SUPREME COURT OF ARIZONA

SABAN RENT-A-CAR, LLC, et al.,

Plaintiffs/Appellees-Cross Appellants,

v.

ARIZONA DEPARTMENT OF REVENUE,

Defendants/Appellants/ Appellees/Cross-Appellees,

TOURISM AND SPORTS AUTHORITY,

Defendants-in-Intervention/ Appellants/Cross-Appellees.

Arizona Supreme Court
No. CV-18-0080-PR

Court of Appeals
Division One
No. 1 CA-TX 16-0007

Arizona Tax Court
No. TX2010-001089

ARIZONA DEPARTMENT OF REVENUE'S SUPPLEMENTAL BRIEF

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INTRODUCTION*

This case and its aftermath will determine the fate of hundreds of millions of dollars in tax revenue that various governmental entities have collected for decades. Saban's Dormant Commerce Clause theory has implications not only for the Surcharge, but for hotel and other taxes paid predominantly by tourists. Accepting that theory would call into question decades of tax policy across the country in a manner that no court anywhere has ever done.

Accepting Saban's Section 14 theory would likewise have impacts that go well beyond the Surcharge. Not only would the Surcharge be invalidated, but other transaction privilege tax monies that various governmental entities have collected for decades arguably would have to be diverted to road uses in a manner that would wreak havoc with governmental financing at various levels.

Yet the law does not require these absurd results. To the contrary, every available tool of judicial interpretation and common sense confirms that the Surcharge does not violate the Dormant Commerce Clause or Section 14, and the Court should so hold.

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* This brief uses the terms "Surcharge," "Section 14," and "Opinion" as used in the Joint Response to Petition for Review. APP references refer to the appendix attached to that Response.

ARGUMENT

I. The Surcharge does not violate the Dormant Commerce Clause.

Saban's Dormant Commerce Clause challenge comes down to whether the Constitution prohibits states from enacting a tax the enacting body believes will burden tourists more than locals, even if the tax aims to increase tourism and interstate commerce. As the prior briefing demonstrated, no court anywhere has ever adopted that theory, and for good reason; it makes no sense and would cripple state and local governments that rely on revenue connected to tourism. *See*, *e.g.*, COA-81 at 61-67.

In its Petition, however, Saban continues to insist that "[t]he Surcharge is invalid because it was motivated by discriminatory intent." Petition at 12. But the type of "intent" it points to does not offend the Dormant Commerce Clause. And even if it did, such an "intent" without more would not justify striking down the Surcharge.

Dormant Commerce Clause cases typically analyze the four factors from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), which is "the now-accepted framework for state taxation," *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (notwithstanding Saban's earlier contention otherwise, COA-93 at 15-18). Of the four factors, only discrimination is at issue in this case: "whether A.R.S. § 5-839 impermissibly discriminates against interstate commerce." Op.

¶ 29; *see also* COA-81 at 16. A law can discriminate "in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) (citation omitted). Saban's Petition focuses only on "(b)": whether the Surcharge "purposefully" discriminates against interstate commerce (i.e., whether it has discriminatory intent).[1]

A. Saban has failed to show the Surcharge has a discriminatory purpose that offends the Constitution.

1. The Surcharge does not implicate the concerns about economic protectionism that the Dormant Commerce Clause guards against.

Saban's contention that the Constitution forbids local governments from taxing tourist-focused businesses loses sight of why we have a Dormant Commerce Clause. "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism. . . ." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008) (internal quotation marks omitted). A protectionist state import tariff is "the quintessential evil targeted by the dormant Commerce Clause." *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1792

[1] Saban has implicitly conceded that the Surcharge is facially neutral, and in fact the Surcharge draws no geographical distinctions based on the location of either rental agencies or their customers. COA-81 at 30-39. Moreover, Saban disclaimed any reliance on discriminatory effects. *See* COA-93 at 43 ("Defendants would very much like Saban's dormant Commerce Clause challenge in this case to be an 'effects-based' challenge. It isn't.").

(2015). For example, Arizona cannot tax wine imports to prop up Arizona's wine industry against competition from California vineyards.

At the same time, "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (internal quotation marks omitted). To the contrary, the Dormant Commerce Clause "respects federalism by protecting local autonomy." *Id.*

The law must be this way. Otherwise the Dormant Commerce Clause would cripple state and local government because almost every governmental action affects interstate commerce in some way. A state-highway speed limit affects interstate FedEx deliveries. Differences in sales tax rates affect interstate purchasing decisions, particularly near state borders. But no one seriously contends that these regulations and taxes violate the Dormant Commerce Clause.

The tax in this case is no different. Nothing in the AzSTA legislation sought to protect a local industry from out-of-state competition. And the AzSTA legislation does not encourage Arizonans to buy products from a local business at the expense of out-of-state competitors. The legislation is intended to promote Arizona tourism, and thus to encourage the type of interstate commerce celebrated by the Commerce Clause. To say that the Surcharge "protects" the tourism industry (in the sense used in Commerce Clause cases) when that tax falls on the

allegedly "protected" industry is nonsensical; you don't protect an industry by taxing it or its customers. The Surcharge, therefore, is not the type of protectionist law that the Dormant Commerce Clause typically targets and does not implicate any constitutional concern.

2. The Dormant Commerce Clause does not prohibit taxes paid primarily by out-of-staters and does not prohibit taxes with that purpose.

Saban nevertheless contends that the Surcharge (both generally and the temporary-replacement provision in A.R.S. § 5-839(B)(2) in particular) "was motivated by discriminatory intent, that is, forcing out-of-state visitors [to] pay a special tax that residents are shielded from." Petition at 12. But all of Saban's evidence of discriminatory intent is irrelevant because it all involves a purpose that does not offend the Dormant Commerce Clause.

In fact, the U.S. Supreme Court has explicitly rejected the foundation of Saban's theory: "that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981). In doing so, the Supreme Court upheld a tax on coal mined in Montana even though "90% of Montana coal is shipped to other states." *Id.* at 617. It expressed "misgivings about judging the validity of a state tax by assessing the State's . . . 'exportation' of the tax burden out of State." *Id.* at 618.

The Court confirmed its hostility to Saban's theory by rebuffing the principle that a "statute is discriminatory because it will apply most often to out-of-state entities." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987). The Ninth Circuit likewise held that "a state law is not 'discriminatory' under the commerce clause simply because it applies most often to out-of-staters." *Valley Bank v. Plus Sys., Inc.*, 914 F.2d 1186, 1193 (9th Cir. 1990). Another state high court also rejected a challenge to a tax on parking lots where "the vast majority of patrons of the parking lots are traveling in air commerce," and 88.5% of them were traveling outside the state. *Airway Arms, Inc. v. Moon Area Sch. Dist.*, 446 A.2d 234, 242 (Pa. 1982). "The tax burden in this case is borne according to the extent of use of the parking facilities and not on a distinction between patrons using interstate air commerce and patrons engaged in intrastate air commerce or local commerce." *Id.* The Surcharge is no different.

Because the *effect* of having a tax borne primarily by out-of-state consumers is permissible, intending for a tax to have that lawful effect cannot by itself qualify as an improper purpose under the Dormant Commerce Clause. Thus, the fundamental premise of Saban's case is simply wrong—i.e., even if the Surcharge was intended to be borne primarily by out-of-state visitors, the Surcharge does not have an unconstitutional discriminatory purpose.

B. Discriminatory purpose alone cannot invalidate a law.

Moreover, even if the Surcharge had a discriminatory purpose, that would not justify striking down the law because a discriminatory purpose, without more, will not suffice in this case. Common sense and the foundational premise of the Dormant Commerce Clause show why. The Commerce Clause reserves for Congress the power "[t]o regulat[e] Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Local governments usurping interstate power from Congress (regulating commerce "among the several States") is the only possible justification for the Dormant Commerce Clause.[2] If local lawmakers intend to regulate interstate commerce but *fail*, then they did not actually do the thing reserved for Congress. By contrast, if lawmakers intend to regulate interstate commerce and they *succeed*, then the resulting law necessarily would discriminate facially or in effect, and could be stricken on those bases.

[2] Several U.S. Supreme Court justices have noted that the Dormant Commerce Clause has no basis in the text of the Constitution, and therefore they believe the doctrine should be rejected entirely or at least as applied beyond the most quintessential interference with interstate commerce. *See, e.g.*, *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) (characterizing the doctrine as "a judicial fraud"); *McBurney v. Young*, 133 S. Ct. 1709, 1720-21 (2013) (Thomas, J., concurring) (stating that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application") (internal quotation marks omitted); *Wayfair*, 138 S. Ct. at 2100-01 (Gorsuch, J., concurring) (saving as "questions for another day" how much of the doctrine "can be squared with the text of the Commerce Clause").

For these reasons, several courts have questioned whether discriminatory purpose alone justifies invalidating a law:

- "[T]here is some reason to question whether *a showing of discriminatory purpose alone* will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause." *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 36 n.3 (1st Cir. 2005).

- "The Court finds it incongruous to say that a law violates the dormant Commerce Clause *merely by having a discriminatory purpose*. . . . If local lawmakers intend to discriminate in favor of local interests, but mistakenly pass a law that does not so discriminate, did those lawmakers violate the dormant Commerce Clause simply by their mistaken intentions? *The Court doubts it.*" *Puppies 'N Love v. City of Phoenix*, 116 F. Supp. 3d 971, 993 (D. Ariz. 2015); *superseded by statute*, 2017 WL 4679258.

- "[E]ven if the court were to find that the law was motivated by some discriminatory purpose, *that finding alone* would be unlikely to violate the Commerce Clause." *Int'l Franchise Ass'n v. City of Seattle*, 97 F. Supp. 3d 1256, 1272 n.14 (W.D. Wash.), *aff'd* 803 F.3d 389.

- "In no Commerce Clause case cited or disclosed by research has a statute or regulation been invalidated *solely because of the legislators' alleged discriminatory motives*." *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1013 (E.D. Cal. 2006) (and collecting citations).

- "[W]e decline to rule the TPT unconstitutional *based solely on the alleged discriminatory motives* of the city council members who supported it. . . . [¶] [T]he discrimination [the Dormant Commerce Clause] prohibits is measured by the economic impact of a local regulation, not the evil motives of local legislators." *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 64 Cal. App. 4th 1217, 1224 (1998).

(Emphases added.) Tellingly, the U.S. Supreme Court has never invalidated a law solely based on discriminatory purpose. This Court should not do so, either.

C. Adopting Saban's legal theory would require courts to set acceptable tax-rate policy.

Unless the Court is prepared to say that local governments cannot tax rental cars at all (along with various other businesses that benefit from tourists), adopting Saban's theory would require determining what (non-zero) tax rate is *constitutionally* permissible. To do so, should courts compare a rental car tax to the tax rate on long-term leases of cars, short-term leases of farm vehicles, or short-term leases of non-vehicle personal property (all of which may be taxed at a different rate)? Sometimes even "Twix and Snickers bars" are taxed "differently" because only one has flour. *Wayfair*, 138 S. Ct. at 2104 (Roberts, C.J., dissenting).

Answering this question reveals yet another flaw with Saban's theory: setting tax rates across goods and industries is a policymaking, not judicial, function. Indeed, unsuccessful federal legislation would have *limited* (not prohibited) state and local taxes on rental cars. *See* H.R. 1528, 114th Cong. (2015). But to do so, it had to define 14 terms, establish a threshold for comparing rental car taxes to other taxes, and choose which taxes to compare. *Id.* § 3(a) (proposed 49 U.S.C. § 80505(a)(5)(A)). Courts cannot do this. *Cf. Commonwealth Edison*, 453 U.S. at 628 ("declin[ing]" "to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of

federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation"). Moreover, doing the only thing courts can do—banning such taxes all together—would be a disaster.

The vast majority of States and many local jurisdictions impose rental car taxes, many with temporary-replacement provisions. COA-81 at 63-64 (collecting citations). And many other jurisdictions have explicitly adopted a "tourism tax." *Id.* at 62-63. If Saban prevails here, all of these taxes would likely be called into question, and courts around the country would be called upon to make impossible tax-policy choices. The Constitution does not require this absurd result.

II. Section 14 does not apply to the AzSTA Surcharge.

The Department's prior briefing established that determining whether an excise relates to vehicle "registration, operation, or use" for purposes of Section 14 depends on the nature of the tax and how far beyond the taxable event a court may stray to look for the necessary connection. As that briefing demonstrated, all relevant considerations—text, history, purpose, consequences, and out-of-state authority—point in the same direction: the AzSTA Surcharge is not related to vehicle registration, operation, or use. In contrast, Saban's Section 14 theory ignores the nature of the Surcharge, conflicts with the relevant history, finds no support in any authority, and lacks a workable limiting principle.

In this brief, the Department emphasizes four additional points. First, examining the nature of the vehicle registration, operation, and use taxes targeted by Section 14 shows that the Surcharge does not fall within the category of "taxes relating to registration, operation, or use of vehicles." Second, the foundational notion of fairness underpinning the Hayden-Cartwright Act and Arizona's Better Roads Amendment—what Saban now labels the "benefits" theory—likewise shows that the Surcharge falls outside of Section 14's scope. Third, Saban's implicit concession that Section 14 does not apply to the 1935 transaction privilege tax on automobile rental services dooms its effort to stretch Section 14 to cover the Surcharge. Lastly, the most relevant out-of-state cases not only support the Department's position, but also show why this case is not close.

A. The text and nature of the Surcharge and Section 14 show the Surcharge falls outside of Section 14's scope.

The text of A.R.S. § 5-839 provides that "[t]he surcharge applies to the business of leasing or renting for less than one year motor vehicles [of a specified-size] for hire without a driver, that are designed to operate on the streets and highways of this state[.]" By its terms, the Surcharge does not tax individual vehicle drivers. It also does not tax the operation or use of vehicles. And the customers' activities do not trigger the tax. Instead, the Surcharge taxes only the rental car company, and then only for the privilege of engaging in the short-term rental car business.

Consequently, the Surcharge is not paid or collected to enable the rented vehicle or operator to lawfully drive on Arizona's roadways. To the contrary, when the car renter goes to rent a car, the driver must merely have the requisite license. The registration and fuel fees necessary to permit the operator to lawfully use the vehicle on the roadways must have already been paid by the rental company. Even if the rental car company does not pay Surcharge, the car renter may lawfully operate or use the rented vehicle on Arizona's roadways. In fact, nothing about the Surcharge's text or nature suggests it has anything to do with vehicle registration, operation, or use. *Cf.* Op. ¶ 17 (noting that "the taxable event that triggers the surcharge is the *rental of a vehicle*, not its *operation or use*").

The Surcharge's actual nature places it in sharp contrast to true vehicle registration, operation, and use taxes. As the relevant text, history, and purpose of Section 14 show, when the voters enacted Section 14 they were concerned with the excises and fees the government charges motorists in connection with registering, operating, or using their vehicles on the public roadways. The Hayden-Cartwright Act specifically linked federal highway funds to "State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds[.]" Ch. 586, § 12, 48 Stat. 993, 995 (1934) (copy at APP072). Section 14's publicity pamphlet further explained that the revenues *derived from road users* in Arizona "are derived from state gasoline and diesel

taxes, registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts." APP055.

So, for example, Arizona generally requires a fee "for the registration of a motor vehicle." *See, e.g.*, A.R.S. § 28-2003(A)(3). State law defines what it means to be a vehicle "operator," A.R.S. § 28-101(46), and operators must obtain a license and pay the necessary vehicle operation or "license" fees set forth in Title 28, Chapter 8. Arizona also generally "impose[s] against each motor vehicle a motor carrier fee[.]" A.R.S. § 28-5852; *see also* Addendum (setting forth examples of vehicle registration, operation, and use fees).

The fees subject to Section 14 are triggered when a driver engages in one of the Section 14 activities—registering, operating, or using a vehicle. The 1939 Motor Carrier Tax, for example, imposed a "license tax" and explicitly stated that "[n]o motor carrier . . . *shall operate* any motor vehicle on any public highway except in accordance with the provisions of this act." APP043, APP040 (emphasis added). Thus, certain operators could not lawfully operate their vehicles on public highways without paying the tax. The Surcharge, in contrast, is paid by the rental car company for the privilege of conducting business generally, and it "is imposed on the car-rental business, regardless of its own usage of vehicles on public highways or streets (and regardless of whether it chooses to pass along the surcharge to its customers)." Op. ¶ 17. Therefore, if an enforcement officer

stopped a rental car driver to determine whether all of the fees and taxes necessary for the rental car to be on the road had been paid, whether the Surcharge had been paid would be irrelevant.

Saban has nevertheless made three arguments to try to put the Surcharge into Section 14's reach. First, Saban insisted the phrase "related to" should be interpreted broadly and *without* regard to Section 14's context, history, and purpose. COA-66 at 43-49 (arguing against the use of Section 14's history and the publicity pamphlet). Presumably due to courts' rejection of similar arguments, COA-80 at 10-14, Saban has now abandoned that position. *See* Petition at 24-25 (invoking history, purpose, and context). Second, Saban has emphasized that Surcharge applies to businesses that rent vehicles "designed to operate on the streets and highways of this state[.]" A.R.S. § 5-839(C). But that language merely defines the nature of the business subject to the Surcharge (e.g., the Surcharge does not apply to farm equipment vehicle rentals). Operating a vehicle still does not trigger the Surcharge. Third, Saban claims "[c]ustomers rent cars to use them." Petition at 24. But making Section 14 turn on customers' use of cars—without regard to the taxable event or nature of the tax—would mean that a tax on drive-in movie businesses would also be captured simply because their customers also use roads. In the end, Saban's theory finds no support in the text or nature of the Surcharge or Section 14.

B. Everything in Section 14's history, including Saban's "benefits theory," confirms Section 14 does not apply to the Surcharge.

The Department's prior briefing further demonstrated that Section 14's history and purpose confirms that it does not apply to the Surcharge. *See* COA-46 at 14-17, 34-40; COA-80 at 20-24; *see also* Op. ¶ 14-17. Although Saban initially asked the court of appeals to simply discount these considerations, Saban now points to what it calls the "benefits theory of taxation," as "historical context" that supports its position. Petition at 20. Saban's effort to find solace in Section 14's history fails.

Congress explained in the Hayden-Cartwright Act that "it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways[.]" APP072. Section 14's Pamphlet likewise explained that "[i]f used for road purposes, the road user taxes are fair because they are based on benefits received by the taxpayer. The user pays as he drives." APP056. In other words, if the government taxes businesses or individuals for their use of the roads, the government should put those taxes toward road uses.

Notably, every tax that everyone agrees fall within Section 14's scope, including the 1939 motor carrier tax, satisfies this criterion. But the Surcharge does not. Unlike a motor carrier tax, paying the Surcharge is not a condition to lawfully using the roads. *See* Argument § I.A; PFR Response at 22.

Saban, however, also claims that Section 14 taxes "those who impose wear and tear or otherwise benefit from using the roads." Petition at 20-21. Setting aside the lack of textual support for this other purpose, it cannot be used to capture the Surcharge and "exclude[] generally applicable taxes and those tangentially related to automobiles." *Id*. at 21. For starters, any wear and tear created by rented cars has already been captured by the actual Section 14 taxes such as fuel taxes. (Rental cars don't impose more wear and tear than other cars, per gallon of fuel.) More fundamentally, if a tax on car rental businesses qualifies as a tax related to vehicle use due to potential wear and tear, so too would a tax on businesses offering standard auto leases, car sales, pizza sales and delivery, and more.

Saban also says that Section 14 uses broad language to prevent the State "from defeating the provision's purpose through creative drafting." Petition at 27. But Section 14 need not be construed as broadly as Saban urges to give the provision teeth. Under the Department's construction the legislature could not, for example, avoid Section 14 by charging motorists a fee for "the privilege of driving cars" rather than a fee for "use of vehicles." Furthermore, when something else like the privilege of operating a rental business is taxed (something well within the legislature's prerogative), what customers happen to do with the rented goods does not matter under Section 14. The nature of the tax dictates whether a tax falls

within Section 14's scope, not whether a business benefits from the existence of roads.

C. Saban's new general/special tax limiting principle does not work.

Before the court of appeals, Saban "conceded" that "without some limiting principle Section 14 would encompass not only the" Surcharge, "but also a broad range of taxes that Arizona does not now funnel to highways—including retail sales or business privilege taxes on car sales, tire sales, car leases and car repairs." *See* Op. ¶ 10. In its Petition, Saban similarly recognizes that any interpretation of Section 14 that reaches the 1935 transaction privilege tax on "automobile rental services" will not work. *See* Petition at 25. Although Saban now advances a new limiting principle based on whether a tax is "special" (Petition at 25), this new principle does not properly distinguish between Section 14 taxes and others.

The Hayden-Cartwright Act referenced "State motor vehicle registration fees, licenses, gasoline taxes, and other *special taxes* on motor-vehicle owners and operators of all kinds[.]" *See* Petition at 21, 25 (citation omitted) (emphasis added). Invoking this language, Saban claims the 1935 tax is a "general" tax because it applied to many businesses; rental car companies were merely identified "in the statutory schedule solely to put them in a rate category." Petition at 25.

Note first that neither the text nor history of the Hayden-Cartwright Act or Section 14 supports Saban's special/general distinction. Congress referenced

"*other special taxes* on motor-vehicle owners and operators" like "motor vehicle registration fees, licenses, gasoline taxes." But the Surcharge is no more a "special tax[] on motor-vehicle owners and operators" than the 1935 tax (which specified "automobile rental services").

Moreover, Saban's special/general distinction turns on where the legislature happened to place statutory numbers. The legislature could have drafted the 1935 tax using separate statutory sections for different businesses with different rates just like the Surcharge. Similarly, the Surcharge could have been drafted as part of a "general tax" with a separate "statutory schedule solely to put [short-term rentals] in a rate category," Petition at 25, like the 1935 tax. But surely the legislature's numbering scheme cannot distinguish the substance of the 1935 tax from the Surcharge.

Moreover, it would be odd for Section 14 to constrain tax policy in the manner Saban suggests. The State may generally impose a transaction privilege tax on any business and use that revenue for any lawful purpose. That was true when voters enacted Section 14. Yet nothing in Section 14's text, history, or purpose purports to limit the State's use of such revenue, whether part of a "general" tax or "special" tax.

D. Out-of-state authority confirms that Section 14 does not reach the Surcharge.

All relevant out-of-state authority supports the Department's position. *See* COA-46 at 42-49; COA-47 at 37-40; COA-80 at 25-29. Moreover, if the Ohio cases reached the "correct" result, as Saban now seems to concede (Petition at 26), then *a fortiori* the court of appeals did too. Two of those cases involved fees that some motorists needed to pay to register or drive. *See Ohio Trucking Ass'n v. Charles*, 983 N.E.2d 1262 (Ohio 2012) (involving a fee for certified motor vehicle records some motorists needed to obtain); *Fowler v. Ohio Dep't of Pub. Safety*, 95 N.E.3d 766 (Ohio App. 2017) (involving a "financial responsibility reinstatement fee" imposed on motorists ticketed for driving without insurance that had to be paid to restore driving and registration privileges). In both cases, the Ohio courts found the fees too attenuated to vehicle registration, operation, or use to fall within Ohio's nearly identical anti-diversion provision. In this case, no one ever pays the Surcharge as a condition to registering, operating, or using a vehicle. Thus, this case is easy as compared to the Ohio cases.

CONCLUSION

The Court should hold that the Surcharge does not violate the Dormant Commerce Clause or Section 14.

RESPECTFULLY SUBMITTED this 15th day of October, 2018.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM
Examples of Vehicle Registration, Operation, and Use Fees

Example of a Vehicle Registration Fee

§ 28-2003. Fees; vehicle title and registration; identification plate; definition

A. The following fees are required:

* * *

3. Except as provided in § 28-1177 [governing off-highway vehicles], for the registration of a motor vehicle, eight dollars, except that the fee for motorcycles is nine dollars.

Examples of Vehicle Operation Fees

§ 28-3002. Fees; driver licenses; disposition

A. The following fees are required:

1. For each original or initial application or renewal application, if a written examination is required, for the following:

(a) Class A driver license, twenty-five dollars.

* * *

(e) Class M driver license issued pursuant to § 28-3171, ten dollars.

See also A.R.S. § 28-101 ("'Operator' means a person who drives a motor vehicle on a highway, who is in actual physical control of a motor vehicle on a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle.").

Examples of Vehicle Use Fees

§ 28-5471. Highway use fees; commercial motor vehicles; definition

A. In addition to all other fees, a person registering a motor vehicle or vehicle combination in this state under chapter 7, article 7 or 8 of this title[] or § 28-2324 shall pay for each motor vehicle or vehicle combination *a highway use fee* determined according to the following table:

Gross weight	Use fee for 1979 and newer models	Use fee for 1978 and older models
75,001–80,000	$2,217	$1,095
	***	
0–8,000	50	50

ATTACHMENT COVER PAGE

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