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 FOR THE PETITIONERS

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QUESTION PRESENTED

As reformulated by the Court, the question presented is:

"Whether the $100 fee [imposed by Michigan in Mich. Comp. Laws § 478.2(1)] upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanverkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab., Inc., Deeco Services, Inc. d/b/a Deeco Transportation, Tiberio Frank d/b/a Fairfield Towing, Elex, Inc. d/b/a/ Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc. d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc. d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc. d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

The parent company of petitioner USF Holland, Inc. is USF Corporation. No publicly held corporation owns more than 10% of the stock of USF Holland, Inc. Petitioner American Trucking Associations, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (J.A. 68-102) is reported at 662 N.W.2d 784. The opinions of the trial court (Pet. App. 33a-60a) and the orders of the Michigan Supreme Court denying review (Pet. App. 61a-63a) are unreported.

JURISDICTION

The order of the Michigan Supreme Court denying review of the judgment of the Michigan Court of Appeals was entered on December 3, 2003. The petition for a writ of certiorari was granted on January 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

Section 478.2(1) of the Michigan Compiled Laws provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

STATEMENT

This case involves a flat tax that Michigan imposes on all trucks that engage in intrastate operations in the State (the "Michigan tax") – even if the trucks subject to the tax also spend some (or most) of their time traveling in *other* states or in interstate commerce. This tax should not survive scrutiny under the Commerce Clause. It is undeniable that the Michigan tax imposes significant structural impediments that discourage and burden interstate commerce: if replicated by other states, taxes like Michigan's would impose a potentially crushing, cumulative burden on trucks that conduct business in more than one state. It is equally apparent that the Michigan tax discriminates against interstate commerce in its practical impact because the levy 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. The decision below upholding the Michigan tax accordingly should be set aside.

1. Michigan imposes a flat tax of $100 per vehicle that has been interpreted to apply only to motor carriers that transport property between points within the State. MCL § 478.2(1). See J.A. 70-71. The same tax must be paid both by vehicles that confine their operations to Michigan and by those that engage in a combination of interstate and intrastate operations.[1] The amount due does not vary according to miles traveled or number of trips taken in Michigan, and is not apportioned to take into account the percentage of a vehi-

[1] A separate charge of $100 per vehicle is imposed on vehicles registered in Michigan that operate exclusively in interstate commerce. MCL § 478.2(2). That levy is challenged on preemption grounds in No. 03-1234, *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Comm'n*. In addition, the State requires trucks that are registered outside Michigan to pay a registration fee of $10. MCL § 478.7. The validity of that charge is not at issue here.

cle's total miles that are driven between states or intrastate in states other than Michigan. Proceeds from the fee are used primarily for the "administration" of Michigan's law relating to the operation of motor carriers. MCL § 478.2(1); see J.A. 91.[2]

To illustrate the operation of the Michigan tax, consider the example of 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 points in the State.[3] That truck is obligated to pay the full $100 Michigan tax. At the same time, an identical truck that travels the same number of annual miles but confines its operations to Michigan, conducting hundreds of trips within the State during the course of the year, will pay the same $100 tax. The only way for the interstate truck to avoid

[2] Prior to 1995, Michigan had a comprehensive regulatory system governing the intrastate transportation of property by motor carriers. During that period, the proceeds from the Michigan tax were used to pay for administration of this system. See MCL § 475.2. As of January 1, 1995, Congress preempted most state economic regulation of intrastate trucking operations, including regulation of intrastate prices, routes, and services; states retained responsibility for regulation of highway safety. See Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, § 601(a)(1), 108 Stat. 1605, codified at 49 U.S.C. § 14501(c). Michigan did not amend its motor carrier law or reduce the Michigan tax to reflect this change (see J.A. 93 n.10), although the State now takes the position that fees collected pursuant to the Michigan tax are devoted to non-preempted regulation of highway safety, financial fitness, and insurance requirements for motor carriers. See *id*. at 87-88.

[3] This is a realistic example; interstate truckers often supplement their interstate deliveries by hauling intrastate loads while between interstate movements or by "topping off" those loads with intrastate shipments. See J.A. 101.

payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan.

2. Petitioners brought this challenge in Michigan state court to contest the constitutionality of the Michigan tax under the U.S. Constitution's Commerce Clause.[4] Petitioners relied on the four-part Commerce Clause test first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), under which a state tax will be deemed unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto Transit*, 430 U.S. at 279). Petitioners maintained that the invalidity of the Michigan tax under the Commerce Clause was established by the Court's decision in *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), which struck down a flat state tax imposed on trucks traveling interstate.

The trial court rejected the challenge, upholding the Michigan tax. Pet. App. 33a-45a. The court declared itself "not persuaded that the choice of whether to engage primar-

[4] The current petitioners intervened to advance their Commerce Clause claim in a suit initiated as a class action by other plaintiffs that challenged other Michigan trucking fees on federal preemption and state-law grounds, and that also contested the Michigan tax on preemption grounds. See J.A. 71. The courts below denied all of the claims and upheld all of the challenged levies. See *id.* at 72-102. Only the Commerce Clause challenge to the Michigan tax is at issue in this case; as noted above, the preemption aspect of the decision below as it relates to Michigan's fee on trucks that are registered in Michigan and that travel interstate is at issue in No. 03-1234, *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Comm'n*.

ily in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns." *Id*. at 43a. Moreover, because the court believed that "the fee itself is not a tax on the privilege of doing business in Michigan," it concluded that "Commerce Clause interests are not affected by the intrastate vehicle fee." *Id*. at 44a. The court added that the "interest furthered by [the] fee" – that of ensuring "that vehicles and carriers operating on Michigan highways in intrastate service comply with [state] safety and fitness norms" – does "not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause." *Ibid*. Similarly, the court reasoned that, because interstate and intrastate carriers are not competing for interstate business, the Michigan tax "does not implicate Commerce Clause concerns." *Id*. at 45a. See *id*. at 46a-60a (denying rehearing).

The Michigan Court of Appeals affirmed, although on a different ground. J.A. 62-102. The court began by repudiating the trial court's rationale, explaining that "any tax or regulation which affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. * * * Because the fee is imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id*. at 98-99.

Having said that, however, the court proceeded to uphold the Michigan tax. In doing so, the court relied upon an earlier aspect of its decision in which it determined, as a matter of *state* law, that the Michigan tax should be characterized as a "fee" rather than a "tax" because (1) most of its proceeds are used to enforce the regulatory provisions of Michigan's motor carrier law and (2) the aggregate fee revenues collected "are proportional to the cost of the services to which they relate." J.A. 91-96.[5] From that starting point, the court held that the *Complete Auto Transit* test is wholly inapplicable to the Michigan tax on the ground 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." *Id*. at 99 n.15. Because the court had found the Michigan tax to be a "regulatory fee," it disregarded *Complete Auto Transit* and instead applied the balancing test used by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), to assess the constitutionality of nondiscriminatory state regulations affecting interstate commerce. See J.A. 99 n.15, 100-102.

The court recognized that it is impermissible for even "regulatory fees" to discriminate against interstate commerce, and acknowledged that, under the Michigan tax, it "may be" that "mixed [interstate and intrastate] carrier[s] invariably will pay a higher per-mile fee than the carrier who operates solely intrastate." J.A. 100-101. The court similarly noted the possibility "that because the fee is a flat annual fee, 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 decision-making by discouraging an intrastate carrier from engaging in interstate commerce." *Ibid*. But the court nevertheless opined that the prospect of discrimination "is a matter of pure speculation" because petitioners "present no evidence that any trucking firm's route choices are affected by imposition of the

[5] The court undertook this analysis in response to the argument that various Michigan levies, including the Michigan tax, "are unconstitutional taxes in violation of various sections of the Michigan constitution." J.A. 91. The court concluded that state law distinguished between "a permissible fee" and "an illegal tax," and that the challenged levies should be characterized as fees for purposes of Michigan law. *Id*. at 91-96.

fee." *Id*. at 101. The court added that "[a]ny effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." *Ibid*. The court went on to uphold the Michigan tax under the standard articulated in *Pike* v. *Bruce Church* because "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." *Id*. at 102.

The Michigan Supreme Court denied review without opinion. Pet. App. 61a-63a.

SUMMARY OF ARGUMENT

A. Under the Court's modern doctrine, the constitutionality of a state tax under the Commerce Clause is assessed by considering the practical effect of the levy: it will be invalidated if it discourages or disadvantages interstate commerce. The Court has given force to this principle by applying the dictates articulated in *Complete Auto Transit*, under which a state tax will be held unconstitutional unless, among other things, it is fairly apportioned and nondiscriminatory. For a number of related reasons, the Michigan tax does not satisfy these requirements.

First, as the Court held in *Scheiner*, flat taxes like Michigan's fail the "internal consistency" test and thus necessarily impose unfair structural burdens on interstate commerce. If applied by every jurisdiction, taxes like Michigan's would impose cumulative burdens on interstate truckers that are not born by equivalent intrastate activity. It is inevitable that such flat taxes bear much more heavily in the aggregate on a firm that does business in many places than on an otherwise identical company that operates in only one state. Indeed, the Michigan tax is especially pernicious because it has a clear protectionist effect: it allows trucks to pass through the state without charge, but penalizes interstate carriers who choose to stop and compete with local truckers for intrastate business in Michigan.

Second, flat taxes like Michigan's necessarily discriminate against interstate firms even on the intrastate portion of their business. While such taxes nominally apply in the same amount to interstate and intrastate businesses, the very nature of the market that interstate operators serve makes it impossible for such businesses to take full advantage of the privilege for which they have paid the state a flat fee. The result, as the Court observed in *Scheiner*, is that, on average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state – and will obtain a vastly greater benefit from its intrastate fee – than will an otherwise identical company that travels both intrastate and interstate. The interstate company therefore will pay the tax at a higher effective rate. This regime places interstate businesses at a substantial competitive disadvantage.

Third, the rationales used by the court below to uphold the Michigan tax lack merit. The distinction that court drew between "regulatory fees" and general taxes rests on a manifest evasion of this Court's precedents: whatever the label placed upon a flat levy by the state, the tax will have the identical – and unconstitutional – effect of suppressing interstate commerce. By the same token, the court erred in insisting on empirical proof that interstate commerce has been discouraged before a flat tax will be invalidated as discriminatory. In fact, this Court repeatedly has rejected the contention that the plaintiff challenging a discriminatory tax must show that the levy actually succeeded in suppressing interstate commerce. Flat taxes necessarily discriminate against interstate activities in what the Court has described as "'the general average of instances'" (*Scheiner*, 483 U.S. at 291 (citation omitted)), and that disparity renders such levies unconstitutional.

B. In its brief supporting the grant of certiorari, the United States suggested that certain of this Court's older decisions could support the constitutionality of the Michigan tax. Those holdings, however, provide no guidance for the resolution of this case. They were decided during a period when the Court took what it has since described as a "metaphysical" approach to the Commerce Clause: the Court regarded interstate commerce "itself" as immune from state taxation, while it treated "local" activities as immune from Commerce Clause scrutiny. In that context, the decisions cited by the Solicitor General addressed the formal and rather artificial question whether particular state taxes should be treated as falling on interstate rather than local functions; those decisions simply did not consider the discrimination and apportionment arguments presented here.

More fundamentally, since issuing those decisions the Court has rejected metaphysics and substituted a realistic assessment of practical effects in assessing the constitutionality of state taxation under the Commerce Clause. That evolution has led the Court to reject both sides of its prior, formalistic Commerce Clause equation. Interstate commerce is no longer immune from state taxation, so long as the tax is apportioned and nondiscriminatory; taxation of intrastate activities is no longer immune from Commerce Clause scrutiny, so long as the taxation has an effect on interstate commerce. Thus, to the extent that the decisions cited by the United States stand for the proposition that taxes on intrastate activities are not subject to Commerce Clause challenge, those decisions are no longer good law.

Any contrary conclusion would have pernicious consequences. Virtually all interstate activities can be broken down into component parts that take place entirely within one state. As a consequence, a holding that some category of taxes on intrastate events is immune from the usual Commerce Clause rules would invite manipulation and gamesmanship by state taxing authorities; it also would require the Court to draw the sort of bizarre and unrealistic distinctions that it emphatically rejected in *Complete Auto*. The ancient doctrine cited by the United States accordingly should not be regarded as controlling here.

ARGUMENT

In this case, the Court is "[a]gain * * * 'asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art. I, § 8, of the Federal Constitution.'" *Scheiner*, 483 U.S. at 268 (citation omitted). Although the Court once famously described its "own decisions in this area as a 'quagmire'" (*id*. at 280 (citation omitted)), the modern rule governing cases of this sort is now settled: a state tax will not survive Commerce Clause scrutiny if, in its practical effect, it disadvantages or discriminates against interstate commerce. As decisions of this Court such as *Scheiner* and *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), make clear, the Michigan tax does just that. The tax threatens to impose cumulative burdens that discourage truckers from doing business in more than one state; it unquestionably gives local truckers a competitive advantage over their interstate counterparts; it acts as a barrier to interstate carriers entering the intrastate market; and a decision upholding the tax would read illogical and unadministrable distinctions into the law. The decision below accordingly should be reversed.

A. The Controlling Principle: The Commerce Clause Invalidates State Laws That Discourage And Discriminate Against Interstate Commerce

1. As the Court has observed repeatedly, the Commerce Clause

> reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Conven-

> tion: 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.

Jefferson Lines, 514 U.S. at 180 (citations and internal quotation marks omitted). See, *e.g.*, *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). Against this background, the Court has understood the Clause to prevent states "from retreating into economic isolationism or jeopardizing the welfare of the Nation as a whole" (*Jefferson Lines*, 514 U.S. at 179-180), either by discriminating against interstate commerce overtly or by imposing taxes that more subtly "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-287 (quoting U.S. Const., Art. I, § 8, cl. 3).

In giving force to these values, the Court in its modern Commerce Clause decisions addressing state taxation has eschewed "a focus on * * * formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. Instead, the Court has determined the validity of state taxes by assessing their "practical effect" on interstate commerce. *Id*. at 279. See, *e.g.*, *Jefferson Lines*, 514 U.S. at 183; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981). Thus, as one leading scholar of the Commerce Clause has noted, "the Court should and will give consideration to any demonstrable, realistic claim that a state tax has a seriously harmful effect on interstate commerce." Lockhart, *A Revolution in State Taxation of Commerce?*, 65 MINN. L. REV. 1025, 1038 (1981).

2. As we have noted, in the area of state taxation the Court implements these controlling Commerce Clause prin-

ciples through application of what has become the familiar four-part test first articulated in *Complete Auto Transit*. Under that test, a state tax will be held unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto Transit*, 430 U.S. at 279). This case involves the second and third prongs of the *Complete Auto* standard, the requirements of apportionment and nondiscrimination.

Satisfaction of these requirements, in turn, may be determined by application of what the Court has termed the "internal consistency" test. As the Court has explained:

> 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. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

Jefferson Lines, 514 U.S. at 185 (emphasis added). Because a state tax that fails the internal consistency test places interstate commerce at an insuperable structural disadvantage, failure of that test demonstrates that the tax both discriminates against interstate commerce and is malapportioned. See *Tyler Pipe Indus., Inc*. v. *Washington State Dep't of Revenue*, 483 U.S. 232, 247 (1987) (noting the test's application to both the nondiscrimination and the apportionment requirements); *Armco Inc*. v. *Hardesty*, 467 U.S. 638, 644 (1984) (same); *United States* v. *Sperry Corp.*, 493 U.S. 52, 61 (1989) (noting test's application to the nondiscrimination requirement); *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, 852 A.2d 142, 163-164 (2004) (same); *American Trucking Ass'ns, Inc.* v. *State of Oregon*, 90 P.3d 15, 21 (Or. App. 2004) ("'Internal consistency' appears to be the primary test for determining whether a tax discriminates against interstate commerce in its effect.").

B. The Michigan Tax Discriminates Against Interstate Commerce And Does Not Satisfy The Commerce Clause Apportionment Requirement

Flat taxes such as Michigan's necessarily fail the internal consistency test, and thus do not satisfy the nondiscrimination and fair apportionment elements of *Complete Auto Transit*. This is so for two related reasons. Such taxes impose cumulative burdens on companies doing business in more than one state that may make it prohibitively expensive to engage in commerce in a multitude of states. And flat levies like Michigan's discriminate against interstate commerce in a comparative sense because they impose a much higher effective per-mile rate on interstate trucks than on vehicles that confine their operation to the taxing state. Taxes like Michigan's therefore are inconsistent with the Commerce Clause.

1. The Michigan tax imposes cumulative burdens on interstate commerce

To begin with, the Michigan tax imposes structural burdens that discourage and disadvantage interstate commerce. The Court's decision in *Scheiner*, which applied the internal consistency test to invalidate flat highway taxes that were identical in their constitutional defects to the levy challenged here, shows why this is so. *Scheiner* involved a challenge to two flat taxes – a "marker fee" and an "axle tax" – imposed by Pennsylvania on both interstate and intrastate truckers. See 483 U.S. at 273-275. In holding the taxes unconstitutional, the Court explained that the Commerce Clause "'by its own force created an area of trade free from interference by the States'" (*id*. at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)), and then concluded that

> [t]he unapportioned flat taxes * * * penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc*. v. *Hardesty*, 467 U.S., at 644. If 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.

Id. at 284.

The reason is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are not borne by equivalent intrastate activity – and that is so whether the flat tax is imposed on the privilege of entering the state or on the privilege of engaging in business within the state. Imagine, for example, a flat tax of $100 (like the one set by Michigan in this case) that is imposed on all trucks that use a State's roads to make an intrastate delivery. If identical taxes were imposed by the 48 contiguous States, a truck that traveled across the country and made intrastate as well as interstate deliveries along the way would pay annual fees of as much as $4800; an identical truck that confined its business to one State but traveled the same number of miles and made the same number of trips would pay only $100. As a consequence, it is inevitable that flat levies like the Michigan tax "'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'" *Scheiner*, 483 U.S. at 285 n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1188 (1986)).

With this principle in mind, one of the leading commentators in this area has explained that

> the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the "internal consistency" doctrine * * * . This conclusion follows inexorably from a simple application of the "internal consistency" principle. If every state were to impose an unapportioned flat tax on business activities in which both intrastate and interstate enterprises engage, the interstate business would pay the tax in each state in which it did business, whereas its intrastate competitor would pay but a single tax in the state in which it did business. Because the tax is not apportioned to the activity carried on in the state, the interstate enterprise would bear a heavier tax burden than its intrastate competitor merely because it was engaged in interstate commerce — a paradigmatic "impermissible interference with free trade."

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988) (quoting *Armco*, 467 U.S. at 644) (emphasis in original; footnote omitted). See also *Scheiner*, 483 U.S. at 303-304 (Scalia J., dissenting) (the internal consistency principle as stated by the Court requires the invalidation of "any unapportioned flat tax on multistate activities"); *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting) (same).[6]

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[6] Many courts have invoked *Scheiner* to invalidate flat state taxes or fees. See, *e.g.*, *Trailer Marine Transp. Corp.* v. *Rivera*

Here, the Michigan tax plainly fails the internal consistency test: it is a flat, unapportioned levy that is imposed on interstate trucks whenever a portion of their trip has an intrastate component in Michigan. If replicated by other states, such a tax would impose crushing burdens on trucks traveling in interstate commerce. Indeed, in its practical effect the Michigan tax is *more* pernicious than the one invalidated in *Scheiner* because it penalizes interstate carriers who choose to compete with local truckers for intrastate business in Michigan. Under the Michigan tax regime, local and interstate businesses pay the same amount for a privilege that is inherently more valuable to the local company – a reality that will either put interstate carriers at a competitive disadvantage or induce those carriers to abandon the Michigan market altogether, to the benefit of the local trucking industry. By the same token, because Michigan truckers would run the risk of subjecting themselves to intrastate fees imposed by other states were they to cross state lines, the Michigan tax also certainly "tends, at least, to discourage domestic corpo-

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Vazquez, 977 F.2d 1 (1st Cir. 1992) (invalidating flat annual fee used to support no-fault insurance fund); *Kentucky Transp. Cabinet* v. *American Trucking Ass'ns*, 746 S.W.2d 65, 67 (Ky. 1988) (invalidating flat highway privilege tax); *Black Beauty Trucking, Inc.* v. *Indiana Dep't of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) (invalidating flat highway privilege tax); *American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955, 957-958 (Md. 1988) (invalidating flat fuel tax registration fee); *American Trucking Ass'ns* v. *State*, 556 N.W.2d 761 (Wis. Ct. App. 1996) (invalidating flat hazardous waste transportation fee), rev. denied, 560 N.W.2d 274 (Wis. 1996); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337-1338 (Vt. 1989) (invalidating flat fuel-user license fee).

rations from plying their trades in interstate commerce." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 (1996).[7]

Writing for the Court in the leading case of *Nippert* v. *City of Richmond*, 327 U.S. at 429, Justice Rutledge[8] described the practical consequences of such a flat tax:

> [The] tax imposes substantial excluding and discriminatory effects of its own. * * * [T]he small operator and especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun. And this effect will be extended to more substantial and regular operators, particularly those whose * * * market in any single locality * * * cannot be mined more than once every so often.

Justice Rutledge added that interstate businesses inevitably "would find the cumulative burden of the [flat] tax eating away all possible return from [their] selling." *Id*. at 430. Such a tax thus "can easily mean the stoppage of a large amount of commerce which would be carried on either in the absence of the tax or under the incidence of one taking account of those

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[7] As the Court has indicated on repeated occasions, for purposes of applying the internal consistency test it does not matter whether other taxing jurisdictions actually have enacted identical taxes; the test looks at the consequence if such taxes *were* to be enacted. See, *e.g.*, *Scheiner*, 483 U.S. at 283 n.15; *Tyler Pipe*, 483 U.S. at n.11.

[8] Justice Rutledge's views anticipated the Court's modern Commerce Clause doctrine in significant respects and were substantially incorporated in the *Complete Auto Transit* test. See *Complete Auto Transit*, 430 U.S. at 280-281, 282; Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, 1 STATE TAX NOTES 581, 586, 587 (1991).

variations." *Id.* "Whether or not it was so intended, those are [the flat tax's] necessary effects." *Id*. at 434.[9]

Needless to say, then, Michigan's tax manifestly does *not* "maintain state boundaries as a neutral factor in decisionmaking." *Scheiner*, 483 U.S. at 283. Such an outcome is precisely what the Commerce Clause nondiscrimination and apportionment requirements were designed to avoid.[10]

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[9] This is a very realistic concern. See, *e.g.*, *Gov't Suppliers Consol. Servs., Inc.* v. *Bayh*, 975 F.2d 1276, 1281 (7th Cir. 1992) ("for trucks that haul [in the taxing state] only once a year, [a] $100 registration fee may be prohibitive"); *Oregon*, 90 P.3d at 22 ("the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on intrastate business and will discriminate against the interstate carrier if it does not do so"). Indeed, in its brief supporting certiorari, the United States noted that "Congress's determination in the [Single State Registration System] that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a fee ten times that amount for 'topping off' an interstate load warrants review by this Court." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 17.

[10] It is no answer to this point to suggest, as the State did below, that a carrier with a fleet of many trucks could avoid competitive disadvantage by dedicating a portion of its fleet exclusively to intrastate commerce in Michigan. As this Court has held repeatedly, "such promotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent" (*Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 n.3 (1996)); a state may not impose "a tax which is 'discriminatory in favor of the local merchant'" so as to "encourag[e] an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72 (1963) (citation omitted). Moreover, the approach suggested by the State simply is not practical. An out-of-state carrier with many trucks cannot know in advance which vehicles will be in position to take advan-

2. The Michigan tax falls on interstate trucks at a higher effective rate per mile than it applies to trucks that travel only intrastate

Flat taxes like Michigan's do more than impose cumulative burdens on firms that conduct business in multiple states; they also necessarily discriminate against interstate firms even on the intrastate portion of their business. While the flat tax nominally applies in the same amount to inter- and intrastate businesses, "[t]he Commerce Clause has a deeper meaning that may be implicated even though state provisions * * * do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner,* 483 U.S. at 281. More than fifty years ago, in *Nippert*, the Court described why this is so. Striking down a flat municipal license fee imposed on solicitors doing business in the city, the Court explained:

> [T]he tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

327 U.S. at 432.

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tage of the opportunity to make an intrastate haul in Michigan; a carrier that hopes to get intrastate business as that business becomes available will have no choice but to register all of its trucks in Michigan – and in all other states that adopt similar intrastate fees.

The Court applied this conclusion to taxes on interstate motor carriers in *Scheiner*, noting that flat taxes necessarily disadvantage interstate businesses: "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego [*sic*] the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Against that background, the discriminatory impact of a flat levy like the Michigan tax is undeniable. On average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intra- and interstate. Such a local company therefore will pay the tax at a lower effective rate than does its interstate competitor. And "imposition of [a] flat tax[] 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. The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding and discriminatory effect.'" *Scheiner*, 483 U.S. at 296 (quoting *Nippert*, 327 U.S. at 426).

Thus, as the United States noted in supporting the grant of certiorari in this case, concerns similar to those raised by the flat taxes invalidated in *Scheiner*

> may be raised by Michigan's intrastate fee under Section 278.2(1) insofar as it is imposed on carriers engaged in interstate as well as intrastate commerce, because the cost-per-mile incurred by those carriers for engaging in intrastate commerce within Michigan would generally be higher than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce. * * * The effect could be to place interstate carriers at a competitive disadvantage if they sought to "top off" an interstate load or haul a load between two points in Michigan after completing (or before commencing) an interstate haul. The carrier's interstate transportation could also be adversely affected as a result.

Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 16. A tax regime in which interstate businesses are thus "placed at a substantial commercial disadvantage" (*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 195 n.11 (1994)) is inconsistent with the Commerce Clause.

C. The Court Below Misapplied The Controlling Commerce Clause Principles

In nevertheless upholding the Michigan tax, the court below regarded the substantial body of this Court's Commerce Clause tax jurisprudence as wholly inapposite. That is so, the court of appeals reasoned, because levies used to support regulatory programs (as Michigan's ostensibly is) should be subjected to a much lower standard of Commerce Clause review than are other forms of state taxation. The court also was of the view that state taxes will survive Commerce Clause scrutiny in the absence of empirical proof that the levies actually have *succeeded* in suppressing interstate commerce. Both elements of this analysis are insupportable.

1. A levy may not escape application of the Complete Auto test simply because its proceeds are used for regulatory purposes

In upholding the constitutionality of the Michigan tax, the court below did not attempt to reconcile its decision with the mandate of holdings like *Scheiner* and *Nippert*. Instead, the court held that a tax simply need not satisfy the *Complete Auto Transit* requirements and the internal consistency test at all so long as it is "regulatory" in nature. The Michigan tax is "regulatory," the court had earlier concluded, because its proceeds are devoted to "promoting and regulating safe use of the highways" and the aggregate amount of the fees collected is "proportionate to the cost of the regulation." J.A. 93-94. See also note 5, *supra*. Having thus characterized the levy here as "regulatory," the court of appeals rejected the *Complete Auto Transit* test and concluded that the applicable standard is the one set forth in *Pike* v. *Bruce Church* for assessing the validity under the Commerce Clause of nondiscriminatory regulations.

This holding, however, rests on a manifest evasion of this Court's precedents. Whatever the validity of a Commerce Clause distinction between taxes and regulations, we would have thought it obvious that a tax whose revenues are dedicated to paying for the enforcement of a regulation is just that: a tax and *not* a form of regulation. This surely is a place for application of the "quacks like a duck" principle; the Michigan court's contrary conclusion, which accords taxes differing constitutional treatment depending upon what they are called and what they pay for, "has no relationship to economic realities" and "focus[es] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 279, 288.

It therefore is no surprise that the Michigan court's decision to hinge the constitutionality of the tax on the uses to which the tax revenue will be put departs from this Court's holdings in several fundamental respects:

a. To begin with, the court below disregarded the undeniable fact that the Michigan tax's effect on interstate commerce is essentially identical to that of the tax invalidated in *Scheiner*. In both cases the flat levies, if imposed by other states, would have a "'cumulative effect'" on interstate trucks that would "'not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.'" *Scheiner*, 483 U.S. at 285 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)). In both cases the interstate vehicle paid for something that "'[i]n the general average of instances * * * is not as valuable to the interstate as to the intrastate carrier.'" *Id*. at 291 (citation omitted). And in both cases the effect of the tax was to "exert an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id*. at 283, 286-287 (quoting U.S. Const., Art, I, § 8, cl. 3). Like the levy in *Scheiner*, the Michigan tax accordingly "produce[d] a forbidden effect" (*Complete Auto*, 430 U.S. at 288) – and that is the crucial consideration for Commerce Clause purposes.

Thus, as Professor Hellerstein has observed,

> there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the state's regulatory power rather than an exercise of the state's taxing power. Surely the evils that the "internal consistency" test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his in-

> trastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. Hence there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.

Hellerstein, *supra*, 87 MICH. L. REV. at 157. See *American Trucking Ass'ns* v. *Secretary of Administration*, 613 N.E.2d 95, 99 n.9, 102 (Mass. 1993) (noting that "[i]t is of no relevance what label is attached to the assessment imposed by the State" so long as the fee has "an impermissible effect on free trade" and finding "no merit to the Commonwealth's claim that the internal consistency test does not apply to user fees"); *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014, 1016 (Me. 1991) ("a tariff * * * is forbidden if it produces the prohibited discriminatory effects on interstate commerce whether designated a 'fee' or a general revenue 'tax'"); *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, 852 A.2d 142, 164 (2004) ("reject[ing] 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*"); *id*. at 158 (citation omitted) ("'[i]t is the 'practical effect of the challenged tax' that is determinative"). See also *Gov't Suppliers Consolidating Servs., Inc.*, v. *Bayh*, 975 F.2d 1276, 1271 n.2, 1281-1282 (7th Cir. 1992) (striking down flat fees on trucks engaged in waste transportation and collection even though the fees' "purpose [was] regulatory"), cert. denied, 506 U.S. 1053 (1993).

b. Moreover, the distinction drawn by the Michigan court – between a tax whose revenues are used "to enforce [regulatory] provisions" and a tax "designed to raise revenue for the general public" (J.A. 93) – makes no sense when applied to the Commerce Clause. For reasons we have just noted, the burden on interstate commerce is not reduced in any respect because the tax revenues are used to finance regulatory activity rather than, for example, highway repairs. Again, *Scheiner* provides an illustration of the point. The taxes there were imposed on all trucks that traveled Pennsylvania's roads and were dedicated to financing "road-related expenditures," including "highway maintenance." 483 U.S. at 270, 271. The burden that those taxes imposed on interstate trucks would not have been reduced (or affected in any way) if the revenues instead had been devoted to paying for safety inspections, sobriety checks, highway patrol salaries, or any other arguably more "regulatory" activity. Indeed, such a "regulatory fee" would, if anything, appear to be more burdensome than a general revenue tax because it would be part of a package that subjected trucks to a double whammy: the trucker would both pay the tax and bear the burden of potentially costly state regulation.

Again, the United States had it right in its brief supporting certiorari:

> What matters is "not the formal language of the tax statute but rather its practical effect." [*Jefferson Lines*, 514 U.S. at 183.] In substance and effect, the distinction drawn by the Court of Appeals is meaningless: the intrastate fee is in effect a tax "for the privilege of doing business in the state" because an interstate carrier cannot make intrastate hauls in the State without paying the fee; whether the fee is characterized as "regulatory" has no bearing on its practical effect.

Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 13-14.[11]

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[11] This is not to deny, of course, that there may be circumstances in which there are relevant distinctions between general revenue taxes and special purpose fees. Some statutes, for example, accord differing treatment to the two types of levy. See, *e.g.*, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (ad-

c. In addition, flat taxes like the ones at issue here and in *Scheiner* are quite different from per-use fees, such as highway tolls, that have survived Commerce Clause attack. The latter type of fee is neither malapportioned nor discriminatory because it is calibrated to charge every user for each use of a particular service provided to the taxpayer (or to compensate the State for every expense imposed upon the State by the taxpayer). In the highway toll example, the traveler who takes ten trips on the highway will pay the toll ten times, while the traveler who passes through once will pay only a single toll; in-state travelers have no special advantage because the fee "'is based on some fair approximation of use or privilege for use.'" *Scheiner*, 483 U.S. at 289 (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972)).

Here, the Michigan court opined that the tax at issue is "proportionate to the cost of regulation" (J.A. 94) – but it meant by this statement that fee revenue *in the aggregate* is used to pay for the State's regulatory program. See *id*. at 95. As with the Pennsylvania fees invalidated in *Scheiner*, the amount of Michigan flat tax "owed by a trucker does not vary directly with miles traveled or with some other proxy for value obtained from the State." 483 U.S. at 291. By defi-

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dressing whether a particular charge is a "fee" within the meaning of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 9701); *Union Pac. R.R. Co.* v. *Public Util. Comm'n*, 899 F.2d 854 (9th Cir. 1990) (addressing whether a particular levy is a "tax" within the meaning of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b), recodified at § 11501). But these decisions have no bearing on the question whether the purposes of the Commerce Clause permit the drawing of a similar distinction between taxes and fees. See Rothfeld, *Scheiner's Next Wave: Distinguishing Taxes From Fees Under the Commerce Clause*, 17 STATE TAX NOTES 1681, 1686 (1999).

nition, such a fee, which does not take account of in-state mileage or number of trips taken, cannot reflect a reasonable approximation of the individual taxpayer's use of state services, and thus does "not even purport to approximate fairly the cost or value of the use of [the State's] roads." *Id*. 290. See *id*. at 286 n.21; *Nippert*, 327 U.S. at 427; Choper & Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 232-233.

d. Finally, the line drawn by the court below makes inconsistency in application inevitable. Because that line is not grounded in Commerce Clause policies, there is no principled way to determine whether a given tax must be deemed a "regulatory fee." In this case, for example, the Michigan court declared the challenged tax to be regulatory because its proceeds ostensibly are used to "promot[e] and regulat[e] safe use of the highways." J.A. 93. But this approach makes the form of the tax dispositive and invites manipulation by legislative draftsmen – a danger that is particularly acute because the court below used a *state-law* test to determine whether a levy is a "fee" and therefore exempt from the *Complete Auto* requirements.[12] As a consequence, the Michigan court's holding would allow States to pay for a wide range of activities through the imposition of flat fees, in the process exporting much of their tax burden to out-of-state

[12] The bankruptcy of this approach is illustrated by the fact that the regulatory program assertedly served by the Michigan tax underwent a radical change in 1995, when Congress preempted state regulation of the prices, routes, and services of intrastate trucking operations. See note 2, *supra*. As the court below itself noted (J.A. 93 n.10), federal law thus displaced most of the purposes served by the Michigan regulatory program pursuant to which the Michigan tax is assessed. Michigan, however, has not adjusted the amount of the fee collected. As this history suggests, it is a simple enough matter for a state to change the asserted "regulatory" justification for a fee when doing so suits its purpose.

taxpayers. The inevitable consequence of such a rule would be to "divide and disrupt the market for interstate transportation services." *Scheiner*, 483 U.S. at 285.

2. There is no need for an empirical demonstration that the flat tax discourages interstate commerce

The decision below also departs from the analysis used by this and other courts in a second respect: the Michigan court erred in failing to recognize the discriminatory nature of the Michigan tax. The court below recognized that it "may be" that "the mixed [inter- and intrastate] carrier invariably will pay a higher per mile fee than the carrier who operates solely intrastate," and "that because the fee is a flat annual fee, 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 decision-making by discouraging an intrastate carrier from engaging in interstate commerce." J.A. 100-101. Having said that, however, the court rejected the claim of discrimination on the ground that "it is a matter of pure speculation," reasoning that it saw no evidence that in practice "the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." *Id*. at 101. This holding, however, "entirely misconceive[s] what is meant by discrimination or undue burden in the sense applicable to these problems." *Nippert*, 327 U.S. at 426.

The assertion that the discrimination did not actually succeed in discouraging interstate commerce (even if, improbably, it is assumed to be true) cannot validate a discriminatory tax. "It is well-settled that '[w]e need not know how unequal the [t]ax is before concluding that it unconstitutionally discriminates.'" *Bacchus Imports, Ltd* v. *Dias*, 468 U.S. 263, 269 (1984) (quoting *Maryland* v. *Lousiana*, 451 U.S. 725, 760 (1981)). The Court thus has held repeatedly that, "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992). See, *e.g.*, *Oregon Waste Sys.*, 511 U.S. at 101. The extent of the discrimination is immaterial so long as a state tax structure "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce" or to discourage interstate companies from competing for local business; the Court has "never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause." *Fulton Corp.*, 516 U.S. at 333 & n.3.

Indeed, in upholding claims that state taxes or regulations violate the Commerce Clause's anti-discrimination requirement, the Court has expressly *rejected* the contention that the plaintiff must show an actual adverse effect on interstate commerce. Thus, "[a] particularized showing of the sort respondent[s] seek[] is not required" (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 n.15 (1997)), and that is so even if the affected entities "are not deterred by the statute from doing a principally interstate business." *Id*. at 578. See, *e.g.*, *Bacchus Imports*, 468 U.S. at 271.[13] Indeed, so far as internal consistency is concerned, the test "asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure

[13] For these reasons, the United States was incorrect when it suggested, in its brief supporting the grant of certiorari, that the Court consider remanding the case for factual development concerning "the extent of any such competitive disadvantage on interstate commerce." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 17 & 17 n.11 (suggesting possibility of a remand because the record does not "reflect the overall extent to which Michigan's flat fee actually deters out-of-state carriers from competing for intrastate hauls in Michigan"). In the face of discrimination, the Court has never deemed such proof to be necessary.

of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a competitive disadvantage as compared with commerce intrastate. A failure of internal consistency shows *as a matter of law* that a State is attempting to take more than its fair share of taxes." *Jefferson Lines*, 514 U.S. at 185 (emphasis added).

By the same token, when the structure of a flat tax necessarily discriminates against interstate businesses "'[i]n the general average of instances'" (*Scheiner*, 483 U.S. at 291 (citation omitted)), there is no need for particularized proof of the per-mile or per-transaction disparity in the effective rates imposed on inter- and intrastate taxpayers. In *Nippert*, for example, no such evidence was required. For, as the Supreme Judicial Court of Massachusetts explained in a case that was virtually identical to this one, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d at 101. Accord *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, 852 A.2d at 163 (flat fees are "structurally discriminatory, and [interstate carriers] should not be compelled to prove the precise level of the per-activity cost disparity"); *American Trucking Ass'ns, Inc.* v. *Oregon*, 90 P.3d at 22 ("In deciding this kind of issue, the Supreme Court's case law does not rely on the specific evidence in a specific case as the foundation for its conclusions concerning a particular tax. Rather, it focuses on the structure of the tax at issue[.]"); *id*. at 23 ("the [Supreme] Court has * * * made it clear that it is the inherent tendency of a tax, not the effects that the tax has actually produced, that matters for the 'internal consistency' test").[14]

D. The Michigan Tax Is Not Subject To A Special Commerce Clause Rule Because It Purports To Fall On An Intrastate Transaction

The conclusion that the court below erred in its analysis would appear to dispose of this case. But one additional issue, raised by the United States in its brief in support of certiorari, warrants discussion. Pointing to *Osborne* v. *Florida*, 164 U.S. 650 (1897), and *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903), the United States suggested that "an older line of this Court's cases * * * subjected flat taxes on transportation companies' intrastate routes to more relaxed scrutiny than taxes on their interstate routes." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 15. The United States broached the possibility that those decisions provide support for Michigan's contention that flat taxes on intrastate commerce are defensible, although the Solicitor General acknowledged that "[t]he continued vitality of those older decisions may be subject to question in light of this Court's decisions in *Complete Auto* and *Scheiner*, which overruled a number of earlier formalist decisions in favor of a more practical framework focusing on the actual effect of a tax." *Id*. at 16. In our view, the doctrine

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[14] See also *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957 (Md. 1988) (deeming it sufficient that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price"); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (concluding that *Scheiner* held "flat highway user taxes inherently discriminatory against interstate commerce").

and decisions cited by the United States cannot support the Michigan tax.

1. At the time that it decided *Osborne* and *Pullman Co.* – and, with occasional exceptions, for most of the next seven decades – the Court applied what it has since described as a "somewhat metaphysical approach to the Commerce Clause that focused on the character of the privilege [taxed] rather than the practical consequences of the tax." *Scheiner*, 483 U.S. at 294-295. During this period, "the Court held the view that interstate commerce was wholly immune from state taxation 'in any form,' * * * even though the same amount of tax should be laid on intrastate commerce." *Jefferson Lines*, 514 U.S. at 180 (citation omitted). See *id*. at 181, 183. See, *e.g.*, *Armco*, 467 U.S. at 643 n.7 (noting "the now rejected notion that only 'direct' burdens on interstate commerce were disapproved"). As a corollary to this doctrine, "at a time when the Commerce Clause was thought to prohibit the States from imposing any direct tax on interstate commerce," "the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power." *Commonwealth Edison*, 453 U.S. at 614-615. Although the Court used different semantic formulations to draw this line, its central view during the late nineteenth and much of the twentieth centuries accordingly was that state taxation of "local" or intrastate activities was wholly unconstrained by the Commerce Clause, while interstate commerce "itself" was absolutely immune from state taxation. See Lockhart, *supra*, 65 MINN. L. REV. at 1027-1034; Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987); McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 URB. LAW. 529, 538-551 (1985); Rothfeld, *supra*, 1 STATE TAX NOTES at 586-587.

Over time, however, the Court came to recognize that this approach was "a triumph of formalism over substance"

(*Complete Auto Transit*, 430 U.S. at 281), and in a series of decisions culminating in *Complete Auto Transit* the Court "categorically abandoned" the test drawing semantic distinctions between local and interstate activities. *Jefferson Lines*, 514 U.S. at 183. See, *e.g.*, *D.H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 30 (1988). In the place of this formal rule, as we have noted, the Court substituted an approach that "seek[s] to 'establish a consistent and rational method of inquiry focusing on the practical effect of the challenged tax.'" *Goldberg* v. *Sweet*, 488 U.S. 252, 260 (1989).

Under the practical approach of *Complete Auto Transit*, the Court has, on the one hand, rejected "the notion that state taxes levied on interstate commerce are per se invalid." *Commonwealth Edison*, 453 U.S. at 615. But sauce for the goose is sauce for the gander: even while recognizing broader state authority to tax nominally *interstate* transactions, the Court also has "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*." *Commonwealth Edison*, 453 U.S. at 615 (emphasis added) (citing cases). Instead, the Court has held that "[s]tate taxes levied on a 'local' activity * * * may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry." *Id*. at 616. Such a tax "must be evaluated under *Complete Auto Transit*'s four-part test." *Id*. at 617. Thus, "[e]ven 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 (citations and internal quotation marks omitted). See *Scheiner*, 483 U.S. at 295-296.

This point is made clear by *Scheiner* itself. There, Pennsylvania imposed an unapportioned tax on trucks "for the privilege of using [the] State's highway system." 483 U.S. at 269, 279. That tax could have been defended on precisely the "intrastate tax" ground noted by the United States (and advanced by Michigan) here: just as no other state may tax intrastate carriage in Michigan, no other state could have imposed a levy on the intrastate use of Pennsylvania's highways. See *id*. at 284 n.16; 293-294. But the Court nevertheless held the Pennsylvania tax invalid because unapportioned levies like Pennsylvania's, if imposed by other states on the (assertedly intrastate) use of *their* highways, would result in cumulative burdens on interstate commerce, placing interstate truckers at a potentially crippling competitive disadvantage. See *id*. at 284, 296. Michigan's unapportioned tax has exactly the same effect. And under the Court's modern view, for purposes of Commerce Clause analysis it is simply immaterial that this "pinch" on interstate commerce is triggered by an intrastate event. See Choper & Yin, *supra*, 1998 SUP. CT. REV. at 232 ("[F]lat taxes such as those in *Scheiner* present exploitative possibilities despite the fact that they are assessed against an object that only the taxing state can reach. * * * Because of this inherent structural prejudice for multistate enterprises, these types of flat taxes should be invalidated regardless of the state's intention in imposing them.").

2. Against this background, the decisions cited by the United States at the certiorari stage do not provide substantial support for the Michigan tax. Those cases were decided during the heyday of the Court's formal, "metaphysical" approach to the Commerce Clause, and their holdings provide no guidance for the resolution of this case.

Osborne involved a Commerce Clause challenge to a flat tax imposed by Florida and its political subdivisions on express companies that carried goods for hire. See 164 U.S. at 652-653. The Court "assumed that if the statute applied to the express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce." *Id*. at 653-654. The Florida Supreme Court, however, read the tax to apply "only as concerns [the taxpayer's] local business." *Id*. at 654. This Court upheld the tax as so construed, explaining that "[i]t has never been held * * * that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to valid taxation by the State of the business of the company which is entirely local." *Id*. at 655. Relying on *Osborne*, the Court in *Pullman Co.* upheld a similar flat Mississippi tax on railway cars that carried passengers from point to point within the State (see 189 U.S. at 421); because the taxpayer was not legally obligated to carry passengers on intrastate journeys, the Court reasoned that "[t]he company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." *Id*. at 422.

On the face of it, and even when viewed on their own terms, nothing in these decisions is inconsistent with our position in this case. We do not argue, as did the taxpayers in *Osborne* and *Pullman Co.*, that interstate activities are immune from properly apportioned and nondiscriminatory state taxation. And the taxpayers in those cases did not argue, as we do, that intrastate taxation must be apportioned when it has substantial effects on interstate commerce. Instead, their contention was that their intrastate transportation of goods and passengers should be regarded (in a "metaphysical" sense) as an aspect of their interstate business, and therefore as wholly outside the state's taxing authority. The Court's rejection of that argument on the ground that the taxpayers' intrastate operations were a "mere incident" to their distinct interstate business does not foreclose the very different argument made by the taxpayers here.

But that technical distinction between the cases is not the end of the matter: more fundamentally, the reasoning that underlay the decisions in *Osborne* and *Pullman Co.* cannot be squared with the Court's current doctrine. It is no longer "assumed" that a state tax is wholly void simply because it is imposed on a "company in relation to its interstate business." And conversely, as we have explained, it also is no longer the case that state taxation is immune from Commerce Clause scrutiny simply because "the business of the [taxpayer] * * * is entirely local."[15] The formal, metaphysical approach to the Commerce Clause that took no account of the practical impact of the challenged tax on interstate commerce – and that dictated the outcome in *Osborne* and *Pullman Co.* – has been "categorically abandoned." *Jefferson Lines*, 514 U.S. at 183. That, doubtless, is why the Court has not cited either of those decisions in more than 50 years; they were last invoked by the Court in *Chicago* v. *Willett Co.*, 344 U.S. 574, 577, 581 (1953).[16] Accordingly, if the holdings of *Osborne* and *Pull-*

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[15] The analysis in *Pullman Co.* also is inconsistent with modern doctrine in a related respect. The Court reasoned there that ["[t]he company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." 189 U.S. at 422. That reasoning would appear to justify any discriminatory tax on intrastate operations that the taxpayer is not legally obligated to perform. But the Court has more recently made clear that a state may not "force a taxpayer" to restructure its operations or conduct a higher percentage of its business in-state "in order to avoid discriminatory taxation." *Kraft Gen. Foods, Inc.* v. *Iowa Dept. of Revenue & Finance*, 505 U.S. 71, 78 (1992).

[16] The other creaky decisions cited in the United States' brief at the certiorari stage likewise cannot justify the Michigan tax. See Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 15 n.9. The Court's cryptic discussion in *Bode* v. *Barrett*, 344 U.S. 583, 583 (1953), appears to reflect the discredited view that a tax on intrastate operations necessarily does not impose an "unreasonable burden on interstate commerce." And in *Willett*, the Court upheld an Illinois truck tax on the ground that the taxpayer was an Illinois corporation that based its trucks in Chicago (see 344 U.S. at 580); whatever the current vitality of that holding, it has no application in this case, in which the taxpayers and their fleets are not headquartered in Michigan.

man Co. are thought to support the constitutionality of the Michigan tax, those holdings should be disapproved.[17]

Indeed, if the Court were to hold that some category of taxes on intrastate events is immune from Commerce Clause scrutiny and the *Complete Auto Transit* test – even though, as in this case, those taxes undeniably have an effect on interstate commerce – it would be required to draw the sort of "opaque" distinctions that led to repudiation of the formal nineteenth century rule in the first place. *Commonwealth Edison*, 453 U.S. at 616 n.6. After all, as Justice Rutledge has noted for the Court, "[a]ll interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact." *Nippert*, 327 U.S. at 423. Thus,

> [i]f the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate or distinct from "the transportation or intercourse which is" the commerce itself and then to levy the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is

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[17] As the Solicitor General noted, the Court has not hesitated to disapprove Commerce Clause decisions that are inconsistent with modern doctrine. See, *e.g.*, *Fulton Corp.*, 516 U.S. at 346 (disapproving *Darnell* v. *Indiana*, 226 U.S. 390 (1912)); *Scheiner*, 483 U.S. at 296-297 (disapproving *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950), *Aero Mayflower Transit Corp.* v. *Board of Railroad Commissioners*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U.S. 285 (1935)); *Complete Auto Transit*, 430 U.S. at 288-289 (disapproving *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951)).

> difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax.

Ibid. The Court rejected a rule that invited such baroque distinctions once, and it should not revive that rule now by upholding the Michigan tax.

CONCLUSION

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

Respectfully submitted.

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