be mileage-based. For similar reasons, because the fee is assessed only for engaging in wholly intrastate operations, nothing in *Scheiner* suggests that the fee must be apportioned according to the number of intrastate hauls that a particular vehicle makes simply because the owners of some interstate vehicles may choose to participate as well in that wholly intrastate activity.

2. The Court in *Scheiner* relied substantially on record evidence indicating that "the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." 483 U.S. at 276. Petitioners contend that MCL § 478.2(1) is likely to have a comparable discriminatory impact (though their argument focuses on the asserted potential for discrimination between intrastate and interstate trucks, rather than between in-state and out-of-state vehicles, see note 4, *supra*). *Scheiner* does not suggest that such a disparate impact, even if proved, would constitute a satisfactory basis for departing from prior decisions (see pp. 9-11, 20-21, *supra*) that have upheld flat fees charged for permission to engage in intrastate carriage and other local businesses.[13]

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[13] In support of its conclusion in *Scheiner* that Pennsylvania's flat fees were discriminatory, the Court quoted with approval its prior statement in *Sprout* (see pp. 10-13, *supra*) that "[a] flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." *Scheiner*, 483 U.S. at 286 n.21 (quoting *Sprout*, 277 U.S. at 170). On the page of the opinion immediately following the

In any event, to the extent that any such disparity would be relevant to the constitutional analysis, it is far from clear that Section 478.2(1) imposes disproportionate burdens upon interstate carriers, relative to alternative taxing schemes that would be unobjectionable under *Scheiner*. In 1994, the State of Michigan "collected approximately $2,905,000 in intrastate vehicle decal fees" pursuant to MCL § 478.2(1). J.A. 24. Consistent with the Commerce Clause, the State could have collected the same total sum through a mileage-based fee, see *Scheiner*, 483 U.S. at 283, 297, under which interstate vehicles as a class (without regard to whether they undertook any intrastate hauls) would have paid a percentage of the $2,905,000 equal to the percentage of total commercial motor vehicle miles traveled by interstate trucks. It is not at all clear whether interstate carriers as a whole pay a greater proportion of the $2,905,000 under Section 478.2(1) than they would pay under the alternative mileage-based regime.

It is likely true (though the fact has not been established with the sort of record evidence that was before the Court in *Scheiner*, see 483 U.S. at 276 n.9) that, *within the class of commercial motor vehicles that actually conduct point-to-point hauls within Michigan and are therefore assessed the $100 fee*, the average interstate vehicle will derive less benefit from the fee imposed by MCL § 478.2(1) than does the average truck that operates wholly within Michigan. But vehicles that use Michigan's roads for interstate deliveries *without* making point-to-point hauls within the State will escape the fee entirely and thus will contribute less money towards the state functions that the fee supports than they would pay

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language quoted in *Scheiner*, however, the Court in *Sprout* expressly recognized the authority of a State or locality to require payment of a flat "occupation tax" as a condition of authority to engage in purely intrastate carriage. 277 U.S. at 171; see p. 11, *supra*.

under a mileage-based system. It is therefore inaccurate to say that MCL § 478.2(1) disproportionately affects interstate vehicles as a class. Rather, Section 478.2(1) favors one subset of interstate vehicles (those that use Michigan roads exclusively in interstate commerce) while probably disfavoring another (those that engage in some point-to-point hauls in Michigan). Absent any record evidence or other reliable information indicating the relative proportions of those two classes of trucks, petitioners have offered no sound basis for concluding that Section 478.2(1) has an adverse aggregate impact upon interstate vehicles.

A similar analysis applies to petitioners' claim that MCL § 478.2(1) fails this Court's "internal consistency" test. If other States imposed similar fees, it is unclear whether interstate vehicles generally, or vehicles operating in numerous States in particular, would as a class contribute larger amounts to the States' regulatory programs or highway systems than they would pay under a mileage-based regime. To the extent that such intrastate flat fees served to defray costs that would otherwise be recouped through mileage-based charges, a vehicle making exclusively interstate deliveries would benefit from such a system, no matter how large the number of States through which it traveled in a given year. By contrast, a vehicle that combined interstate travel with point-to-point hauls in each of several States might well pay a disproportionate (in comparison to mileage traveled) share of total assessments. Neither record evidence nor abstract logic makes clear whether the overall effect of such a system would be to increase or to reduce existing financial disincentives to interstate travel.

3. Petitioners also suggest that, whatever impact MCL § 478.2(1) may have on interstate operators in the aggregate, the prospect that Section 478.2(1) will deter *some* individual carriers from undertaking point-to-point hauls within Michi-

gan is a sufficient basis for declaring the law unconstitutional. Absent evident protectionist intent, facial discrimination against interstate (or out-of-state) operators, or an established likelihood of systemic burdens on interstate commerce, this Court's decisions do not support the application of so demanding a constitutional standard for determining the validity of a state tax on a wholly *intrastate* transaction. Rather, the fee imposed by MCL § 478.2(1) should be reviewed under the standard set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970): "Where the statute regulates evenhandedly to effectuate 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." Section 478.2(1) is constitutional under that standard because it is facially nondiscriminatory; the regulated conduct has a distinctly local character; the effects on interstate deliveries are indirect and unproven; and petitioners have failed to prove that the fee has a disproportionate impact on interstate vehicles and/or operators as a class.

Petitioners' apparent constitutional objective—*i.e.*, a regulatory regime in which state boundaries have *no* economic relevance to a motor carrier's choice of routes—is impossible to achieve without much greater standardization of state fees than Congress has yet been willing to require. Cf. *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 279-280 (1978) (explaining that "[t]he prevention of duplicative [state] taxation * * * would require national uniform rules for the division of income," and recognizing that "the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause," but concluding that the authority to promulgate any such uniform rules is properly entrusted to Congress rather than to the Court). To take one example: under current precedent, assessments based on mileage traveled within a State appear to be largely insulated from

Commerce Clause attack. See *Scheiner*, 483 U.S. at 283 & n.15. But so long as some States charge higher per-mile fees than others, that disparity will (other things being equal) affect the relative profitability of doing business in different States. The infeasibility of altogether eliminating such incentives reinforces the conclusion that there should be play in the joints, and that, at least in the absence of record evidence concerning the likely practical impact of MCL § 478.2(1) on interstate carriage, the theoretical possibility that some such effect will occur is not a sufficient basis for declaring the law invalid.

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted.

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