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.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Amicus Curiae

February 28, 2005

QUESTIONS PRESENTED

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

Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. § 14504.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Cont.)

Page(s)

TABLE OF AUTHORITIES (Cont.)

Page(s)

TABLE OF AUTHORITIES (Cont.)

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES (Cont.)

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.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

limited government and individual liberty, including principles of commercial freedom. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has a strong interest in ensuring that the States do not impose unconstitutional burdens on the free and unrestricted flow of goods and services through interstate commerce, as has the State of Michigan by enacting the vehicle fee at issue here.

STATEMENT

Petitioners challenge a $100 fee imposed by M.C.L. § 478.2(1) on each vehicle that travels within the State of Michigan on the ground that it violates the Commerce Clause. *See Westlake Transp., Inc. v. Michigan Public Serv. Comm'n*, 662 N.W.2d 784, 802 (Mich. App. 2003). The fee is imposed on any vehicle that operates within the State pursuant to a certificate of authority. *Id.* Accordingly, it applies to both carriers that travel solely intrastate and those that travel both intrastate and interstate. *Id.* at 803. Petitioners argue that the vehicle fee violates the Commerce Clause because it imposes a heavier per-mile burden on carriers that operate interstate than those that operate solely within the State of Michigan. *See id.* Unlike a fee that is apportioned based on mileage within the State, the Michigan fee is a flat annual fee. *Id.* As a result, the per-mile burden on interstate carriers is significantly greater.

Petitioners further contend that the fee adversely influences commercial behavior. According to petitioners, "in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce." *Id.* In contrast, interstate carriers have an incentive to "top off their interstate loads with intrastate

hauls or transport intrastate loads in between interstate hauls." *Id.* at 804.

The Michigan Court of Appeals held that the fee did not violate the Commerce Clause. Its decision turned on the fact that the fee was characterized as a regulatory measure, rather than a tax. Based on this conclusion, the court refused to apply the four-part test this Court articulated in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), which would have required that the court hold that Michigan's vehicle fee unconstitutionally burdened interstate commerce.

SUMMARY OF ARGUMENT

The text, structure, and history of the Constitution demonstrate that the Framers intended to protect and nurture the free and unrestricted flow of goods and services among the States. A variety of provisions expressly prohibit State action that discriminates against or disproportionately burdens interstate commerce. From the Commerce Clause, to the Import-Export Clause, to the Privileges and Immunities Clause, the Constitution is filled with measures that make clear that such State action is prohibited.

An analysis of the constitutional structure further supports this conclusion. The States are "co-equal sovereigns" within the federal system. The natural equality of the States within that system prohibits State action that seeks to advantage one State over another. Measures such as those at issue here, which have the effect of discriminating against the goods and services of other States, are flatly inconsistent with the constitutional structure.

Finally, the historical record demonstrates that those responsible for drafting and ratifying the Constitution sought to ensure that the flow of goods and services among the States would remain unrestricted. The provisions ultimately embodied in the Constitution were strongly motivated by fundamental principles that encouraged free and unrestricted

trade as well as practical concerns over commercial disputes that had arisen under the Articles of Confederation. These concerns led the Framers to put commercial union front and center in drafting the Constitution, embodying numerous safeguards in the constitutional text that would ensure that commerce among the States would be unrestricted.

ARGUMENT

I. The Text And Structure Of The Constitution Prohibit The States From Taking Actions That Impede The Free And Unrestricted Flow Of Goods And Services Among The States.

The text and structure of the Constitution make clear that burdens upon interstate commerce such as those enacted by the State of Michigan are prohibited. Not only the Commerce Clause, but also several other provisions of the Constitution, demonstrate the Framers' desire that commercial intercourse among the States remain free and unrestricted. The Court has made clear that such provisions prohibit States from enacting any measures—whether in the form of "taxes" or "regulations"—that would burden or restrict the free flow of goods and services.

A. The Commerce Clause.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "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 the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87

(1984).[2] Accordingly, the Court has observed that the clause embodies "a limitation on state regulatory powers." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996). Indeed, it has held that "'[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

Under the clause, the States may not "burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994). Accordingly, "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation, *or regulation*, that discriminates against or unduly burdens interstate commerce and thereby 'impede[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (emphasis added). The Court's "Commerce Clause jurisprudence has shown that even the *smallest scale* discrimination can interfere with the project of our Federal Union." *Camps Newfound/Owatonna, Inc. v. Town of*

---

[2] *See also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) ("[W]e have consistently held this language [of the Commerce Clause] to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7-8 (1986) ("[W]e have acknowledged the self-executing nature of the Commerce Clause and held on countless occasions that, even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state regulation . . . may be invalid under the unexercised Commerce Clause."); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) ("It is now well established . . . that the Clause itself is 'a limitation upon state power even without congressional implementation.'") (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)).

Harrison, Maine, 520 U.S. 564, 595 (1997) (emphasis added). Such discrimination is therefore prohibited.

B. The Import-Export Clause.

Similarly, the Import-Export Clause prohibits specific barriers to the free exchange of goods and services among the States. That clause provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports." U.S. CONST. art. I, § 10, cl. 2. While the Court construed the clause decades after its enactment as prohibiting only taxes on foreign goods, *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868), as members of the Court recently observed, the Court's "rule that state taxes that discriminate against interstate commerce are virtually *per se* invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself." *Camps Newfound/Owatonna*, 520 U.S. at 636 (Thomas, J., dissenting). The plain language of the clause provides "an *express* check on the States' power to levy certain discriminatory taxes on the commerce of other States." *Id.* at 610 (emphasis added).

This prohibition was designed to address a specific and significant concern under the Articles of Confederation. "From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827). Indeed, "one of the first criticisms leveled against the Articles of Confederation during the ensuing Federal Convention was the general Government's inability to prevent 'quarrels between states,' including those arising from the various 'duties' the States imposed upon each other, both on foreign goods moving through the seaport States and on each other's goods." *Camps Newfound/Owatonna*, 520 U.S. at 630 (Thomas, J., dissenting) (quoting 1 FARRAND 19,

25 (Edmund Randolph, May 29)). In order to remedy this significant problem, such duties upon goods and services traveling in interstate commerce were expressly prohibited.[3]

C. The Privileges And Immunities Clause.

The Privileges and Immunities Clause of Article IV, Section 2 similarly ensures that there is no discrimination against other States. The clause provides that "[c]itzens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. It was designed to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).

While the clause was interpreted decades after its ratification as applying solely to individuals and not corporations, *see Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981), it nonetheless evidences the Framers' intent to ensure free and unrestricted commercial intercourse among the States. Thus, the Court has specifically applied the clause to invalidate State action that has the effect of discriminating against citizens from other States, including in areas involving economic activity. *See Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *see*

---

[3] Given the plain language of the constitutional text, the Court may wish to "consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role" and overrule *Woodruff v. Parham*. *See Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). "[A] strong argument can be made that for the Constitution's Framers and ratifiers—representatives of States which still viewed themselves as semi-independent sovereigns—the terms 'imports' and 'exports' encompassed not just trade with foreign nations, but trade with *other States* as well." *Id.* at 621 (emphasis in original).

also United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 221-22 (1984).

Moreover, the Court has made clear that the guarantees under the Commerce Clause and those under the Privileges and Immunities Clause are interrelated. Accordingly, it has explicitly adopted reasoning from cases addressing claims under the Privileges and Immunities Clause in its decisions addressing claims under the negative Commerce Clause. *See Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979) (reasoning "stated in reference to [a] Privileges and Immunities Clause challenge" was "equally applicable to [a] Commerce Clause challenge"). As with the Commerce and Import-Export Clauses, the Privileges and Immunities Clause serves to ensure that commerce among the States remains unrestricted.

D. The Constitutional Structure.

Finally, the constitutional structure itself further demonstrates the necessity of free and unrestricted commercial interchange among the States. Under the Constitution, the States are "'coequal sovereigns in a federal system.'" *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982). The "structure of our Nation" is "a union of States, each possessing equal sovereign powers." *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982). Thus, for example, "all States are admitted to the Union with the same attributes of sovereignty (i.e., on equal footing) as the original 13 States." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (citing *Coyle v. Smith*, 221 U.S. 559 (1911)). In sum, there is a "constitutional rule of equality among the states." *State of Oklahoma v. State of Texas*, 258 U.S. 574, 583 (1922).

As a result, each State has certain rights and obligations as a member of the federal union. To the extent permitted by Congress, the States are required to give "Full Faith and

Credit" to other States' public acts. *See* U.S. CONST. art. IV, § 1. The Constitution ensures that they maintain a "Republican Form of Government." *Id.* art. IV, § 4. All of these provisions are designed to ensure that the States continue to function as free and equal components of the federal system. Indeed, the Court has explained that "the constitutional equality of the states is *essential* to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (emphasis added).

This natural equality of the States requires that they not impose measures that discriminate against commerce from other States. If nothing else, the equality of rights and obligations under the federal system means that no single State can take measures that disadvantage other States. Quite simply, "the whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).

II. The Historical Record Demonstrates That The Constitution Was Intended To Ensure The Free And Unrestricted Flow Of Goods And Services Among the States.

The historical record confirms that these structural features were intended to broadly prohibit any State action that might burden or restrict the free flow of goods and services in interstate commerce. As this Court has observed, "history, including the history of commercial conflict that preceded the Constitutional Convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history provides the context in which each individual controversy must be judged." *Camps Newfound/Owatonna*, 520 U.S. at 595. Here, that history uniformly demonstrates that the Framers sought to prohibit

State action, such as that here, which impedes the free and unrestricted flow of commerce among the States.

A. The Constitutional Convention And Ratification Debates.

Under the Articles of Confederation, the States had "fettered, interrupted and narrowed" the free exchange of goods and services. THE FEDERALIST NO. 11 (Alexander Hamilton). As noted in *The Federalist No. 22*, "[t]he interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint." THE FEDERALIST NO. 22, at 104 (Alexander Hamilton) (Bantam 1982).

One of the primary purposes of the new Constitution was to remedy this problem and ensure that there would be free and unrestricted trade among the States in the federal union. "The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every state could alone be promoted and secured by establishing these on principles of reciprocity." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 526 (1839). In particular, provisions such as the Commerce Clause reflect "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention," namely, "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995).

The Federalist No. 7 warned, for example, that if the Constitution were not ratified, "competition of commerce" among the States would be a "fruitful source of contention." THE FEDERALIST NO. 7, at 29 (Alexander Hamilton). "Each

State, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance." *Id.* This "discontent" would, in turn, "naturally lead to outrages, and these to reprisals and wars." *Id.* at 29-30.

The same concerns were expressed during the Constitutional Convention. Luther Martin argued that "the States like individuals were in a State of nature equally sovereign & free," and that as a result, they must be "treat[ed] as free states with each other, upon the same terms of equality that men originally formed themselves into societies." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437-38, 440 (Max Farrand ed., rev. ed. 1937) (citing Vattel, Rutherford and Locke). This natural equality required that no State take actions that might disadvantage other States in the federal union. In particular, it required that the States not burden or discriminate against interstate commerce.

The proposed Constitution provided a solution by implementing several measures that would ensure free and unrestrained trade among the States. The Framers underscored this aspect of the founding document in advocating for its ratification: "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigour from a free circulation of the commodities of every part." THE FEDERALIST NO. 11, at 53 (Alexander Hamilton).

B. Early Judicial Interpretation.

This Court has consistently recognized these same principles in interpreting the constitutional text. Thus, for example, it has "endorsed Justice Johnson's appraisal" in *Gibbons v. Ogden* that "the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power." *Camps Newfound/Owatonna*, 520 U.S. at 571. In *Gibbons*, Justice Johnson observed that "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231-32 (1824) (Johnson, J.). This constitutional purpose was designed to remedy the commercial discord under the Articles of Confederation, which had allowed a "conflict of commercial regulations, destructive to the harmony of the States." *Id.* at 224.

The Court has consistently and resolutely applied these principles in its subsequent decisions. *See Camps Newfound/Owatonna*, 520 U.S. at 571. It has consistently prohibited any measures that "burden" or "discriminate" against interstate commerce. *Oregon Waste Sys.*, 511 U.S. at 98. In doing so, it has consistently prohibited even the "smallest scale discrimination." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 595. In the process, it has underscored that the Constitution has created "an area of free trade among the several States.'" *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618. As Justice Johnson observed nearly two hundred years ago, the Constitution was designed "to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons*, 22 U.S. at 231-32.

III. Michigan's Fee Upon Vehicles Violates The Constitutional Text And Structure.

The vehicle fee at issue here violates these established principles. Whether the measure is characterized as a "regulation" or a "tax", the effect is the same. It erects an unnatural impediment to commercial intercourse among the States. It is for this very reason that this Court in *Scheiner* held that a nearly identical measure was unconstitutional. 483 U.S. at 284-86.

In *Scheiner*, the Court considered the constitutionality of a tax on vehicles traveling in intrastate commerce enacted by the State of Pennsylvania. *Id.* In invalidating the measure as a violation of the negative Commerce Clause, the Court made clear that discriminatory state enactments could not be salvaged by reliance upon "formalism". *Id.* at 296. Rather, it emphasized that the critical element in determining the constitutionality of State action under the Commerce Clause was whether the action "produces a forbidden effect." *Id.*[4] *See also Camps Newfound/Owatonna*, 520 U.S. at 575 ("To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides.").

---

[4] *See also American Trucking Associations, Inc. v. New Jersey*, 852 A.2d 142, 164 (N.J. 2004) ("We reject the State's contention that as long as a 'flat fee' is a 'regulatory user fee,' it is not subject to the four-prong test of *Complete Auto Transit*. Such a view ignores the underlying rationale of *Scheiner* that it is the practical effect of the charge that controls, not its formal language or purported structure."); *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014, 1016 (Me. 1991) ("[I]t would seem that a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effects on interstate commerce whether designated as a 'fee' or a general revenue 'tax.'").

Applying this test, the Court struck down the tax on the ground that it violated the "internal consistency" standard articulated in *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). *See Scheiner*, 483 U.S. at 284-86. The Court held that the tax was unconstitutional because there would undoubtedly be an "impermissible interference with free trade" if such taxes were "applied by every jurisdiction." *Id.* As in this case, the tax at issue in *Scheiner* did not "vary directly with miles traveled or with some other proxy for value obtained from the State." *Id.* at 291. Rather, it was a flat tax that was not "fairly apportioned" based upon a carrier's use of State services. *Id.* at 294-95. The Court observed that "[w]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude . . . that the State is imposing an undue burden on interstate commerce.'" *Id.* at 291 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629 (1981)).

At the same time, the Court made clear that the fact that a tax or other State action "extends the same nominal privilege to interstate commerce that it extends to in-state activities" does not save it from these constitutional requirements. *Id.* at 296. State action violates the Commerce Clause "'when it unfairly burdens commerce by exacting more than a just share from the interstate activity.'" *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 247 (1987) (quoting *Washington Dep't of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978)). A State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Quite simply, "[t]he great constitutional purpose" of the Framers in implementing the Commerce Clause "cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect.'" *Scheiner*, 483 U.S. at 296 (quoting *Nippert v. Richmond*, 327 U.S. 416,

426 (1946)). *See also id.* at 282 (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").[5]

The Court in *Scheiner* concluded that an unapportioned tax on vehicles traveling within a State violated these principles. Moreover, it determined that it was well within the State's ability to erect a regulatory regime that would not impose an unconstitutional restraint upon interstate commerce. The State could have apportioned the fee based on the actual mileage that registered vehicles traveled in the State. *See id.* at 291. One simple means of accomplishing this task would be to use a fuel consumption tax that would by definition be "directly apportioned to the mileage traveled." *Id.* at 283. *See also American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E.2d 95, 103 (Mass. 1993) (discussing constitutionality of fuel consumption taxes). Yet, the State rejected this

---

[5] The fact that a regulation governs only intrastate activity is irrelevant. The Court has "long . . . rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." *Montana*, 453 U.S. at 615. "Even when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Camps Newfound/Owatonna*, 520 U.S. at 573-74 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964)).

Nor is there any "'*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause." *Id.* at 581 n.15 (quoting *Fulton Corp.*, 516 U.S. at 334 n.3). "[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.'" *Id.* (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994)).

constitutional alternative in favor of a flat fee that had the effect of discriminating against interstate commerce.

The same analysis demonstrates that Michigan's vehicle fee is unconstitutional. As the Court emphasized in *Scheiner*, whether state action violates the Commerce Clause depends upon whether it produces "a forbidden *effect*." 483 U.S. at 296 (emphasis added). The vehicle fee here has an effect that is identical to that of the tax at issue in *Scheiner*—namely, it disproportionately burdens interstate carriers. The text, structure, and history of the Constitution all demonstrate that such measures, which restrict the free flow of goods and serves among the States, are expressly prohibited.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the Constitution's prohibition on State action that restricts the free flow of goods and services and reverse the Court of Appeals' decision.

Respectfully submitted,

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Dated: February 28, 2005