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3 AMERICAN TRUCKING :
4 ASSOCIATIONS, INC., AND USF :
5 HOLLAND, INC., :
6 Petitioners :

7 v. : No. 03-1230

8 MICHIGAN PUBLIC SERVICE :
9 COMMISSION, ET AL.; :
10 and :
11 MID-CON FREIGHT SYSTEMS, INC., :
12 ET AL., :

13 Petitioners :

14 v. : No. 03-1234

15 MICHIGAN PUBLIC SERVICE :
16 COMMISSION, ET AL. :

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18 Washington, D.C.

19 Tuesday, April 26, 2005

20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States at
22 10:11 a.m.

23 APPEARANCES:

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25 of the Petitioners in No. 03-1230.

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7 behalf of the United States, as amicus curiae,
8 supporting the Respondents in No. 03-1230 and
9 supporting the Petitioners in No. 03-1234.

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in American Trucking Associations v. Michigan Public
5 Service Commission and a companion case.

6 Mr. Digges.

7 ORAL ARGUMENT OF ROBERT DIGGES, JR.

8 ON BEHALF OF THE PETITIONERS IN NO. 03-1230

9 MR. DIGGES: Mr. Chief Justice, and may it
10 please the Court:

11 This case is a challenge to Michigan's \$100 per
12 truck flat annual fee that is imposed on all trucks that
13 are registered to do point-to-point operations in the
14 State of Michigan. We submit that this fee, this flat per
15 truck fee, has the same impermissible effects on
16 interstate commerce as the two flat truck fees that were
17 struck down by this Court in American Trucking
18 Associations v. Scheiner.

19 In the American Trucking Associations v.
20 Scheiner case, this Court looked at the practical effect
21 of these fees and found that because of their
22 unapportioned structure, that the fees had four
23 interrelated types of impermissible effects on interstate
24 commerce.

25 First, the Court found that these kinds of flat

1 fees were a financial barrier against out-of-state motor
2 carriers even coming into the State that imposed the --
3 the fee. There's no question in this case that the
4 Michigan flat fee has the same kind of protectionist
5 quality.

6 JUSTICE SOUTER: Well, it -- it does for trucks
7 that want to deliver things within the State of Michigan.
8 It doesn't for anybody else.

9 MR. DIGGES: Yes, it -- it discriminates and it
10 -- it has an exclusory effect on trucks -- out-of-state
11 carriers that want to compete in the -- and bring their
12 trucks across the -- the border of Michigan and compete
13 against local carriers for intrastate hauls.

14 JUSTICE SOUTER: It would have that -- it
15 certainly has that tendency. Do we have -- do we know in
16 fact what the effect is? Is it deterring anybody? How
17 many trucks does it affect?

18 MR. DIGGES: There was not a trial below. So we
19 don't have that fact.

20 We believe that as in the Scheiner case, these
21 -- these tendencies are inherent there. Because of the
22 structure of the fee, it not only has this effect, it has
23 what this Court called a hydraulic pressure effect, and
24 that is to -- for carriers, once they have paid this fee
25 as an entrance fee, to pull their trucks out of interstate

1 commerce and to concentrate them into -- in the State of
2 Michigan in the local activities. And that -- in fact,
3 the State acknowledges that. Below, the State said that
4 motor carriers should allocate or dedicate their trucks to
5 the State of Michigan in order to avoid these
6 consequences. And even the Michigan Court of Appeals
7 recognized that, saying a local carrier would be
8 discouraged from operating in interstate commerce.

9 JUSTICE SCALIA: Of course, it also -- I mean,
10 you say it -- it favors the in-state -- intrastate carrier
11 because if you're doing nothing but intrastate carriage,
12 you -- you amortize the \$100 over many more miles, whereas
13 the interstate carrier, much of whose business is out-of-
14 state, doesn't do that.

15 On the other hand, you can certainly argue that
16 -- that this tax discriminates against intrastate carriers
17 in -- in another respect, that is to say, interstate
18 carriers who -- who do nothing within the State do not pay
19 it, whereas the -- the Michigan carrier that does a lot of
20 interstate business but if he does one piece of intrastate
21 business -- interstate business, he still pays it. Isn't
22 that right?

23 MR. DIGGES: Well, Your Honor, I think what --
24 what that's saying -- and I know that was the argument
25 made in the Solicitor General's brief -- is that you can

1 discriminate against one component of interstate commerce,
2 those carriers that want to actually compete and do
3 intrastate business in the State, as long as you give a
4 benefit to another component of interstate commerce, those
5 who just wish to operate in the -- in the State of
6 Michigan in interstate commerce.

7 JUSTICE SOUTER: Well, it's not so much that you
8 necessarily can do it, but it -- it sort of interrupts the
9 -- the kind of the a priori reasoning and you're thrown
10 back on a -- on -- on a practical effects analysis under
11 Pike.

12 MR. DIGGES: No, Your Honor. I think what
13 happens is that -- that there are the segment of carriers
14 that would like to compete against intrastate carriers.
15 The fact that other carriers may be getting a break in
16 terms of regulatory fees -- and we don't know that to be
17 the truth, getting the other interstate carriers. It's
18 the Boston Stock Exchange, and I think it was said again
19 in the Scheiner case that -- that you can't discriminate
20 among interstate carriers.

21 And as we pointed out in our brief, you could
22 set up a situation in which a -- a State discriminated in
23 favor of interstate carriers in situations or industries
24 where their locals had no interest in competing, but where
25 their -- their locals were interested in competing, they

1 could set up a discriminatory system. So you can protect
2 timber industry in -- in Oregon and --

3 JUSTICE STEVENS: But may I ask this question?
4 Suppose you have an interstate carrier that does 100,000
5 miles of business in Michigan and you have an intrastate
6 carrier that does a 100,000 miles of business in Michigan.
7 They both say the -- pay the same tax, don't they?

8 MR. DIGGES: If they each do 100,000 miles of
9 intrastate business in Michigan --

10 JUSTICE STEVENS: Yes.

11 MR. DIGGES: -- they would pay the same flat
12 fee.

13 JUSTICE STEVENS: They would both pay the same
14 tax, both the intra and the interstate. Now, that doesn't
15 sound to me like discrimination against either one.

16 MR. DIGGES: If -- if this -- if this tax was
17 apportioned based on mileage, it would not be
18 discrimination, but unfortunately, it is not and --

19 JUSTICE STEVENS: No, but I'm just saying if the
20 intrastate and interstate carriers both have the same
21 intrastate mileage, they both pay the same tax.

22 MR. DIGGES: And we -- we would -- and again, if
23 this was a mileage-apportioned fee, it would be -- it
24 would be fine. But the fact is as in Scheiner, the out-
25 of-state carriers, because the interstate carrier is -- is

1 operating --

2 JUSTICE STEVENS: Yes, but you might have an
3 intrastate carrier that does a smaller amount of mileage,
4 only 50,000 miles, and an interstate carrier that pays --
5 does 100,000 miles. They both pay the same tax too. And
6 everybody is treated alike on their intrastate business.

7 MR. DIGGES: That would be true but that --

8 JUSTICE STEVENS: And the tax only operates on
9 intrastate business.

10 MR. DIGGES: The factual situation is going to
11 be that the interstate carrier is just not going to have
12 the opportunity to do as much business in Michigan as the
13 intrastate carrier.

14 JUSTICE SCALIA: Well, it seems to me you should
15 have introduced some evidence on that point. I mean, it
16 -- it really is an assumption of your unfairness argument
17 that purely intrastate carriers do significantly more
18 intrastate business than interstate carriers who choose to
19 do some interstate business. Now, does that strike you as
20 self-evident? It does not need any --

21 MR. DIGGES: Yes. Yes, Your Honor.

22 JUSTICE SCALIA: -- demonstration?

23 MR. DIGGES: It does strike me as self-evident.

24 In fact, to courts below -- we have -- we've made this
25 argument. We've seen this argument now. The cases have

1 called it intuitively obvious. And from the discussion of
2 -- in the Scheiner case and from the discussion in the
3 Nippert case, the very difference between interstate and
4 intrastate commerce means that on average the interstate
5 carrier is just not going to use the State's facilities as
6 much as the in-state carrier.

7 CHIEF JUSTICE REHNQUIST: Wouldn't we be better
8 able to decide this question after a trial rather than
9 speculation on both sides?

10 MR. DIGGES: I don't think a trial is necessary
11 because, as I say, this -- this Court quoted Justice
12 Frankfurter clearly, and I think the Solicitor General in
13 his brief says that on average the out-of-state carrier is
14 not going to get as much benefit from this fee. This is a
15 variable cost fee. In effect, the out-of-state carrier is
16 having to pay more than its fair share of the cost of the
17 -- of the State's regulatory system. And again, that's
18 something that was accepted in the Scheiner case, accepted
19 in -- in the Nippert case. And the intrastate carrier --
20 every time that it operates in the State, it is using that
21 privilege.

22 CHIEF JUSTICE REHNQUIST: Well, Nippert was over
23 100 years ago, wasn't it?

24 MR. DIGGES: I think the Nippert case was from
25 the 1940's I believe. In any event, as we've been

1 discussing --

2 CHIEF JUSTICE REHNQUIST: It seems like 100
3 years ago.

4 (Laughter.)

5 MR. DIGGES: It's --

6 JUSTICE GINSBURG: Mr. Digges, this -- the --
7 the -- there was a question about the ramifications of the
8 position that you're presenting. That is, there are many
9 situations in which there is some kind of licensing fee
10 that is imposed on everyone, the same dollar amount,
11 although some people who are licensed will be doing
12 business in other States and have to get licenses there as
13 well. The example that was featured in the -- in the
14 briefs on the other side of the lawyer who is licensed,
15 say, in Massachusetts and also in D.C. does not get any
16 break on his D.C. Bar admission because he is also
17 admitted in Massachusetts, and in fact, does most of his
18 practice out-of-state, out of the District.

19 MR. DIGGES: Yes, Your Honor. I know that --
20 that example was given. I think there are a variety of
21 flat fees that would be unaffected by this. There are
22 fees that would be administrative charges and -- and if
23 all the State is doing is charging, for example, the cost
24 of a background investigation or the cost of a truck
25 inspection, a fixed cost, then it's fair to ask the

1 carrier to pay a fixed fee or to ask the taxpayer to pay a
2 fixed fee.

3 With respect to the bar fees, they are obviously
4 different than the trucking industry and -- and the
5 taxation of an instrumentality in interstate commerce.
6 But we think that there may be impracticalities in
7 apportioning a bar fee. You could have an attorney in his
8 office in Virginia that is working for a California
9 customer or California client that is being -- for a case
10 that is being tried in the court system of Oregon, and
11 then for transaction work, he could be working for a
12 customer or a client in -- in Missouri for -- a multi-
13 state. So it may be difficult to apportion fees. We
14 haven't really examined that.

15 But we know from this Court's decisions that --
16 that is easy and can be apportioned for truck fees, and
17 truck fees -- this Court said in Scheiner that the
18 technology is now available to look at the extent of the
19 activity and the taxpayer in -- in -- of the truck in the
20 State, and later on in a subsequent decision said that you
21 can easily track large physical objects over States. So
22 you can apportion these fees on trucks to their mileage in
23 the State, to their loads, to the gross revenue associated
24 with the --

25 JUSTICE GINSBURG: The Scheiner case didn't

1 make a distinction based on in-state activity. I thought
2 that that -- that flat fee was applicable to every motor
3 carrier that went on the roads in Pennsylvania.

4 MR. DIGGES: That is accurate, Your Honor, but
5 -- but nominally Scheiner -- for instance, the
6 Pennsylvania Supreme Court in the Scheiner case did say
7 that -- did uphold the fee because they said only
8 Pennsylvania could charge for the privilege of using
9 Pennsylvania's highways. So like a lot of -- like all
10 interstate commerce, you can always -- as -- as the Court
11 said in Nippert, you can always find -- carve out a local
12 activity to say that this is going to be the focus of the
13 tax.

14 I think a problem here is with the -- the
15 approach taken by the State and the Solicitor General is
16 they suggest that you go back to the days in which you're
17 trying to draw a line between interstate and intrastate
18 activity, this time not because the intrastate activity is
19 going to be immune from the tax, but this time because
20 you're going to have some separate, different kind of test
21 applicable to something that clearly is subject to
22 Commerce Clause protections, but is -- is, in their view,
23 subject to a more lenient Commerce Clause protection. And
24 I don't think this Court wants to retreat back to the days
25 of having to draw a line between interstate and intrastate

1 commerce and -- and then having separate tests.

2 If there are no more questions, I'd like to
3 reserve the rest of my time for rebuttal. Thank you.

4 CHIEF JUSTICE REHNQUIST: Very well, Mr. Digges.
5 Mr. Hanson.

6 ORAL ARGUMENT OF JAMES H. HANSON
7 ON BEHALF OF THE PETITIONERS IN NO. 03-1234

8 MR. HANSON: Mr. Chief Justice, and may it
9 please the Court:

10 In contrast to the ATA case, the question before
11 the Court today in the Mid-Con case is whether the fee on
12 vehicles operating solely in interstate commerce is
13 preempted by 49 U.S.C., section 14504.

14 JUSTICE O'CONNOR: It's the same fee we're
15 talking about.

16 MR. HANSON: It is --

17 JUSTICE O'CONNOR: But a different theory of
18 invalidity.

19 MR. HANSON: It is not the same fee. The -- the
20 fee under subsection (1) that ATA is arguing about is an
21 intrastate fee charged only to --

22 JUSTICE O'CONNOR: Intrastate.

23 MR. HANSON: -- carriers that engage in
24 intrastate activities.

25 JUSTICE O'CONNOR: Okay, and yours is the

1 interstate fee.

2 MR. HANSON: The subsection (2) fee under
3 478.1 --

4 JUSTICE KENNEDY: And your fee applies to all
5 Michigan-plated vehicles. Am I correct about that?

6 MR. HANSON: That are operating solely in
7 interstate commerce.

8 JUSTICE KENNEDY: Yes.

9 JUSTICE SOUTER: Do -- do I understand that the
10 two distinctions in what is done with the -- or the way
11 the fee is collected and what's done with it is that the
12 -- the fee is charged against the -- is it the operator as
13 opposed to the owner, if there is a distinction? Is -- is
14 that correct?

15 MR. HANSON: All of the fees under subsections
16 (1) and (2) are charged against the motor carrier --

17 JUSTICE SOUTER: The carrier.

18 MR. HANSON: -- or --

19 JUSTICE SOUTER: That's the term I should use.

20 MR. HANSON: -- motor carrier, not to the owner.

21 JUSTICE SOUTER: Which may not be the owner.

22 And number two, as I understand it, as distinct
23 from the registration fee, this fee goes to a different
24 State department. Is that right?

25 MR. HANSON: That's correct.

1 JUSTICE SOUTER: Now, let -- that's -- that's a
2 premise for a question I want to ask you, and the question
3 is in economic effect, is there any difference really
4 between charging this \$100 fee with those differences from
5 the registration fee and simply jacking up the
6 registration fee by \$100? Would there -- would there be
7 any economic difference to the -- to the public or -- or
8 indeed even to the carriers if they simply jacked up the
9 -- the registration fee by \$100? Because the -- the
10 registration fee is passed on to the carrier, if it's not
11 the owner, and the carrier -- it doesn't make any
12 difference to the carrier whether the -- whether the State
13 diverts the \$100 up front or -- or divides the -- the
14 registration fee after it's paid. So is there any
15 economic difference?

16 MR. HANSON: Yes, there is and the reason why
17 there is a difference is that the -- the fees that are
18 paid for plating are under the -- under the International
19 Reciprocity Plan, the registration plan, the IRP. And
20 that is an apportioned fee. It is charged to all
21 vehicles, all commercial motor vehicles, regardless of
22 whether it's for-hire or private, regardless of it's in-
23 state or -- of interstate. So everybody pays their
24 apportioned amount based on mileage.

25 JUSTICE SOUTER: No, but that shows -- that --

1 maybe I don't understand. That -- that tells us what happens
2 to the money after it's paid, but it doesn't make any
3 difference to the person who is paying the money, does it?

4 MR. HANSON: Yes, it does.

5 JUSTICE SOUTER: Except that he only has to pay
6 in one place, and -- and if they --

7 MR. HANSON: He pays --

8 JUSTICE SOUTER: -- increase the registration
9 fee, he'd only have to pay in one place, once.

10 MR. HANSON: But he would only pay the fee based
11 on his mileage in the State. It is not a flat fee if it
12 is put onto the IRP fees. Those --

13 JUSTICE GINSBURG: Who -- who sets the fee for
14 the plating?

15 MR. HANSON: The -- the State does. It is
16 administered by the Michigan Secretary of State --

17 JUSTICE GINSBURG: So --

18 MR. HANSON: -- but I believe all of those are
19 statutory fees.

20 JUSTICE GINSBURG: -- you could have -- unlike
21 the -- the fee, the \$10 fee, that --

22 MR. HANSON: The SSRS.

23 JUSTICE GINSBURG: -- the Federal cap, this
24 would -- for plating it could be anything each individual
25 State chooses it to be?

1 MR. HANSON: In terms of the plating fee?

2 JUSTICE GINSBURG: Yes.

3 MR. HANSON: Each State is free to charge its --
4 its own amount as the plating fee.

5 JUSTICE SOUTER: Sure, but it -- so -- so
6 regardless of what Michigan does with the apportioned
7 amounts, the amount it charges to the -- to the owner, in
8 the case of the -- the plating fee, is -- is simply set by
9 the State of Michigan.

10 MR. HANSON: That is --

11 JUSTICE SOUTER: Yes.

12 MR. HANSON: -- that is correct.

13 JUSTICE SOUTER: So what -- and -- and the --
14 the virtue of the apportionment is that the -- that the
15 owner or the -- or the owner, I guess in this case, does
16 not have to pay fees in 49 other States.

17 MR. HANSON: That is correct.

18 JUSTICE SOUTER: But he doesn't -- it doesn't
19 matter to -- that's the value to him. It doesn't matter
20 to him how they apportion whatever that fee is that
21 Michigan charges.

22 MR. HANSON: If they apportion it, however, it
23 is -- it is not -- it does not -- if they put it into the
24 IRP, it is not part of the registration process. The
25 thing that the --

1 JUSTICE SOUTER: But who -- I mean, is -- that's
2 -- that's fine as a matter of administration, but in terms
3 of the -- the end effect on the person who has to pay it
4 and on the consumers to whom it is ultimately passed on,
5 what difference does it make?

6 MR. HANSON: Well, the -- the difference for the
7 person who is paying it under IRP is that if only 20
8 percent of their interstate miles as a solely interstate
9 operating carrier, if only 20 percent are in the State,
10 they would, in fact, only pay \$20 per vehicle.

11 JUSTICE BREYER: Can I ask a quick question?
12 The -- there are three things. Were -- were you finished?

13 JUSTICE SCALIA: No, I don't think he -- I
14 didn't --

15 JUSTICE BREYER: Sorry.

16 JUSTICE SCALIA: I don't understand your answer.
17 If you were finished, I don't understand.

18 JUSTICE BREYER: Okay.

19 MR. HANSON: If it's -- if it is put into a
20 plating charge as opposed to a registration -- part of the
21 registration of a carrier for the privilege or the
22 opportunity to carry on interstate trucking activities in
23 the State of Michigan, that is the flat fee that we're
24 talking about. Under the SSRS we believe that \$100 charge
25 exceeds the \$10 maximum and is therefore preempted.

1 If they put it into the IRP, that -- IRP is
2 charged against the owner of the vehicle, paid against the
3 Secretary of -- paid to the Secretary of State. It is not
4 a qualification under -- for the privilege of engaging in
5 interstate trucking in the State of Michigan.

6 The SSRS sets up the standards by which a
7 carrier becomes qualified to operate in the State.
8 Michigan exceeds those standards. If you put those fees
9 into the IRP fees, then the carrier -- or then the owner
10 of the vehicle pays only the proportionate amount based on
11 his mileage in the State.

12 JUSTICE STEVENS: May I ask this question?
13 Supposing the -- Michigan changed its system and said
14 we're going to charge you \$90 for -- as a plating fee.
15 We're only talking about vehicles that are plated in
16 Michigan. We're going to charge you \$90 for a plating fee
17 and now we're going to take 10 -- what used to part of the
18 \$100 and another \$10 registration fee. Would that be
19 permissible?

20 MR. HANSON: It would be permissible because the
21 -- if the \$10 is charged to the carrier as part of the
22 registration process, in order to be qualified to engage
23 in interstate trucking. The \$90 would be charged to the
24 owner of the vehicle and would be paid on an apportioned
25 basis under IRP.

1 JUSTICE SOUTER: Okay. What if he said \$20
2 instead of \$10?

3 MR. HANSON: If he said \$20 was going to be put
4 towards the -- the State instead of -- instead of \$100?

5 JUSTICE SOUTER: Yes.

6 MR. HANSON: And \$80 towards IRP?

7 JUSTICE SOUTER: Yes.

8 MR. HANSON: In that case, that would still
9 violate the -- the SSRS, if it is done as part of the
10 registration process, which is what Michigan does.
11 Michigan -- even though you're properly SSRS registered,
12 Michigan still requires, under its SSRS form -- it directs
13 the carrier to specifically identify vehicles by make,
14 model, and serial number to obtain a decal by paying \$100
15 for that fee. If they pay \$20, that exceeds the \$10
16 maximum that Congress set up in the SSRS in order to be
17 qualified to operate in interstate trucking in the State
18 of Michigan, as an interstate carrier in -- in Michigan.

19 JUSTICE SCALIA: But that -- that assumes it's
20 an SSRS charge, and the State denies that it -- it has
21 anything to do with SSRS. Don't you have to establish
22 that it's part of the SSRS program?

23 MR. HANSON: I think what you have to do is you
24 have to look at what the -- the standards do. The -- the
25 registration standards in the SSRS are set up as the

1 process by which a carrier has the privilege to enter into
2 interstate trucking activities in Michigan. When you look
3 at the statute --

4 JUSTICE SOUTER: Okay, but what -- what if the
5 State says, you can enter -- enter into interstate
6 activities for nothing? We're simply going to increase
7 the registration fee by \$100. Couldn't the State do that?

8 MR. HANSON: The State could do that and that
9 would be perfectly permissible.

10 JUSTICE SOUTER: So this is pure formalism.

11 MR. HANSON: It is not pure form. Any -- what
12 -- what Congress did was say that in order to qualify a
13 carrier -- they were concerned about the burdens. When
14 ISTEA was enacted in 1991, they were concerned about the
15 burdens on carriers of individual State registration
16 requirements. And they sought to -- to alleviate that by
17 making it so that carriers could only -- would only have
18 to register in one State so they could do business in all
19 States on an interstate basis.

20 JUSTICE SCALIA: Maybe they sought to but maybe
21 they didn't succeed. As I read the statute, it -- it
22 really applies to the -- the limitation of \$10 only to
23 those fees that are SSRS fees, and these are not. So
24 maybe there's -- there's a hole in the Federal statute.

25 MR. HANSON: And I don't believe that's the

1 case, Justice Scalia.

2 JUSTICE SCALIA: You're trying to make the
3 Federal statute work sensibly, but --

4 MR. HANSON: Right.

5 JUSTICE SCALIA: -- I hate to tell you, but not
6 all statutes work sensibly.

7 MR. HANSON: Right.

8 I think what you have to do, though, is go back
9 and look at what Michigan does. Michigan has a -- a State
10 statute, 478.7(1), that says in order to operate to carry
11 property on an interstate basis in Michigan, you must
12 register with the PSC and you must pay the required
13 vehicle fees. The registration standards are what they do
14 as in accordance with SSRS: insurance, service of
15 process, and operating authority. Then you have to pay a
16 fee, and the fee is limited to \$10 per vehicle.

17 In the case of Michigan, those vehicle fees are
18 set forth in two different sections of the statutes. One
19 is .7(4), which is the \$10 SSRS fee. The other one is
20 subsection -- it's 2(2). That fee is \$100 --

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hanson.

22 MR. HANSON: -- in order for a Michigan-plated
23 vehicle to engage in interstate commerce.

24 CHIEF JUSTICE REHNQUIST: Your time is expired.

25 MR. HANSON: Thank you.

1 CHIEF JUSTICE REHNQUIST: Mr. Boynton, we'll
2 hear from you.

3 ORAL ARGUMENT OF HENRY J. BOYNTON
4 ON BEHALF OF THE RESPONDENTS

5 MR. BOYNTON: Mr. Chief Justice, and may it
6 please the Court:

7 The petitioner, American Trucking, began its
8 reply brief with the claim that the central reality in
9 this case is that the Michigan intrastate fee places
10 significant burdens on interstate commerce. The Michigan
11 Court of Appeals rejected this claim squarely, saying that
12 as a matter of -- that that was a matter of pure
13 speculation.

14 There's no evidence in the record before this
15 Court that the trucking companies' route choices are
16 affected by the intrastate fee. Furthermore, there is no
17 evidence in the record that the intrastate fee keeps
18 anyone out from engaging in intrastate trucking in
19 Michigan.

20 JUSTICE SCALIA: It sure does make sense to me,
21 though. Surely it's the case that a company that does
22 nothing but intrastate Michigan business will, by and
23 large, log in many more miles intrastate than a company
24 which does interstate business but part of its business is
25 intrastate Michigan business. I -- I just -- it seems to

1 me obvious that --

2 MR. BOYNTON: Well, the Michigan Court of
3 Appeals said that that very well may be the case, but they
4 pointed to the fact that there were no facts to support
5 that finding.

6 And this is completely different than in
7 Scheiner. In Scheiner you had a -- a trial, you had
8 evidence before the court. This Court noted that the --
9 the cost to an interstate trucker in that situation was
10 five times greater than the cost to a trucker that was in
11 Pennsylvania. You just simply don't have those facts
12 here.

13 What you have is a discrete or a distinct local
14 activity that is something that doesn't affect the
15 interstate commerce.

16 JUSTICE SCALIA: It -- it's the case that a
17 company that does only intrastate Michigan business logs
18 all of its miles on -- in Michigan. Right? No miles
19 outside of Michigan.

20 MR. BOYNTON: That's right.

21 JUSTICE SCALIA: And it seems to me it's obvious
22 that a -- a company that does interstate business does not
23 log all of its miles in -- in Michigan, and likely --
24 likely -- very likely does -- does less miles in Michigan
25 than -- than a purely intrastate Michigan trucker.

1 MR. BOYNTON: Well, Justice Scalia, that very
2 well may be true, but we don't have any way of -- of
3 qualifying or quantifying the burden here because we don't
4 have those facts.

5 JUSTICE O'CONNOR: Is it difficult to apportion
6 the intrastate fee based on the number of miles traveled
7 intrastate?

8 MR. BOYNTON: Well, Your Honor, I -- I think it
9 is very difficult to do that. As the United States noted
10 in its brief, they didn't think that mileage would be
11 appropriate because this -- this fee doesn't support the
12 maintenance of the highways. What this fee does is allows
13 trucking companies or allows that truck to operate that
14 truck in intrastate business. So mileage isn't
15 appropriate.

16 Our position is that mileage isn't appropriate
17 because it's next to impossible to try and figure out.
18 What do you compare it to? Do you -- do you compare it to
19 interstate miles? Do you compare it to a ratio of
20 interstate -- intrastate to interstate? And if you do
21 that, how -- how can you come up with a accurate picture
22 of, you know, what the value of that license is in
23 Michigan? It may be --

24 JUSTICE O'CONNOR: Does it make any difference
25 how high the -- the fee is set? If it were \$10,000 a

1 truck, does that raise any concerns that are different?

2 MR. BOYNTON: Well, Your Honor, the Michigan
3 Court of Appeals had taken the position that this was a
4 fee, not a tax, and under a fee -- if -- if a fee was
5 \$10,000, if the expenses matched the -- the revenue from
6 it, well, then it -- it would be a -- could be sustained
7 as a fee. Now, if were a tax --

8 JUSTICE SCALIA: You -- you defend that
9 position, that -- that it doesn't violate the Commerce
10 Clause so long as it's a fee not a tax?

11 MR. BOYNTON: Your Honor, we think that the --
12 if it's a fee and not a tax, the Michigan Court of Appeals
13 applied the correct standard, and that was the standard of
14 Pike v. Bruce Church. And you would look to the --
15 whether the statute regulated even-handedly, whether it
16 affected a legitimate local --

17 JUSTICE SCALIA: Whenever it's a fee, not a tax,
18 you immediately go to Pike Church.

19 MR. BOYNTON: I think that -- that that was what
20 the Michigan Court of Appeals --

21 JUSTICE SCALIA: I know. I know that's what
22 they said.

23 MR. BOYNTON: Yes, and I -- I think that's a --

24 JUSTICE SCALIA: I found it very strange.

25 MR. BOYNTON: I think that's an appropriate

1 manner in dealing with it.

2 But if you -- if you look at the Michigan Court
3 of Appeals opinion --

4 JUSTICE O'CONNOR: What makes it a fee instead
5 of a tax other than the court saying so?

6 MR. BOYNTON: Well, first of all, it provided a
7 direct benefit to the intrastate truckers. They were able
8 to operate in the State of Michigan. Second of all, they
9 pointed out that it was in relation to the services
10 granted, being able to do that, and then the third
11 component would be the voluntariness, whether they could
12 agree to -- they didn't have to engage in intrastate
13 trucking --

14 JUSTICE SCALIA: You could say the same about a
15 tax. You could say, you know, you only have to pay this
16 tax if you operate in Michigan. You don't want to
17 operate; you don't have to pay it. And you could also say
18 unless you pay the tax, you cannot operate in Michigan.
19 Does that make it a tax or a fee?

20 MR. BOYNTON: Well, I think in the Michigan
21 Court of Appeals opinion, it -- it was a fee, and I think
22 -- I think what we come back to, Your Honor, is the idea
23 is there a specific class of individuals or businesses
24 that are benefitted. And I think that that's the
25 distinction between a fee and tax.

1 Also, a tax is a general revenue-raising
2 measure, whereas a fee is not. And that's another
3 distinction of -- of a tax. And indeed, this Court -- in
4 National Cable Industry v. the United States, which we
5 cited in our brief, this Court said as whether an exaction
6 is a tax or a fee depends on whether its purpose is to
7 raise revenue or regulate an industry or services.

8 One of the things --

9 JUSTICE KENNEDY: I'd like to get back just for
10 a moment --

11 MR. BOYNTON: Yes, Your Honor.

12 JUSTICE KENNEDY: -- to the answer you gave
13 about apportionment because I wasn't quite sure I
14 understood the answer. You said, well, apportionment is
15 very difficult. What are you supposed to do? What are
16 you -- what's the base? Well, and you said, should we
17 apportion against -- between in-state and out-of-state,
18 and I would think the answer is yes. That's the whole
19 point.

20 MR. BOYNTON: Well --

21 JUSTICE KENNEDY: And if we're talking about
22 mileage here, maybe this is something that's eminently
23 susceptible of apportionment. Now, it may be that
24 administratively this is just too expensive. That may be
25 -- that may be a very valid argument.

1 But so far as saying that there's no basis for
2 appportionment, I didn't understand your answer.

3 MR. BOYNTON: Well, I -- I -- maybe I misspoke
4 myself. What I really meant to say was it would be very
5 difficult to do. And in our joint appendix -- in the
6 joint appendix --

7 JUSTICE KENNEDY: It would be difficult to do
8 administratively. But -- just because of the cost of
9 collecting all the --

10 MR. BOYNTON: Well, Your Honor, I think that you
11 got to look at what's the total cost here. The cost is
12 not only to the administrative aspect by the State, but
13 this imposes another cost on the truckers.

14 JUSTICE KENNEDY: That -- that -- I agree that
15 that is expensive. However, it seems to me that it would
16 be easier to do it with trucks which have miles than
17 with --

18 MR. BOYNTON: But, Your Honor, the problem is --

19 JUSTICE KENNEDY: -- than with, say, attorneys
20 or accountants or whatever.

21 MR. BOYNTON: Your Honor, the problem with that
22 is that this fee, this intrastate fee, does not go to
23 maintain the highways as it was in Scheiner. They make
24 the argument that it's very easy that the mechanism --
25 they, being American Trucking, makes the argument that

1 it's very easy to just start logging up the miles and --
2 and you have the mechanism there.

3 But the difference between Scheiner and this
4 case is that in Scheiner you were measuring all intrastate
5 miles, any miles traveled within that State. And there's
6 a mechanism available administratively to do that. The
7 IRP requires that.

8 But here you're not logging all intrastate
9 miles. You're only logging those miles in the State that
10 involve a point-to-point delivery, from one intrastate
11 point to another. So you don't -- you'd have to get a
12 whole new record keeping or you'd have to keep track of a
13 while different set of miles than you would with respect
14 to the IRP.

15 And that's the thing that I find striking about
16 this, that the American Trucking Association is basically
17 saying to its members that they want to have them do more
18 record keeping on their part.

19 JUSTICE SCALIA: But the American Trucking
20 Association is -- is willing to be thrown into the -- into
21 the briar bush apparently. It certainly involves no -- no
22 difficulty for your Michigan intrastate truckers. All of
23 their miles are intrastate. And the plaintiffs here say
24 we're -- we're willing to -- you know, to provide figures
25 showing how much of our carriage was -- was exclusively

1 intrastate if you want to apportion.

2 MR. BOYNTON: Well, that may be, Your Honor, but
3 the -- the point is -- what we're dealing with is a -- a
4 fee that has revenues of about \$3 million. And if you
5 have additional record keeping, how much of that \$3
6 million is going to have to be devoted to paying for the
7 administrative costs that are involved?

8 JUSTICE STEVENS: May I ask this question? Is
9 the fee payable before the -- a carrier may engage in
10 business or is it after the carrier has paid? Is it -- is
11 it like a tax that's paid after the year is out?

12 MR. BOYNTON: It's paid before. They -- they
13 have to have --

14 JUSTICE STEVENS: If you had to pay it before,
15 there would be no way to calculate it ahead of time
16 because nobody would have had any mileage. Isn't that
17 correct?

18 MR. BOYNTON: I'm sorry.

19 JUSTICE STEVENS: If you have to pay it before
20 the year begins and before you're allowed to engage in the
21 business, you would have no way of measuring the number of
22 miles you're going to travel during the -- the ensuing
23 year.

24 MR. BOYNTON: That's correct. You would have to
25 have --

1 JUSTICE SCALIA: Well, I suppose that's the same
2 thing for the \$10 fee for the whatever the acronym is
3 there. That's paid at the beginning of the year, isn't
4 it? And it has to be apportioned among the States. And
5 you don't know how to apportion it at the beginning of the
6 year.

7 MR. BOYNTON: Now, you're talking about the
8 interstate fee, Your Honor.

9 JUSTICE SCALIA: Right, right. But I'm saying
10 the same problem arises when you do any apportioning.

11 MR. BOYNTON: Well, it -- let me back up. The
12 reason I asked with you -- when you were referring to the
13 \$10 fee is because the intrastate fee -- we have a \$10
14 component in that as well. You can obtain a temporary fee
15 for \$10 for 72 hours to conduct an intrastate operation.
16 So the statute in -- structurally has some apportionment
17 factor in it. So you don't have to necessarily buy the
18 \$100 intrastate fee decal to conduct intrastate
19 operations.

20 JUSTICE SCALIA: It's like a 3-day fishing
21 license.

22 MR. BOYNTON: I suppose that would be one way --

23 JUSTICE GINSBURG: How -- how does that work in
24 -- in practice? Is it easily accessible? Suppose the
25 company --

1 MR. BOYNTON: Well --

2 JUSTICE GINSBURG: -- wants to fill up its truck
3 and -- and it said, well, this is going to be -- the only
4 haul this season for me, so I want the 3-day permit.

5 MR. BOYNTON: Yes, Your Honor, you can obtain
6 the permits in advance. You don't have to have trucks
7 lined up at the border waiting to get a decal or get a
8 permit. You can purchase them in advance. So that --
9 that's available to the truckers.

10 The one thing I should mention, though, is you
11 have to have one -- you already have to have one vehicle
12 licensed intrastate. You already have to have paid the
13 fee on one vehicle, and then you would be eligible to
14 purchase additional temporary permits as the need arose
15 based on seasonal needs or an emergency situation. So
16 that -- that allows the -- the statute -- I -- I would
17 submit to Your Honor, allows some apportioning in and of
18 itself.

19 JUSTICE GINSBURG: This -- this applies only to
20 operations that are both licensed and registered in
21 Michigan. Is that so?

22 MR. BOYNTON: No. Your Honor I think is
23 referring to the interstate fee --

24 JUSTICE GINSBURG: Right, right, yes.

25 MR. BOYNTON: -- which is a different fee, which

1 is in the Mid-Con case.

2 Our position --

3 JUSTICE O'CONNOR: Are you going to address the
4 Mid-Con question?

5 MR. BOYNTON: I'm sorry?

6 JUSTICE O'CONNOR: Are you going to address the
7 Mid-Con question?

8 MR. BOYNTON: I was going to do that right now,
9 Your Honor.

10 The position that the State of Michigan and the
11 Michigan Public Service Commission has is the SSRS does
12 not preempt the interstate fee. And the reason for that
13 is --

14 JUSTICE O'CONNOR: Well, what's the point of the
15 limitation in SSRS to \$10 if the State can impose any
16 additional fee it wants just by calling it a different
17 name?

18 MR. BOYNTON: Well, Your Honor, I think what you
19 have to realize is you have -- when you look at the text
20 of the statute, I think what is very clear from reading
21 the text is that the SSRS does not preempt all State fees
22 and charges on motor carriers. It only preempts those
23 fees and charges that are specifically related to the
24 registration of that motor carrier's interstate authority.
25 The interstate fee, or the Michigan-plated vehicle fee

1 here, is not preempted because it's a regulatory fee that
2 does not relate to the registration of the motor carrier's
3 SSRS interstate authority.

4 JUSTICE KENNEDY: Of course, it -- it does.
5 Number one, it's somewhat suspect at the outset because it
6 applies only to interstate travel.

7 MR. BOYNTON: Well --

8 JUSTICE KENNEDY: And -- and then the -- the
9 other vehicles pay \$100 for the -- for the in-state fees,
10 and so this seems to me that -- that on -- on its face
11 shows that it's like a registration fee.

12 MR. BOYNTON: Well, Your Honor, I think a couple
13 things. Number one, I think that -- I believe that if you
14 look at the structure of the Michigan statute, you'll see
15 that under section 2, which contains both the interstate
16 fee and the intrastate fee, virtually all Michigan
17 vehicles that are plated in Michigan -- the effect of it
18 is that all vehicles that are plated in Michigan will have
19 paid this \$100 fee.

20 And furthermore, if you look at section 7 of the
21 Michigan statute, which is 478.7, that involves the
22 registration procedure. That's specifically applicable to
23 the registration of interstate authority. And within that
24 section 7, subsection (4) deals with the payment of the
25 \$10 fee for -- and -- and it's to be made by vehicles that

1 are not plated in the State of Michigan.

2 JUSTICE BREYER: That's -- that's the problem.

3 MR. BOYNTON: Well, that's the argument.

4 JUSTICE BREYER: That's the problem because here
5 we're dealing with the fee to be paid by the people who
6 are plated in Michigan, and it looks like that \$100 is the
7 fee for them.

8 Well, let me -- I have a question. I'm trying
9 to test this. Suppose that I have a company in Maine.
10 All right? And I have -- I decide all my -- I -- I have
11 all Maine plates, by the way. And I decide I want my --
12 now, let's -- one word is license plates. I'm going to
13 talk about plating. Another word is the ICC insurance.
14 Let's call it a decal. And the third kind of a concept is
15 whatever you refer to in your statute by a fee. All
16 right? The \$100.

17 MR. BOYNTON: Right.

18 JUSTICE BREYER: All right. Now, suppose in
19 Maine what I do with my trucks is I say I want Michigan to
20 be my home State for purposes of -- what do you call it?
21 The SS?

22 MR. BOYNTON: SSRS.

23 JUSTICE BREYER: Yes. And so I go to Michigan,
24 and now I pay all the registration fees here. Do I get a
25 -- a certificate of some kind, a decal or something to

1 show I did it?

2 MR. BOYNTON: No. Your Honor, I -- I -- you say
3 that you're a Maine company --

4 JUSTICE BREYER: Yes.

5 MR. BOYNTON: -- but your principal place of
6 business is in Michigan?

7 JUSTICE BREYER: Yes, yes. So -- that's right.

8 MR. BOYNTON: Okay. And your question is?

9 JUSTICE BREYER: Do I get a decal after I go
10 through all this procedure? You have a whole form. I pay
11 \$6 for Alabama. I pay \$2 for Idaho, and -- but -- but I
12 do it all in one shopping place which happens to be
13 Michigan.

14 MR. BOYNTON: Okay.

15 JUSTICE BREYER: Then do I get a little
16 certificate to put on the truck to say I did it. I -- I
17 registered my ICC decal everywhere.

18 MR. BOYNTON: If that vehicle -- if the vehicle
19 you're registering is plated in Michigan --

20 JUSTICE BREYER: No, it's not.

21 MR. BOYNTON: Okay. You will pay nothing.

22 JUSTICE BREYER: I know for Michigan. But I
23 have to pay. But Michigan is my -- I can't ask the
24 question until I get clear on this.

25 MR. BOYNTON: I'm sorry.

1 JUSTICE BREYER: Don't -- when I -- when I go
2 under this -- this 49 U.S.C. 14504 and I choose a home
3 State --

4 MR. BOYNTON: That's correct.

5 JUSTICE BREYER: -- and I make all the relevant
6 payments to that State, but they distribute, don't I get a
7 piece of paper saying I did it?

8 MR. BOYNTON: I believe so, Your Honor.

9 JUSTICE BREYER: Fine. Now, I'm now plated in
10 Michigan, and I make Michigan my home State for this. And
11 I go and I make -- I say, Michigan, I'm going to give you
12 this big check to distribute, but the amount I'm putting
13 here for Michigan, by the way, is zero. And you say pay
14 me \$100. No. I'm not going to do it. So I haven't paid
15 them the \$100. I haven't paid Michigan everything, but I
16 paid \$2 for Idaho. Do I get the decal or don't I?

17 MR. BOYNTON: To get a decal from Michigan, you
18 have to be Michigan-plated and you have to pay the \$100.

19 JUSTICE BREYER: Excellent. Now, if I don't get
20 the decal, because I didn't pay the \$100, then that \$100
21 is a charge that falls within the SSI. It is a charge for
22 a decal which shows that I registered the ICC and my
23 insurance because otherwise, if it weren't, you'd give me
24 the decal.

25 MR. BOYNTON: Your Honor, we believe that under

1 the -- the section 7 of the Michigan law, there is no fee
2 charged for your SSRS.

3 JUSTICE BREYER: I'm talking about a fee. I'm
4 trying to -- oh, fine. If there's no fee charged and I
5 didn't pay the \$100 and I didn't pay anything else, you'd
6 give me the decal. But you said you wouldn't.

7 MR. BOYNTON: Your Honor, you have to -- you
8 have to -- if it's Michigan-plated, that's the triggering
9 mechanism. It's not the -- that's -- that's what triggers
10 the \$100 fee.

11 JUSTICE STEVENS: Mr. Boynton, may I just -- may
12 I just ask this question? Is part of your position that
13 the Federal statute does not prevent Michigan from waiving
14 the \$10 fee on -- for this particular purpose?

15 MR. BOYNTON: Our position, with respect to
16 that, Your Honor, is the fact that under section 7 of the
17 Michigan Motor Carrier Act, 478.7, Michigan has no
18 authority to charge a Michigan-plated vehicle any fee at
19 all.

20 JUSTICE STEVENS: Right. So that -- but you're
21 saying to Justice Breyer then is they have waived the \$10
22 and they do it to a narrow class, those vehicles who are
23 plated in Michigan because they've already charged them
24 \$100, a very heavy charge for the privilege of being
25 plated.

1 MR. BOYNTON: Well, I don't know if I'm saying
2 that, Your Honor. I'm saying that the -- there's a zero
3 charge, and then there's -- there's another charge with
4 respect to a vehicle fee.

5 The one thing that I need to point out here is
6 that the SSRS is not vehicle-specific. It talks about
7 numbers of vehicles, but the Michigan decal fee for -- or
8 the interstate fee is vehicle-specific. You have to
9 identify the particular --

10 JUSTICE SCALIA: Is that right? Let me -- let
11 me -- I wanted to ask this question to see whether it's
12 vehicle-specific. Suppose I have nine trucks. They're
13 Michigan-plated, so I have to pay \$100 for each of the
14 nine.

15 MR. BOYNTON: Interstate commerce.

16 JUSTICE SCALIA: Now, suppose I -- suppose I
17 only pay the fee for eight of them. What happens?

18 MR. BOYNTON: And how do you want to use the
19 truck? Do you want to use it in interstate commerce?

20 JUSTICE SCALIA: No. I've paid for eight, but I
21 haven't paid for the ninth. As I read the Michigan law,
22 it says shall not operate any motor vehicle upon or over
23 the highways of this State while any of the fees imposed
24 by this act remain unpaid. Now, if -- if I can't operate
25 the other eight because I haven't paid for the nine, that

1 sounds to me like a vehicle-specific tax.

2 MR. BOYNTON: Yes, it is.

3 JUSTICE SCALIA: I mean -- I mean the opposite.
4 It's -- it's not vehicle-specific.

5 MR. BOYNTON: Oh.

6 JUSTICE SCALIA: I've paid for the eight, and I
7 can't operate at all because I haven't paid for the ninth.

8 MR. BOYNTON: Well, I think administratively
9 that -- that wouldn't happen. I -- I think once you go --

10 JUSTICE SCALIA: It seems to me how it reads.
11 Am I reading the law wrong? It says, shall not operate
12 any motor vehicle while any of the fees imposed by this
13 act remain unpaid.

14 MR. BOYNTON: I suppose that if the -- for --
15 for nonpayment of fees, a motor carrier risks its
16 authority to operate in the State.

17 JUSTICE SCALIA: At all. So it's not really
18 vehicle-specific.

19 MR. BOYNTON: Well, I -- I think it is. I would
20 disagree with Your Honor.

21 JUSTICE SOUTER: Well, the computation is
22 vehicle-specific, but you're using all the vehicles as
23 hostage for the payment of -- of any shortfall. That's
24 what you're doing, isn't it?

25 JUSTICE SCALIA: So it's carrier-based.

1 MR. BOYNTON: Well, Your Honor, I would have to
2 disagree with Your Honor respectfully. I think that the
3 -- that it is vehicle-specific because it identifies the
4 particular vehicle that's involved here. And I -- I think
5 you have to read the statute, the preemption statute, the
6 scope of what preemption has sought to do here, and not
7 all State fees and charges on motor carrier vehicles are
8 preempted.

9 JUSTICE GINSBURG: Do you place any reliance in
10 this scheme on the fact that the only people subject to it
11 are people who have their principal place of business in
12 Michigan?

13 MR. BOYNTON: No, Your Honor. The triggering
14 event for the interstate fee is the plating of the vehicle
15 in Michigan.

16 JUSTICE SOUTER: And -- and anyone can choose to
17 do that? I mean, going back to Justice Breyer's example,
18 anybody can say, well, I think I'd like to be plated in
19 Michigan even though I operate in -- in other States. My
20 principal place of business is in another State.

21 MR. BOYNTON: Right. I think all parties have
22 noted, Your Honor, that the -- under the SSRS it's much
23 more stringent, more rigorous --

24 JUSTICE SOUTER: No. I'm just asking about what
25 you do in Michigan.

1 MR. BOYNTON: Yes. Yes, you can.

2 JUSTICE SOUTER: You really can do that?

3 MR. BOYNTON: You can plate wherever you have
4 contacts with the State. If your principal place of
5 business is in Ohio but you have trucks going to and from
6 Michigan, that -- that would allow you to plate in State
7 of Michigan.

8 JUSTICE SOUTER: You -- you can plate your whole
9 fleet in Michigan under those circumstances.

10 MR. BOYNTON: You could -- you can choose where
11 to plate your feet -- plate your trucks, and a number of
12 considerations go into that. It's not just the license
13 plating fees. It has everything to do -- as we noted in
14 our brief, it could have to do with no fault insurance,
15 the weight limits on trucks. It's an economic decision
16 and there's a number of different factors that go into
17 that decision of where to plate a vehicle.

18 In conclusion, I would say that the Michigan
19 Court of Appeals correctly decided this case. And they --
20 they found that the challenged fees in these cases are
21 regulatory fees, that they serve the critical function of
22 protecting the people of Michigan that use the highways.
23 And the Michigan Court of Appeals should be affirmed.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 Boynton.

1 Mr. Stewart, we'll hear from you.

2 ORAL ARGUMENT OF MALCOLM L. STEWART

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE RESPONDENTS IN NO. 03-1230 AND

5 SUPPORTING THE PETITIONERS IN NO. 03-1234

6 MR. STEWART: Mr. Chief Justice, and may it
7 please the Court:

8 The United States as amicus curiae supports the
9 State in American Trucking and the petitioner in Mid-Con.

10 With respect to American Trucking, in our view
11 the central question in resolving the constitutional issue
12 is not whether it would be possible to apportion the
13 intrastate fee on a more precise basis. The question is
14 whether the Constitution requires it.

15 And in the prior cases that we've cited in our
16 brief, both the older cases dealing specifically with
17 intrastate transportation and the more recent cases
18 dealing with authority to engage in other intrastate
19 businesses, this Court has repeatedly upheld the authority
20 of States and municipalities to charge flat fees for the
21 privilege of engaging in the local business within the
22 jurisdiction during the -- the relevant period of time.
23 And that practice --

24 JUSTICE SCALIA: That seems to me really to
25 go back on -- on Scheiner. And I thought we tried to get

1 away from deciding Commerce Clause questions on the basis
2 of whether it is interstate commerce or local commerce,
3 you know, the original package doctrine and things that
4 succeeded it. And you're -- you're just dragging back in
5 this -- this inquiry into whether it's really interstate
6 or -- or rather local.

7 MR. STEWART: Well, with -- with respect, Your
8 Honor, I think the Court has certainly abandoned the
9 notion that there is a bright, absolute line between
10 intrastate activities which are subject to plenary
11 regulation by the States without any Commerce Clause
12 inquiry and interstate commerce which is wholly immune
13 from State regulation. The Court has recognized that the
14 question is more complicated than that.

15 But in cases like Jefferson Lines, for instance,
16 the Court held that the sales price of a ticket for an
17 interstate bus trip could be taxed in -- in its entirety
18 by the State in which the ticket was purchased because the
19 sale of the ticket was regarded as a separate, discrete
20 event properly severable from the underlying interstate
21 transaction.

22 And the case for severance is all the more
23 powerful here. That is, here we're dealing not with a --
24 an aspect of an interstate transaction, we're dealing with
25 point-to-point hauls within the State of Michigan. It's

1 true that those may be undertaken by trucks that also do
2 interstate business, and it's even true that in some
3 instances the intrastate load may be carried on the same
4 truck at the same time that it's also carrying goods
5 between the States. But the intrastate haul is itself a
6 discrete commercial transaction. To the shipper it's
7 wholly irrelevant, in most instances, that the -- the
8 truck is also doing an interstate business.

9 And to differentiate this case from Scheiner,
10 one of the things that the Court has looked at in the
11 dormant Commerce Clause inquiry is the risk of multiple
12 taxation. And the Court doesn't just mean multiple
13 taxation in -- in the abstract because it's necessarily
14 going to be the case that an entity that does business in
15 many States will be taxed in many States. Rather the
16 question is whether there's an undue risk of multiple
17 taxation on the same transaction or the same conduct or
18 the same activity.

19 And that was at real risk in Scheiner because if
20 you imagine a truck that's delivering cargo from Maine to
21 Florida and passing through several States on the way, and
22 it's required to pay a fee that is, in essence, a fee for
23 entering the State, has nothing to do with the mileage
24 traveled within the jurisdiction, it's entirely reasonable
25 to say that the imposition of those cumulative trips --

1 cumulative taxes for a single haul of goods from Maine to
2 Florida is an instance of multiple taxation of the same
3 event.

4 Here we don't have a problem with that. The tax
5 is being levied solely on point-to-point hauls within the
6 State of Michigan. If a particular truck also makes
7 point-to-point hauls in some other State within the
8 calendar year, it may be subject to two taxes, but they
9 can't be characterized as two taxes on the same conduct or
10 the same transaction.

11 The second aspect of -- of Scheiner --

12 JUSTICE SCALIA: Yes, it could. I mean, if --
13 if this -- this truck is making one -- one haul, it's
14 carrying some goods from Texas to -- to Maine, but some
15 other goods it picks up along the way within Tennessee and
16 just carries it to another place within Tennessee, and
17 then it picks some other goods in New Jersey, carries it
18 elsewhere to New Jersey, you're going to be taxed. It
19 seems to me it's -- it's one trip.

20 We never used to -- used to divide railroads on
21 the basis of well, the ICC has jurisdiction over just the
22 interstate portions and -- and the two stops within a
23 State can be regulated by the State.

24 MR. STEWART: I mean, I think you're right that
25 it wouldn't be reasonable to regard the within-Texas

1 segment or the within-Oklahoma segment of a transfer of
2 goods between States as a discrete, separable event. But
3 if the truck is picking up goods at one point in Texas and
4 depositing them at another point in Texas, again from the
5 shipper's point of view, that's clearly a discrete
6 transaction. The shipper is unlikely to have any interest
7 in whether the same truck is simultaneously carrying goods
8 among the States. And it's reasonable to regard that as a
9 discrete event that is taxable by the State in which it
10 occurs.

11 The other point to make about Scheiner is that
12 even if we assume, as the petitioner argues, that the
13 average interstate truck that makes some point-to-point
14 hauls within Michigan will do so less frequently than the
15 average truck that does business solely within that State,
16 there's still a whole different class of interstate
17 truckers that makes substantial use of Michigan's roads
18 that could be charged taxes on the basis of mileage
19 traveled and they're being let off the hook because the
20 State has chosen to focus this tax on intrastate activity.
21 Petitioners' response to this is that you can't
22 discriminate against one class and then make up for it by
23 -- by discriminating in favor of a different class.

24 And if this were, to use title VII terminology,
25 a disparate treatment case, we would agree. That is, if a

1 State overtly discriminates against one class of
2 interstate or out-of-state activities and on the face of
3 the law those people are treated less favorably, then we
4 would entirely agree that the State couldn't make up for
5 it by giving more favorable treatment to a different class
6 of out-of-state entities.

7 But here the petitioner is making what amounts
8 to a disparate impact claim, and the essence of a
9 disparate impact claim is not that any particular
10 individual has suffered unfair treatment. The way you
11 prove a disparate impact claim is to show the effect
12 cumulatively upon the class, upon interstate truckers in
13 this case in the aggregate. And there's really no way to
14 feel any kind of confidence that interstate truckers won't
15 do better as a group by virtue of Michigan's decision to
16 focus this tax on intrastate activity rather than on the
17 basis of mileage, which would sweep in a lot of out-of-
18 state truckers that are not currently covered.

19 I'd like to speak briefly at least about the --
20 the Mid-Con case. And in our view the best way of
21 understanding -- to -- to return to the historical
22 antecedents of the current SSRS provision, in its original
23 form, as enacted in 1965, the statute said it's not an
24 unreasonable burden of -- on interstate commerce to
25 require an interstate carrier to register its Federal

1 certificate so along as you do so in accordance with the
2 standards of the ICC. If you go beyond those standards,
3 it's an unreasonable burden on commerce.

4 JUSTICE SCALIA: I'd like to know the text you
5 rely on.

6 MR. STEWART: That was --

7 JUSTICE SCALIA: For -- for preemption, the text
8 of the current statute that you rely on.

9 MR. STEWART: The text of the current statute is
10 set forth at page 82 of the appendix to the certiorari
11 petition in Mid-Con, and it's now 49 U.S.C. 14504(b). And
12 the statute says, the first sentence, the requirement of a
13 State that a motor carrier providing transportation
14 subject to jurisdiction under subchapter 1 of chapter 135
15 -- and that refers to interstate transportation --
16 providing interstate transportation and providing
17 transportation in that State must register with the State
18 is not an unreasonable burden on transportation referred
19 to in section 13501.

20 JUSTICE SCALIA: 13501 deals just with SSRS.

21 MR. STEWART: No. 13501 is the provision that
22 -- that defines the general regulatory jurisdiction of the
23 Department of Transportation and the Surface
24 Transportation Board. And it basically says these
25 agencies have general regulatory jurisdiction over

1 transportation between points in one State and points in
2 another State and -- or between points in the same State
3 passing through another State. So in -- in using that
4 shorthand reference, the Congress just means interstate
5 transportation.

6 JUSTICE STEVENS: May I ask this question?
7 Because I know your time is short. Supposing Michigan
8 imposed a new \$10 fee per -- and it identified it
9 precisely as in order to comply with that statute and then
10 reduced its present plating fee from \$100 to \$90, would
11 that be permissible?

12 MR. STEWART: Well, as long as the -- again, to
13 -- in our view the distinctive and disqualifying feature
14 of the current statute is that subsection (2) is imposed
15 specifically on vehicles that operate entirely in
16 interstate commerce. And if Michigan reduced to \$90 the
17 extra --

18 JUSTICE STEVENS: I'm not saying -- they reduced
19 to \$90 the plating fee, but then they enacted a new \$10
20 fee specifically designed to comply with the statute.

21 MR. STEWART: As long as --

22 JUSTICE STEVENS: Could they do that?

23 MR. STEWART: As long as they were still
24 imposing that additional -- again --

25 JUSTICE STEVENS: The \$90 is for plating. It

1 said only -- only Michigan-plated vehicles pay the \$90.
2 Everybody else -- everybody -- and everybody also pays the
3 \$10.

4 MR. STEWART: As long as that \$90 fee was
5 imposed not just on Michigan-plated vehicles generally,
6 but specifically on Michigan-plated vehicles that operate
7 entirely in interstate commerce, we would say that's
8 preempted because our reading of the statute is that
9 basically Congress has said there's a severe limit on what
10 you can do to interstate carriers that you don't do to
11 intrastate carriers.

12 JUSTICE SCALIA: Where does it say that? Let --
13 let me come back to the -- to the section of the statute
14 you're quoting. You didn't finish the sentence. It says
15 that it's not an unreasonable burden when the State
16 registration is completed under standards of the Secretary
17 under subsection (c). Subsection (c) is entitled SSRS,
18 Single State Registration System.

19 MR. STEWART: May I answer, Mr. Chief Justice?

20 CHIEF JUSTICE REHNQUIST: Briefly.

21 MR. STEWART: The State doesn't argue that this
22 registration was completed in accordance with this
23 standard. It argues that the provision doesn't apply at
24 all because this is not the sort of registration
25 requirement that the statute speaks of. We think it is

1 because it's imposed strictly on interstate carriers.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

3 Stewart.

4 Mr. Digges, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF ROBERT DIGGES, JR.

6 ON BEHALF OF THE PETITIONERS IN NO. 03-1230

7 MR. DIGGES: Thank you. I'd like to just

8 briefly cover three points.

9 First, I believe that -- that is accurate to say
10 that the Solicitor General's position is returning us to
11 the pre-Complete Auto days of line-drawing, but more than
12 that, the Solicitor General's position is ignoring the
13 practical effect of these fees on taxpayers. I think the
14 -- the citation to the Peddler v. Drummer line of cases
15 illustrates that.

16 The only difference between the Peddler cases
17 and the Drummer cases was that in the -- in the Nippert
18 case and -- and the Drummer case, they looked at the
19 practical effect on an out-of-state salesman and whether
20 that salesman would be discouraged by the \$50 fee that was
21 being imposed from coming into the State. In the Wagner
22 case, they simply said that the fee fell on an essentially
23 local event, didn't look at the form of the fee, didn't
24 look at the form of the fee on the out-of-state salesman.
25 I don't think it can be disputed that to out-of-state --

1 that out-of-state salesmen would be equally discouraged
2 from coming into a State because a \$50 fee or a \$100 fee,
3 whether or not they're carrying the goods with them in at
4 that time or whether the goods are later mailed in.

5 So, again, I think it is returning to the line-
6 drawing issues, and really there is no test that is made as
7 to, after you -- you draw these lines, what the appropriate
8 test should be.

9 The second point is it -- with respect to the
10 administrative practicality of apportioning these fees.
11 The purpose of apportionment would not be, as in a highway
12 tax, to -- to show the amount of highway damage that was
13 done by a truck. The purpose of apportionment here is
14 simply to show the extent of the taxpayer's level of
15 activity in the State. It would be like a general revenue
16 tax in which we're trying to allocate the taxpayer's
17 activity to particular States, make sure that that
18 taxpayer is paying its fair share of the State's costs
19 with respect -- of the State's generic costs, in this
20 case, generic regulatory costs. So, again, I think that
21 apportionment would be very easy.

22 As Justice Scalia said, the trucking industry is
23 willing to take the onus of this. We bill by the mile.
24 You could do it on number of loads. You could do it in a
25 lot -- a lot of ways. And by apportioning the fee, you

1 eliminate the burden and you make the out-of-state
2 carrier, who would be otherwise prohibited from only
3 hauling a load or two -- he would then have the ability to
4 haul that load and -- and not be discriminated against.

5 The final area I'd like to talk about a little
6 bit is the need for additional -- the need for evidence in
7 this case. Again, in the Nippert and the Scheiner cases,
8 there -- they -- they -- it was expressly said that there
9 was no need for evidence in the cases because in the
10 general average of instances, the out-of-state trucker
11 will always pay more than the in-state trucker.

12 And in answer to your question, Justice Stevens,
13 I think it was recognized in those cases that there would
14 be some exceptions to that rule. There would be a few
15 out-of-state carriers that would operate more heavily in
16 the State than in-state carriers. But that exception
17 wasn't -- wasn't what was going to happen and the most
18 often, and that the average of instances, it would always
19 work to the disadvantage of the out-of-state carriers.

20 And -- and the final point is that with respect
21 to evidence, you have here also a failure of internal
22 consistency test, and this Court has said a number of
23 times that failure internal -- of internal consistency is
24 not a test related -- it doesn't rely on specific facts
25 but it relies on hypotheticals.

1 And in this instance, I think there's a very
2 clear failure of internal consistency. Like in Scheiner,
3 there's a cumulative burden on an out-of-state trucker.
4 If a trucker wants to operate in intrastate commerce
5 around the country, it has to -- and just haul one load in
6 every State, it has to pay 48 times a \$100 fee or pay
7 \$4,800 in eligible -- in order to be eligible to haul in
8 all of those States. So that illustrates how that's going
9 to balkanize commerce, that that carrier is not going to
10 be able to pay that kind of entrance fee nationwide. So
11 that carrier will operate in less intrastate activities in
12 -- in only a few States or maybe none.

13 And again, we think that that defeats the
14 purpose. When Congress passed economic deregulation of
15 the trucking industry, that they wanted to open it up to
16 out-of-state carriers to be able to augment their
17 interstate loads.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Digges.

19 MR. DIGGES: Thank you.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 11:11 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25