UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

AMERICAN TRUCKING ASSOCIATIONS, INC.; CUMBERLAND FARMS, INC.; M&M TRANSPORT SERVICES, INC.; and NEW ENGLAND MOTOR FREIGHT, INC.

Plaintiffs,

v.

PETER ALVITI, JR., in his official capacity as Director of the Rhode Island Department of Transportation,

Defendant.

Civil Action No. 1:18-cv-00378-WES-PAS

CHIEF JUDGE WILLIAM E. SMITH

WES

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION AND SUMMARY

Rhode Island's "RhodeWorks" bridge tolling regime is extraordinary in a number of respects. There is no other statewide tolling system in the country—in fact, there may ***never*** have been another such tolling system—that tolls only large trucks. RhodeWorks also has other unique features, including a system of toll caps and its imposition of tolls on large but not small trucks, that are explicable only as an effort to benefit in-state truck owners. Despite RhodeWorks' exclusive focus on large trucks, state officials made ***no*** serious effort to determine the impact that those trucks have on bridges before giving RhodeWorks its truck-only form. And state officials were expressly clear in their intent to have RhodeWorks place a disproportionate share of the toll burden on out-of-staters.

Plaintiffs will show that this scheme violates the Commerce Clause.

1. The record shows that RhodeWorks' aberrant approach imposes a discriminatory burden on large trucks. The evidence in this case establishes unambiguously that Rhode Island officials structured RhodeWorks so as to impose discriminatory and disproportionate burdens on out-of-state businesses and those that engage in interstate commerce. That goal explains the State's decision to use a system of tolling rather than some other means to raise funds to repair Rhode Island's deteriorating bridges; the State's choice of locations to toll; the decision to toll only trucks, and then to limit the tolls further to only the largest trucks; and the establishment of toll caps. On each of these points, state officials engaged in careful analysis to assess the relative impact that its choices would have on in-state as opposed to out-of-state vehicles—a distinction that has no relevance to the allocation of bridge costs but is central to an effort to export the State's tax burden to out-of-staters.

Once implemented, the RhodeWorks tolls have had precisely the discriminatory effect on out-of-state trucks that they were designed to achieve and that the State's consultants predicted

they would have. The data demonstrate that the toll caps have disproportionately benefited in-staters, whose tolls effectively have been reduced by more than those of out-of-staters and who therefore receive a competitive benefit from the tolls' structure. In-staters also receive a discriminatory benefit from the ***complete*** exclusion of smaller trucks from the tolls; as state officials determined before incorporating that tolling exclusion into RhodeWorks, Rhode Island businesses are disproportionately likely to operate the small trucks that are exempt from the tolls, and interstate businesses to operate the larger ones that pay the tolls.

In contrast to their close study of the tolls' likely differential impact on interstate commerce, before making the decision to focus RhodeWorks exclusively on large trucks, state officials engaged in ***no*** real analysis of the relative impact that those trucks have on the costs of maintaining bridges; the Rhode Island Department of Transportation's (RIDOT's) research on that point consisted principally of a few haphazard Google searches. As a consequence, the cost-allocation methodology that Rhode Island used to develop its large-truck-only tolling scheme departs radically from that used by the federal government and by every other state. The result is a defective system of cost allocation that wholly ignores many of the most important sources of bridge maintenance costs, including weather, congestion, and environmental factors. Using that system, Rhode Island vastly overstates the proportion of bridge costs for which large trucks are fairly held responsible.

2. RhodeWorks is unconstitutional. The evidence establishes that RhodeWorks is unconstitutional for three reasons: (1) it discriminates against interstate commerce in effect; (2) state officials adopted RhodeWorks with the intent to discriminate against interstate commerce; and (3) the RhodeWorks tolls are not based on "some fair approximation of the use of the [tolled] facilities."

The RhodeWorks caps effectively discriminate against out-of-state trucks as a matter of law. The caps function as a form of flat fee that does not vary with use of the tolled facilities. Fees having that form ***necessarily*** impose higher per-use or per-mile charges on interstate than on in-state travelers; they fail the "internal consistency test" used by the Supreme Court to determine the constitutionality under the Commerce Clause of charges that superficially are neutral. They also are discriminatory in fact: As would be expected given the tolls' structure, the record establishes that the caps offer disproportionate benefits to in-state vehicles. So does the exclusion of smaller vehicles from the tolls; those vehicles, which are predominantly owned by in-staters, compete with (and obtain a competitive benefit over) out-of-state trucks. This discrimination-in-effect makes RhodeWorks unconstitutional.

RhodeWorks also is unconstitutional because state officials enacted it with the intent to discriminate. The Governor, state legislators, and RIDOT officials all made expressly clear that the goal of RhodeWorks was to place a disproportionate burden on out-of-staters; that point is confirmed by evidence of state officials' extraordinary focus on determining RhodeWorks' relative impact on in-state and out-of-state trucks, as well as on the system's very unusual structure (*e.g.*, the caps and exclusion of smaller trucks). The Supreme Court and courts of appeals repeatedly have recognized that discriminatory intent of this sort is enough, standing alone, to require invalidation of legislation under the Commerce Clause. And even if that is not so, that state officials enacted RhodeWorks with an intent to discriminate strongly supports the conclusion that the tolling regime in fact discriminates in effect.

Charges for the use of a facility are not a fair approximation of use if they (a) do not draw reasonable distinctions between entities that are required to pay and those that are not; or (b) make the payer responsible for an unreasonably large proportion of the facility's costs.

RhodeWorks fails both of those tests. ***All*** vehicles that use bridges—including cars, smaller trucks, and large trucks—contribute to the costs of, and benefit from the use of, the facilities. The distinction drawn by RhodeWorks, which makes large trucks responsible for 100 percent of the tolls and other vehicles for none, therefore is not reasonable, a point confirmed by the fact that ***no*** other statewide tolling system in the country now makes use (or, it appears, has ***ever*** made use) of such a system. And RhodeWorks makes large trucks liable for a proportion of highway tolls that is vastly greater than their responsibility for bridge costs. For this reason as well, RhodeWorks violates the Commerce Clause.

PROPOSED FINDINGS OF FACT

I. DEVELOPMENT OF THE RHODEWORKS TOLLING SCHEME

A. Rhode Island's deteriorating bridges and the State's evaluation of a response.

Through neglect and failure to perform routine maintenance, Rhode Island allowed many of its bridges to fall into disrepair. *See* RI0424512 (describing Rhode Island's "crumbling infrastructure"). For years, despite receiving hundreds of millions of dollars in federal funds allocated for the purpose (and more than twice the amount that Rhode Island contributed to the federal system), Rhode Island failed to perform necessary maintenance or repairs. *Id.* at RI0424514. The result, as the Rhode Island Department of Transportation ("RIDOT") itself acknowledged, is that "Rhode Island ranks last in the nation—50th out of 50 states—in percent of structurally deficient bridges by deck area." *Id.* This prolonged neglect and deficient maintenance significantly increased the costs associated with any eventual attempt to restore the State's bridges. *See*, *e.g.*, RI0013735 at 13739 (equating Rhode Island's bridges with a broken hinge on a screen door; by failing the fix the $10 hinge, Rhode Island was required to replace the entire door when it blew away).

Starting in 2008, Rhode Island began to evaluate ways of addressing its crumbling infrastructure. Although the State considered several possible tolling mechanisms to fund repairs, contemporaneous documents from this period show that one of the goals of these mechanisms was to place as substantial a portion of the cost on out-of-state payers as possible. Specifically, in 2008 Rhode Island created a Blue Ribbon Panel on Transportation Funding. ATA_0031600. The resulting study, *2008 Study for Governor: Rhode Island's Transportation Future: Reinvesting in our transportation system to preserve it for future generations*, analyzed transportation funding strategies. *Id*. As one option, the study contemplated tolling solely the Rhode Island border with Connecticut on Interstate 95. ATA_0031600 at ATA_0031614. The study also contemplated tolling "all Interstate highway borders of Rhode Island." *Id*. at ATA_0031618. After reviewing traffic flow data, the study determined that such tolls would capture predominantly out-of-state traffic, while largely sparing Rhode Islanders from paying the tolls. The study also suggested tolling discounts that could be implemented to further mitigate any impact on Rhode Islanders. *Id*. at ATA_0031624.

A few years later, in 2011, Rhode Island established a Senate Commission on Sustainable Transportation Funding. *See* ATA_0031659. The resulting study, like the earlier Blue Ribbon Panel report, considered tolling the Connecticut border on I-95 and other interstate borders. *See* ATA_0031659 at ATA_0031678.

During Governor Raimondo's administration, discussion of transportation repair funding methods continued. Womer Dep. Tr. at 148:21-150:24 (recalling discussions about alternative funding such as gas taxes, fee increases, diverting revenue from other sources). But the focus of these discussions remained on deriving funds from out-of-staters, while limiting the impact on Rhode Island's taxpayers. At a "very, very early stage" in development of a plan, officials

considered several differing funding options. *Id*. But the plan quickly settled on tolls and, specifically, on tolling only those road corridors that had the heaviest percentages of out-of-state traffic. To this end, RIDOT employees began studying traffic patterns with consultant CDM Smith as early as September 2014. CDMS0000988 (CDM Smith Data Collection Plan from September 2014); Regan Dep. Tr. at 62:16-62:22 (testifying that by the time that RIDOT engaged CDM Smith, RIDOT had elected a toll-only system as its funding mechanism). By April 2015, RIDOT began selecting corridors to toll, with the primary focus being interstate highway corridors like I-95, which carry the largest volumes of out-of-state and through traffic. RI0395302 (describing methodology and assumptions for RIDOT corridor analysis); *see also* Regan Dep. Tr. at 48:6-50:25 (stating that RIDOT prepared a list of bridges along preselected corridors that could be subject to tolling); Alviti 30(b)(6) Dep. Tr. at pp. 57-59 (describing that RIDOT "considered just about every road in the state" to toll before selecting interstate corridors under RhodeWorks). Consistent with Rhode Island's earlier-conducted traffic studies on these corridors, "[t]here always was an interest"—on RIDOT's part—in knowing the proportion of intrastate and out-of-state vehicles potentially subject to tolls. Regan Dep. Tr. at 149:9-149:20.

B. The selection of tolling locations

The tolling regime that Rhode Island ultimately adopted was consistent with this goal of placing the primary burden on out-of-state payers, by targeting large commercial large trucks that were mostly transiting the State on long-haul trips to other places. Although some RIDOT witnesses have asserted that RIDOT ***may*** have selected truck tolling locations in part based on which bridges required repairs (*see, e.g.*, Garino Dep. Tr. at 19:21-20:5) or based on other potential factors (Alviti Dep. Tr. at 54:1-55:15), the contemporaneous record evidence leaves no doubt that RIDOT and the State's political leaders were primarily concerned with selecting the

tolling method that would capture the greatest possible portion of out-of-state truck traffic, while sparing Rhode Islanders to the greatest extent possible. *See* RI0378402 (characterizing information on in-state versus out-of-state traffic counts at tolling locations as "important to the legislative effort"); *see also* RI0419849 (considering both bridge construction costs estimates and whether the bridge was on the interstate system); OMB0001429 at 130 (draft document stating that toll placement decisions would "be made to minimize the impact on Rhode Islanders based on truck counts"); RI0395302 (discussing goal of charging out-of-state trucks for 75% of the total daily cost of tolls, and charging in-state trucks 25% of total toll costs). This concern drove the development of various aspects of RhodeWorks, ranging from the location of toll gantries to the specific classes of vehicles exempted from tolling.

The earliest study of toll placement in the record, an April 16, 2015 memorandum entitled *Corridor Analysis for Toll Trucking*, reveals that RIDOT specifically targeted interstate commercial corridors as the foundation of its tolling scheme. RI0395302. At RIDOT's request, its consultant CDM Smith extensively evaluated proposed tolling locations by comparing the amount of in-state versus out-of-state revenue that truck tolling would likely generate at each location. CDMS0000993 (excel sheet containing traffic percentage breakdowns by in-state vs. out-of-state heavy truck volumes at each proposed tolling location); *see also* CDMS0011926 (listing the volume of Rhode Island vs. non-Rhode Island heavy truck traffic at 17 tolling locations); CDMS0005599 (document containing daily truck counts); CDMS0002520 (explaining CDM Smith's calculations on interstate vs. intrastate truck trip counts); CDMS0000768 (spreadsheet examining the duplicate trips at each tolling location based on whether the vehicle had Rhode Island or non-Rhode Island plates). Indeed, the relative burdens on out-of-state versus in-state trucks were so important to the effort—and to the calibration of the

tolling program overall—that RIDOT insisted that CDM Smith and other vendors collect and analyze in-state versus out-of-state traffic counts 24 hours a day, day and night, even though this effort involved considerable additional costs and technical challenges. CDMS0008843; *see also* RI0424004; Regan Dep. Tr. at 307:5-309:17.

An analysis of the collected traffic data confirms that RIDOT tended to drop proposed tolling locations that had higher in-state volumes of truck traffic, while retaining those locations with higher volumes of out-of-state truck traffic. Peters Opening Expert Report (Peters Rep.) ¶ 51; Peters Reply Expert Report (Peters Reply Rep.) ¶¶ 10-16. The first two tolling locations implemented were in fact at the State's border, as the Blue Ribbon Panel had contemplated in 2008. *See* Peters Rep. ¶ 55; *see also* ATA_0031600 at ATA_0031614 (2008 Blue Ribbon Panel discussing tolling the Rhode Island-Connecticut border); RI0256471 (map showing original 17 tolling locations with breakdowns of Rhode Island traffic at each location); RIDOT, The RhodeWorks Tolling Program, Toll Gantry Locations, https://www.dot.ri.gov/tolling/index.php (last accessed May 2, 2022) (map depicting information regarding the "live date" for each toll gantry).

C. The decision to toll only large trucks

In contrast to the exhaustive analysis conducted by the State to ensure that the ultimate burden of its tolling program fell primarily on out out-of-state vehicles, Rhode Island did virtually no study or analysis to determine whether the condition of the State's bridges was actually caused by damage from commercial trucks, or that truck-only tolls could be justified on that basis. Mr. Peter Garino, then-Deputy Director of RIDOT, testified that he personally conceived of the idea to toll only trucks sometime between February 2015 and the announcement of the RhodeWorks scheme in May 2015. *See* Garino Dep. Tr. at 14:3-16:5 (March 18, 2022). According to Mr. Garino, this notion was not based on any study or analysis. Instead, he

allegedly generated the idea one evening, while sitting at his family dinner table, based on his personal belief—uninformed by actual data or engineering analysis—that trucks may cause more damage to roadways than do other vehicles. *Id.* at pp. 15:19-16:8. Mr. Garino (who is not an engineer) then performed an internet search using Google, and came across a 1979 study from the Government Accountability Office ("GAO") addressing overweight trucks (*see CED*-79-94, *Excessive Truck Weight: An Expensive Burden We Can No Longer Support*, U.S. GAO (1979)). Based solely on this dinner table speculation and the GAO report generated by his Google search, RIDOT chose to propose truck-only tolling on the State's previously untolled interstate highways—an approach never before used by any state system. *Id.*

In May 2015, after RIDOT already had developed the truck-only tolling concept as the core component of RhodeWorks, RIDOT employee Mr. Andrew Koziol was tasked by Mr. Garino with estimating the relative portion of damage attributable to large trucks. Koziol Dep. Tr. 29-32 (describing his analysis during the first year of the development of the RhodeWorks program). To do so, Mr. Koziol did not conduct any form of highway cost allocation study (HCAS), which is the industry-standard methodology that has been used by the federal government and the vast majority of state highway systems for many decades to assess and assign costs associated with bridges and roadways. Koziol Dep. Tr. at 145:5-147:10 (stating that Koziol "doesn't know" what a highway cost allocation study refers to when asked if he reviewed any such studies); s*ee also* Small Draft Dep. Tr. at 212:11-212:17 (acknowledging that Rhode Island conducted no cost allocation study). Instead, Mr. Koziol exclusively used the data from the GAO report to generate his estimate. *See, e.g.*, Alviti 30(b)(6) Dep. Tr. at 28:17-29; 26:3-37:1 (referring to "the GAO report that early on we became aware of"). Although engineering research has long recognized a difference between the damage caused by ***overweight*** vehicles to

pavement (the subject of the GAO study) and that caused by properly loaded trucks to infrastructure, and despite the many developments in the fields of road and bridge design, engineering, and construction in the intervening years, in May 2015 Mr. Koziol used GAO's 1979 overweight truck analysis, and that alone, to develop an estimate that trucks in FHWA classes 7 and above cause 83% of the damage to Rhode Island's highway infrastructure. *See* RI0378447 (Koziol's chart showing a 83% damage calculation); RI0378448 (same); RI0378446.

The record evidence is silent as to why Mr. Koziol based his truck damage estimate on this single 43-year-old report—other, more recent studies support a markedly lower estimate—apart from RIDOT's general claim that the GAO report was located "early on." Alviti 30(b)(6) Dep. Tr. at 28:17-29:20. Mr. Koziol himself testified that he could not recall even whether he had read the full GAO Report; he could not confirm whether the report was used in any subsequent analysis or evaluation, and he could recall only one graphic from the several dozen contained in the study. *See* Koziol Dep. Tr. at 136-7-139:14. Mr. Koziol also reported that he did not specifically recall how he got the study, although he remembered searching online at some point. *Id.* Director Alviti, testifying on behalf of RIDOT, did not know whether any other RIDOT engineer even reviewed the GAO Report to determine whether its contents supported the claim that trucks have a disproportionately destructive impact on Rhode Island's roads. Alviti Dep. Tr. at 112:19-114:19. Mr. David Fish, the head of the RIDOT Bridge Group, could not remember who had identified the GAO Report as relevant, or whether he had been involved in that decision. *See* Fish Dep. Tr. at 129:19-21. Nor could he recall whether he had ever reviewed the GAO Report himself. *Id.* This sort of haphazard approach is not consistent with the way that the Federal Highway Administration or other state governments typically make decisions about the

allocation of transportation-system costs. *See, e.g.*, Potiowsky Report ¶ 13 (describing the rigorous study and analysis that typically supports highway cost allocation processes).

What is clear is that RIDOT and Governor Raimondo announced the RhodeWorks proposal on May 27, 2015. RI0215899 (Press Release announcing RhodeWorks plan). In that announcement, and in communications that followed, RIDOT used Mr. Koziol's calculations to represent that heavy trucks were not paying their fair share of Rhode Island's infrastructure costs, and thus justified the RhodeWorks trucks-only tolling program. Later, as questions arose regarding the source of Mr. Koziol's analysis, Mr. Koziol sent a link of the GAO Study to Mr. Charles St. Martin in RIDOT's Office of Communications in June 2015. RI0364671 at 4675. Mr. St. Martin, in turn, corresponded about the GAO Report with employees of the American Association of State Highway and Transportation Officials ("AASHTO"), who informed him that the figures reflected in the Report were based on even older data from the 1960s—originating in an AASHTO study so old that it had been archived and was no longer publicly available. *Id.* at RI0364671-64675.

D. Exclusion of smaller trucks from tolling

Around the same time that it formulated its truck-damage estimate, RIDOT was also seeking to determine which classes of trucks it would toll. Here, too, the evidence shows that the breakdown of in-state versus out-of-state vehicles in each vehicle class was the determining factor in Rhode Island's ultimate tolling decisions.

RIDOT's consultant CDM Smith informed RIDOT that every other state system in the United States that tolls vehicles imposes such fees on both passenger vehicles and all categories of trucks. Garino Dep. Tr. at 16:12-17:10; *see also* CDMS0010446 (Excel sheet containing data from tolling agencies from across the United States that all toll passenger vehicles and trucks); CDMS0010445 (email describing Excel sheet). The data collected by CDM Smith and others

also made clear that passenger vehicles comprise the vast majority of Rhode Island's traffic, such that passenger vehicles were and are the most frequent users of the State's bridges and the greatest contributors to traffic volume, congestion, and other factors that have a direct impact on bridge costs. *See* RI0237704 at RI0237713 (Level 2 Study finding that passenger vehicles make up 91.8% of all traffic in Rhode Island); RI0000882 at RI0000920 (Level 3 Study finding that passenger vehicles make up 94.4% of all traffic in Rhode Island).

Despite this, the first public draft of the RhodeWorks legislation proposed on May 27, 2015, specifically exempted all passenger vehicles from tolls. RI0320929 at 0938; *see also* RI0215899 at 5901 (press release noting "the plan explicitly prohibits RIDOT from placing a user fee on cars, motorcycles, SUVs, pick-up trucks and small commercial vehicles."). That version of RhodeWorks, however, would have potentially tolled FHWA vehicles in Classes 6 and 7—Class 6 and 7 trucks are commonly referred to as "straight" or "single-unit" trucks, and they are used more frequently for in-state commercial deliveries than for long-haul interstate shipments. RI0320929 at RI0320937. Tolling class 6 and above trucks would have been in line with the recommendations from RIDOT's consultant CDM Smith because "it would increase the population of trucks being charged and, therefore, the [toll] rates could be lower." Regan Dep. Tr. at 142:11-142:20; CDMS0006288 at 6289 (recommending that RIDOT toll Class 6 and above vehicles).

But Rhode Island-based commercial interests that utilize straight trucks quickly expressed opposition to that plan. *See* RI0003753 at 03763; see also Maxwell Dep. Tr. 115:15-116:19 (explaining that Rhode Island businesses opposed the initial proposal because "you were not only tolling trucks on the interstate, passing through, you were also tolling Class 6, or in this case, seven trucks that were more likely to be owned and operated by local entities, such as

construction contractors, oil companies … garbage companies, beer delivery trucks, unlike the trucks that eventually wound up being the target of the program, which are Class 8."). RIDOT employees and others from across the state government responded by assessing, not the extent to which particular classes of trucks contribute to bridge damage, but whether certain truck classes were disproportionately owned by in-state rather than out-of-state businesses. *See* CDMS0011375 (email from Andrew Koziol stating "[w]e are looking to associate FHWA classes with truck classes that pay taxes to R.I."); *see also* CDMS0008843 (requesting urgent collection of data and analysis to demonstrate the relative proportion of in-state and out-of-state trucks at the 17 proposed tolling locations); CDMS0008423 at CDMS0008425-25 (seeking comparison of daytime vs. nighttime in-state vs. out-of-state traffic counts and requesting the information be provided "quickly").

By May 29, 2015, RIDOT and other state agencies were investigating whether they could determine which FHWA classes of trucks "pay taxes to [Rhode Island]," referring to how many trucks in each class were registered in the state. CDMSMITH00000060-0061. RIDOT also asked CDM Smith to provide separate local vs. through-trip breakdowns, as well as, ultimately, in-state versus out-of-state license plate counts, for different groupings of FHWA classes of trucks. CDMS0005635 (email containing in-state vs. out-of-state comparisons); CDMS0011345 (spreadsheet showing traffic breakdowns by Class 7-13, 7-13, and 8-13 and looking at the amount of Rhode Island vs. non-Rhode Island trucks, respectively). The data tends to show that for classes 6 and 7, Rhode Island-plated vehicles comprise a substantial portion of those observed at the proposed tolling locations. In contrast, for Classes 8 and above, vehicles plated out-of-state comprised the vast majority. *See, e.g.*, Peters Reply Rep. ¶ 28 (RIDOT's data reveals

that Rhode Island-plated trucks comprise majorities of excluded vehicle classes and a small minority of Class 8+ trucks at toll locations).

By May 30, Governor Raimondo was telling the press that her administration was working with local companies to ensure that the greater portion of the tolling burden was shifted away from Rhode Island commercial interests: "[W]e are willing to sit down with local companies and say, 'Is there a way we can make this less burdensome for local Rhode Island companies?' We're at the table discussing it." RI0003697 at 3716.

Shortly thereafter, the RhodeWorks proposal was modified so that it would toll only FHWA Class 8 and above vehicles, those classes that traffic-study data reveal were comprised primarily of out-of-state plated trucks. RI0237704 at RI0237719 (estimating that Rhode Island trucks make up 40% of Class 8 and above traffic while out-of-state trucks make up 60%). On June 2, 2015, Governor Raimondo requested that a revised draft of the proposal be submitted to replace the earlier May 27, 2015, version, incorporating this change. RI0320949 (memorandum introducing revised bill on behalf of Governor Raimondo). Director Alviti explained before the Rhode Island Senate that this revised proposal came after "listening to the thoughts of the business community." RI0196972 at 31:11-18. He further explained: "[W]e have made changes to the funding mechanism that I think make it have an even less impact, particularly upon the trucking industry in Rhode Island." *Id.*; *see also* Womer Dep. Tr. at 56:1-17.

As Director Alviti later explained, before the ultimate passage of the RhodeWorks Act, "[t]he governor's plan would ***mainly affect cargo trucks from outside Rhode Island*** since 'the majority of large commercial vehicles traveling on the state's roads and bridges are registered out of state.'" RI0001299 at 1336 (emphasis added). In presentations to the Rhode Island Legislature, RIDOT also provided charts analyzing in detail the limited impact the legislation

would have on Rhode Island-based trucking companies. RI0281209 at RI0281223 (presentation to the House Finance Committee describing RhodeWorks impact on RI trucking companies); RI0281271 at RI0281285 (same). To the extent any analysis of out-of-state impact was presented, it was simply to show that a large majority of the tolling burden would fall on out-of-state trucks. *See* RI0196968 at 87:21- 88:07 (Alviti testimony before the House Finance Committee: "I'm thinking 60 percent of the funding coming from out of state versus 100 percent coming out of the taxpayers' pockets in Rhode Island").

E. Additional truck damage estimates and revenue modeling

In early June 2015, Governor Raimondo began to make public statements claiming that trucks cause 90 percent of the damage to Rhode Island roads; she stopped when media reports cast doubt on the accuracy of that figure. RI0402048 (PolitiFact article giving the Governor's statement that trucks cause 90 percent of damage to highways and bridges a "half true" rating because it failed to take into account damage from weather or deferred maintenance); RI0364012 (email discussing the "half true" rating for the Governor's statement); RI0364654 (Governor's office trying to explain the Governor's statement that received a "half true" ranking); RI0378432 (discussing response to "half true" ranking of Governor's statement). In response to an inquiry from the Providence Journal, Mr. St. Martin directed Mr. Koziol to quickly find additional support for the Governor's proffered 90 percent figure. RI0378432; RI0378433. Koziol Dep. Tr. at 112:14-113:17; 161:16-162:20. Mr. Koziol testified that he responded to this directive by conducting another internet search, locating five studies regarding roadway design that all were premised on the same so-called ESAL (equivalent single axle load) calculation that was the basis of the GAO report. A table summarizing those five studies was later provided to the legislature. RI0281209 at RI0281221. ESAL has been used by some states in assessing the design and thickness required for pavement; it is not, however, a commonly used metric for evaluating

damage to bridges, and it has been largely replaced even with respect to pavement by the National Pavement Cost Model (NAPCOM). See Vavrik Opening Report (Vavrik Rep.) at ¶ 40 ("The NAPCOM model was developed because the simplistic ESAL-based methods, like that used by Rhode Island, did not align with data on pavement performance"); see also Potiowsky Report ¶ 34.

Throughout the summer of 2015, RIDOT did no further analysis of the relative damage that trucks cause to bridges or roads. It did, however, do a significant amount of analysis to confirm that the greatest part of the RhodeWorks tolls would fall on out-of-state truckers. Among other things, Rhode Island hired a contractor, Regional Economic Models, Inc. (REMI) to determine the economic benefits that RhodeWorks might generate, and how those benefits compared to those offered by other alternative funding mechanisms. In October 2015, REMI produced a report "model[ing] the economic and demographic effects of the RhodeWorks transportation infrastructure improvement and restoration plan" under various funding scenarios. RI0216348 at RI0216351. Among several scenarios considered, one compared a regime that sought to finance repairs solely through tolls as compared to using a combination of tolls and gasoline or diesel fuel tax increases. RI0216348 at RI0216351-52. The report explained, "[i]t is important to understand that the tolling financing regime shifts a segment of the cost of the RhodeWorks project onto semi-tractor trailer trucks that pass through the state without stopping. That is, these trucks' trips originate at an out-of-state location and terminate at an out-of-state location and simply use Rhode Island's roads as a conduit for making the trip." *Id*. at RI0216353. The REMI Study further explained that "[t]he economic benefits of the RhodeWorks proposal are significantly positive because the majority of the project funding comes from outside of the state, either through tolls on semi-tractor trucks with trailers that merely pass through the state

without stopping or the federal government." *Id.* at RI0216354. RIDOT ultimately rejected all of the alternatives in favor of the existing truck-only tolling proposal. RI0216348.

F. Development of the RhodeWorks toll caps

As the RhodeWorks program evolved, it did more than exempt all but FHWA Class 8 and above vehicles from tolls; it also added new language "to authorize the Department of Transportation to establish a program that would limit the assessment of the tolls on the same individual large commercial vehicle to once per location, per day in each direction." RI0320949. This cap was designed to protect Rhode Island trucks, at the expense of out-of-state vehicles, since only those trucks making frequent local trips within the state (as opposed to interstate trucks passing though on long-haul trips) would pass through the same gantry multiple times in one day. *See* RI0196991 at 25:1-24 (hearing testimony of Director Alviti discussing potential economic rebate program and other protections for Rhode Island trucks subject to RhodeWorks tolling), RI019672 at 31:11-18 (discussing how changes to legislation results in RhodeWorks tolls "hav[ing] an even less impact, particularly upon the trucking industry in Rhode Island").

Other analyses from within Rhode Island's government further corroborate that the RhodeWorks caps were intended to "reduce the burden" on Rhode Island trucks and "shift[] the burden" to out-of-state trucks. RI0402926 at RI0402928. For example, internal notes to a draft OMB Summary of the RhodeWorks program, dated June 10, 2015, state: "[T]he caps ***reduce the burden on RI trucks*** somewhat, but since we still need $100M, we're setting toll rates and ***shifting the burden to non-RI trucks***." *Id*. (emphasis added). Reflecting an understanding that such a burden shifting was likely unconstitutional, the comment further warns against acknowledging this effort explicitly "in case tolls get challenged by out-of-state truckers." *Id.*

RIDOT, OMB, and their consultants also extensively studied the impact of the proposed toll caps on in-state and out-of-state trucks. RI0214934 (Level 2 Study describing the percentage

of in-state and out-of-state trucks tolled after adjusting for toll caps); *see also* RI0402926 (discussing RhodeWorks impact on in-state trucks); OMB0001794 (instructing REMI to include in its analysis the impact of the tolls on the trucking industry); CDMS0003712 (looking at in-state and out-of-state truck traffic breakdown and adjusting for toll cap); RI0214934 (CDM Smith Traffic Study memorandum doing same); RI0378375 (email from CDM Smith describing in-state vs. out-of-state traffic breakdowns); Roccio Tr. at pp. 63-65 (recalling asking CDM Smith for in-state vs. out-of-state traffic counts). In October 2015, CDM Smith produced a Truck Traffic Count Summary Report, which determined that although Rhode Island trucks accounted, on average, for 45% of the FHWA Class 8 and above traffic passing through the RhodeWorks toll locations, they would pay proportionately less of the overall toll revenues—only 40%—after adjusting for toll caps. RI0001200. Contemporaneous documents also reflect that RIDOT's focus on the in-state versus out-of-state tolling burden was driven by "questions from [the] legislature," and that the breakdown was deemed "critical" for RhodeWorks' success. CDMS0000771 at 772. Peter Garino likewise acknowledged that CDM Smith was asked to consider the in-state and out-of-state share of tolls in order to "prepare for questions from the legislature." Garino Dep Tr. at 144:13-146:12. Apart from satisfying the legislature's interest in ensuring that RhodeWorks tolls disproportionately fell on out-of-state trucks, there was no reason to collect this data. See CDM Smith 30(b)(6), Aron Dep. Tr. at 34:4-8, 99:12-21 (explaining that data collection was to inform the legislature of the division between Rhode Island and out-of-state traffic).

G. The State's goal to limit the impact of tolls on Rhode Island interests

Throughout the development of the RhodeWorks legislation, RIDOT officials and Rhode Island elected officials repeatedly emphasized that the purpose of the truck-only toll system and RhodeWorks caps was to place disproportionately high toll burdens on out-of-state, rather than in-state, commercial interests. Governor Raimondo, whose administration was the moving force

behind the RhodeWorks legislation, stated that "[t]he reason I prefer the tolling proposal is because the majority of the burden is on out-of-state truckers and out-of-state companies who are using—and I would say abusing—our roads." RI0001254 at RI0001258 (Patrick Anderson & Katherine Gregg, *Raimondo: Plan shifts burden off R.I.*, PROVIDENCE JOURNAL (Oct. 29, 2015)). Marie Aberger, Governor Raimondo's spokesperson, repeated on several occasions that the Governor did not want to "put the burden on the backs of Rhode Island families." RI0004485, RI0024774, RI0274989. Other elected state officials, including Rhode Island House Speaker Nicholas Mattiello, likewise emphasized repeatedly that the RhodeWorks tolls were structured so that "a lot of the burden for the repair of our bridges, overpasses and infrastructure is passed on to out-of-state truckers." RI0219506 at RI0219529 (Mary McDonald, *Improved business climate positions R.I. for growth,* PROVIDENCE BUSINESS NEWS (Dec. 23, 2015)); *see also* RI0196968 at 46:07-23 (Feb. 4, 2016); *id.* at 44:22-45:06; RI0196968 at 46:07-23 (Director Alviti explaining that a tolling system had been selected as the preferred funding mechanism for RhodeWorks because "60 percent of the funding coming from out of state"); RI0001299, RI0001167, RI0028069 (RIDOT officials explaining in press releases that the tolling would largely affect out-of-state truckers, while Rhode Island truckers would not be severely harmed).

In addition, referring to the anticipated discriminatory effect of the toll caps and specifically to the CDM Smith data, Rhode Island legislators repeatedly expressed support for the RhodeWorks program because a disproportionate share of the tolls would come from out-of-state payers, with the disparity benefiting in-state businesses. *See* Ian Smith, *On 52-21 Vote, RI House Approves Truck Toll Plan,* Rhode Island Public Radio (Feb 10, 2016)) (Rhode Island House Speaker Nicholas Mattielo: "People should know that 60 percent of the money [for tolls] is going to come from out of state."); RI0005026- RI0005027 (quoting Patrick Anderson, *R.I.*

House passes Raimondo's truck-toll plan, THE PROVIDENCE JOURNAL (Feb. 11, 2016)) (Rep. Stephen Ucci: "The tolling relies on 60 percent revenue from out of state trucks who would have never paid to come through this state."); *see also* Rhode Island House Committee on Finance, Testimony of Peter Alviti, Jr., Director of RIDOT (June 2, 2015), https://tinyurl.com/5czd4jb6 (Director Alviti, describing the toll caps: "That's part of the mitigation that we put in place. That local businesses[,] they benefit.").

At the Rhode Island Senate Finance Committee Hearings convened for the RhodeWorks legislation, the bulk of the questions and Director Alviti's responsive testimony focused on how out-of-state interests would be made to pay for the majority of the RhodeWorks program. *See* RI0196987 (Hr'g Tr. 42:15-24) (Feb 3, 2016) (CHAIRMAN DAPONTE: "Is there an estimate or what is the estimate of the percentage of the total toll revenue generated that will be generated by Rhode Island vehicles? MR. ALVITI: "It's looking in our analysis, in the actual over summer truck counts that we did that actually analyzed also their – their origins, that about 60 percent of the revenue would be coming from out-of-state vehicles passing through Rhode Island."); *see also id* at 44:22- 45:06 (MR. ALVITI: "Matter of fact, 60 percent of that $350 million is coming from out of state. *It's not coming from us*.") (emphasis added); RI0196968 at 46:07-23 ("I'll take the 60 percent coming from out of state."). Statements from members of the Rhode Island House of Representatives show that chamber was similarly focused on ensuring that most toll funds came from out-of-staters. *See* RI0196980 (Statement of House Majority Leader John DiSimone, Tr. 14:08 – 15:21 ("[F]or me, it came down to simply what's going to be get [sic] out of state money, and if we are anticipating around $50 million a year for the tolls and 60 percent of that is 30 million, over ten years, that's $300,000,000 of out of state money to help support our roads."); *see also* RI0196798 (Capital TV Tr. 65:09-25, 66:01-02) (Feb. 10, 2016) (Rep. DiSimone: "We

chose to toll. Why did we chose to toll? Why was that decision made? In my mind, any other way we did it would involve Rhode Islanders, our constituents paying 100 percent of the tab…. [A]ny other way we did it they would all be paying. And that's the truth. No other plan brought in out-of-state money.").

Indeed, in multiple public statements, House Speaker Mattiello and Governor Raimondo used Rhodeworks' disproportionate targeting of out-of-staters as the primary selling point for the tolling scheme. *See, e.g.*, RI0274903, Ian Donnis, *Speaker Mattiello, Gov. Raimondo Continue Discussions Over Truck Toll Proposal*, RIPR (October 28, 2015) (Mattiello: "One of the things that I really like about the proposal is more than half your revenues are derived from out of state trucks."); RI0219506, Mary McDonald, *Improved business climate positions R.I. for growth* Providence Business News (Dec. 23, 2015) (Mattiello: "[A] lot of the burden for the repair of our bridges, overpasses and infrastructure is passed on to out-of-state truckers"; and that "[a] lot of the cost gets shifted to out-of-state truckers…. The tolling proposal raises our gross state product the most, it creates the most jobs and it doesn't impose as significant a burden on Rhode Islanders…. It seems the tolling proposal is best for the economy. A lot of the cost gets shifted to out-of-state truckers."); Katherine Gregg, *Relief Plan Offered for R.I. in-state commercial truck owners*, Providence Journal (June 9, 2016) ("Asked in January how he would construct a local industry relief package that didn't run afoul of interstate commerce protections, Mattiello said: 'Carefully.'"); RI0026769, *RI Lawmakers devise alternative plan for bridge, road repairs* (October 7, 2015) (Raimondo: "If we do it the way I'm proposing, most of the money comes from out of staters so it puts the least burden on the people of Rhode Island."); RI0005026 Patrick Anderson & Katherine Gregg, *Back to Top Foes fail to beat back bill on tolls: House passes measure 52 to 21; all 11 Republicans assail plan*, Providence Journal (Feb. 11, 2016)

("Governor Raimondo stated that the Rhodeworks tolls are meant to shift the burden to out of state truckers 'who currently use our infrastructure but pay next to nothing to maintain it.'"); *see also id.* (Raimondo: "'[T]his is a point that I don't think people get: taxpayers won't be on the hook.' If the toll revenue comes up short? 'You'd have to raise the tolls….. It's not taxpayer money. It's tolling money.'").

Conversely, throughout the development of the RhodeWorks legislation, RIDOT officials and Rhode Island legislators expressed a desire to limit the impact of the tolling program on in-state interests. During multiple legislative hearings and proceedings, RIDOT officials suggested they were hoping to reduce the impact tolling would have on local Rhode Island businesses. RI0196991 at 25:1-24 (discussing economic rebate program for Rhode Island trucks), RI019672 at 31:11-18 (discussing RhodeWorks tolls "hav[ing] an even less impact, particularly upon the trucking industry in Rhode Island"), RI0196987 at 49:15-24 (discussing in-state vs. out-of-state traffic breakdowns), RI0196968 at 44:22-45:06 (testifying that the gas tax would require Rhode Islanders to foot 100% of the bill for bridge repair, where RhodeWorks tolls would have 60% out-of-state trucks pay for tolls), RI0001299 (explaining that tolls would mostly effect out-of-state truckers).

On several occasions, RIDOT officials and officials from the Governor's office discussed tax credits, rebates, and other "sweeteners" designed to alleviate the burden tolling would have on Rhode Island companies. RI0028069 at RI0028073; RI0015388 (describing potential tax rebates and grants for Rhode Island truckers). Speaker Mattiello and other legislators specifically expressed concern about creating protections for the state's landscaping and boating industries, as well as for multi-axle campers. CDMS0011155-1159.

As the passage of RhodeWorks approached, RIDOT hunted for additional sources to justify its decision to impose tolls only on Class 8 and above trucks. In January 2016, almost a year after RIDOT had decided to exempt all other vehicles from tolls, Mr. Fish was tasked with conducting research to quantify the damage that trucks cause to Rhode Island bridges. RI0422128. Mr. Fish asked lower-level RIDOT employees to find this information, suggesting that they reach out to third parties to obtain it. RI0422128. Engineering firms provided studies that related to truck damage, but those studies contradicted the earlier, far higher estimate that Mr. Koziol had created in June 2015. RI0422137 (email to D. Fish containing a link to the Oregon Department of Transportation Cost Allocation Study); RI0258096 at RI0258122 (Ohio DOT study finding trucks responsible for 16.24% of bridge costs); RI0258166 ("Effect of Truck Weight on Bridge Network Costs"). Mr. Fish then instructed his subordinates to stop looking for truck-damage data; RIDOT reverted to Mr. Koziol's damage calculations in explaining how RIDOT evaluated the impact of trucks on Rhode Island's bridges for the purpose of determining the tolls. RI0391900 (RIDOT memorandum purporting to calculate truck-caused bridge damage at the 14 RhodeWorks bridges).

On or around January 28, 2016, language was inserted into the draft RhodeWorks legislation recounting that, according to a Department estimate, tractor-trailer trucks cause over 70% of damage to state roadways. *See* S. 2246 (2016). That estimate is based on the 43-year-old GAO Report and the road design research found by the Google-searching of a non-engineer; neither RIDOT's report nor the legislation mention the many more recent engineering studies known to RIDOT that would have supported a significantly lower truck damage estimate.

II. THE RHODEWORKS LEGISLATION AS ENACTED

In February 2016, the Rhode Island Legislature enacted *The Rhode Island Bridge Replacement, Reconstruction, and Maintenance Fund Act of 2016*. *See* R.I. Gen. Laws 42-13.1-

4, *et seq*. This Act permitted RIDOT to establish the RhodeWorks toll system. A number of aspects of the RhodeWorks scheme are undisputed.

First, RhodeWorks expressly exempts all passenger vehicles from paying tolls, and the statute forbids imposing tolls on all such vehicles in the future, absent consent of voters in a statewide referendum. R.I. Gen. Laws 42-13.1-4(a). This provision exempts the vast bulk of vehicles using Rhode Island's roads from the RhodeWorks tolls. Passenger cars comprise over 90% of vehicles on roads across the United States. Peters Rep. ¶¶ 65-67. They also are responsible for most traffic on Rhode Island's roads. *See* RI0230244 at RI0230253 (passenger vehicles are 91.8% of traffic); RI0000882 at RI0000920 (passenger vehicles make up 94.4% of traffic in Rhode Island); Peters Rep. ¶¶ 69-70 & Figure 6 (estimating passenger vehicles account for 95.4% of traffic in Rhode Island). RIDOT 's own traffic studies establish that the vast majority of passenger vehicles using Rhode Island's roads are local traffic—that is, the vehicles are owned by Rhode Islanders making in-state trips. Peters Rep.¶¶ 74-75; Peters Reply Rep. ¶ 28.

This feature makes RhodeWorks exceptional. It is virtually unheard of, and likely unprecedented, for a statewide tolling system to entirely exempt passenger cars. Peters Rep. ¶ 83. Information provided to RIDOT by its consultant, CDM Smith, reflects that of the 110 tolling agencies that CDM Smith studied, all collect tolling revenue from passenger cars. CDMS0010446; *see also* CDMS0010445. Neither CDM Smith nor Rhode Island's paid experts in this case could identify any other statewide tolling system in the history of the United States that had completely exempted passenger vehicles from tolls. Regan Dep. Tr. 136:9-19 (calling RhodeWorks "unprecedented" and noting it had not been done before); Small Rough Dep. Tr. 51:5-13.

Second, the RhodeWorks statute also exempts straight and other single-unit trucks (such as dump trucks and garbage trucks), vehicles in FHWA Classes 4-7, from paying tolls. This exclusion also is extraordinary; it also is unprecedented for a tolling system to exempt straight trucks. Peters Rep. ¶ 38. The trucks that benefit from this exclusion are predominantly owned by in-staters; RIDOT's data establish that straight trucks are far more likely than are tolled vehicles to bear Rhode Island plates and to be owned by Rhode Island businesses. Peters Reply Rep. ¶ 28 (determining that 57.5% of Class 4-7 vehicles observed at toll locations bore Rhode Island license plates, as compared with just 20.32% of Class 8 and above vehicles); RI0325197. But straight trucks compete directly with the tolled interstate trucks for certain types of business, especially for trips "dropping off or picking up loads in Rhode Island." Peters Rep. ¶ 136. It is also possible (and even common) for straight trucks to bear more weight per axle than tolled trucks, meaning they can cause more vehicle damage to Rhode Island's bridge facilities than do class 8 and larger trucks. Vavrik Opening Report ¶¶ 40, 157-158 (Vavrik Rep.); Peters Reply Report, ¶¶ 40-41.

The above exemptions mean that the entirety of the revenue that Rhode Island seeks to obtain from tolls to modernize its bridges must be derived from FHWA Class 8 and above vehicles—the type of commercial tractor-trailer trucks most commonly used in long-haul, interstate commerce. Studies conducted by experts in this case and by RIDOT's own consultants demonstrate that around 75% of the Class 8 and above truck trips tolled by RhodeWorks are interstate in character, whereas only around 25% of truck trips tolled by RhodeWorks are intrastate trips. *See* Peters Rep. ¶¶ 108-109 % Figures 11 & 12; RI0276067 (CDM Smith's results).

Third, the RhodeWorks statute as enacted instituted a series of toll caps that had the effect of further shifting the tolling burden to out-of-state trucks. These caps include:

- A "per-day" cap that "limit[s] the assessment of tolls upon the same individual large commercial truck … to once per toll facility per day in each direction." R.I. Gen. Laws § 42-13.1-4(b).
- A through-trip cap providing that "the total amount of tolls imposed upon the same individual large commercial truck … for making a border-to-border through trip on Route 95 Connecticut to Route 95 Massachusetts, or the reverse, shall not exceed twenty dollars ($20.00)." R.I. § Gen. Laws 42-13.1-4(c).
- A cap providing that "the daily maximum amount of the tolls collected upon the same individual, large commercial truck … shall not exceed forty dollars ($40.00)." *Id.* at § 42-13.1-4(d).

Fourth, a legislative finding in the RhodeWorks statute justifies the tolling scheme in part based on the GAO Report's decades-old estimate regarding the amount of damage that overweight trucks cause to roads. *Id.* at § 42-13.1-2(8). The legislative finding also cites a RIDOT estimate that "tractor trailers cause in excess of seventy percent (70%) of the damage on the state's transportation infrastructure." *Id.* at § 42-13.1-2(8). No other study is cited regarding the amount of damage that trucks allegedly cause to roads, much less bridges. It is undisputed that Rhode Island never conducted a cost allocation study to determine whether the 70 percent figure cited by the Legislature is remotely accurate. Small Draft Dep. Tr. 210:7-11.

III. THE RHODEWORKS TOLLING SYSTEM HAS A DISCRIMINATORY EFFECT ON INTERSTATE COMMERCE

As implemented, the RhodeWorks tolling program places a disproportionate burden on commercial trucks engaged in interstate commerce in at least three ways. First, the RhodeWorks toll caps primarily benefit local vehicles at the expense of out-of-state vehicles, thereby shifting a greater percentage of the toll burden to vehicles travelling in interstate commerce and to those registered out-of-state. Second, RhodeWorks entirely exempts from tolls the classes of truck that are more likely to belong to Rhode Island taxpayers and imposes tolls only on those classes of interstate commercial truck that are more likely to belong to out-of-state owners. And third, Rhode Island's toll gantries are predominantly positioned along interstate commercial corridors and close to state borders in such a way as to ensure that the greater portion of tolls collected comes from out-of-state vehicles. The net effect of these design decisions is that the RhodeWorks tolling system collects approximately 83.43% percent of its toll revenue from trucks that actively engaged in interstate commercial travel, even though these same trucks comprise less than 2.5% percent of vehicle traffic on the state's roadways. Peters Rep. ¶ 160 (percent revenue), Figure 37 (percent traffic).

A. The RhodeWorks toll caps disproportionately benefit local trucks at the expense of out-of-state vehicles engaged in interstate commerce

Collectively, the RhodeWorks toll caps disproportionately benefit local vehicles at the expense of those travelling in interstate commerce.

Before adding the toll caps to the RhodeWorks scheme, RIDOT extensively studied the traffic patterns of local and out-of-state trucks. See, e.g., RI0214934. Based on this analysis, RIDOT added caps to alleviate the burden that the tolls would impose on local trucks. The first cap—the "same day, same direction" cap—was added to the scheme between the end of May and the beginning of June 2015, the same period when Governor Raimondo was negotiating with

local business interests to make the scheme "less burdensome for local Rhode Island companies." RI0003697. The analysis of RIDOT's consultant CDM Smith found that this cap applied principally to Rhode Island-plated trucks making local trips; absent the caps, out-of-staters would pay 55 percent of the tolls, but the caps increased that burden to 60 percent. See RI0001200. Director Alviti referred to this burden on out-of-state trucks as the primary feature of the tolling scheme, a result meaning that more revenue would come from out-of-staters and not the "taxpayers' pockets in Rhode Island[.]" RI0196968 at 46:07-23

The disparate impact of caps to favor Rhode Islanders, as projected by RIDOT, has indeed come to pass. In July 2020, for example, Rhode Island-plated vehicles accounted for only 18.6% of recorded RhodeWorks toll transactions, but they received 39.9% of the money saved by the toll payers under the caps. Peters Rep. at Figure 19. During the same time period, out-of-state trucks travelling in interstate commerce paid 91.74% of the full toll amount they would have been charged in the absence of the toll caps, while local vehicles paid an average of just 76.89% of the full fare amount. *Id.* at ¶ 148.

Put differently, Rhode Island trucks saved a total of $118,146.99 on their tolls in July 2020 alone as a consequence of the caps, or 23.11% of the total tolls they would have been assessed absent the caps, while out-of-state trucks saved only 8.26% of their total tolls due to the toll caps. *Id* at ¶149. This is precisely what RIDOT's extensive study of in-state versus out-of-state traffic volumes predicted and what the caps were designed to accomplish. *See, e.g.*, RI0402926, at RI0402927 (internal memo describing effect of tolling on trucks); RI0196969 at 105:9-15-24 ("the reason the REMI study generally concludes that there's a big positive impact for Rhode Islanders is you have this huge influx of out-of-state money"), RI0001124 (REMI report showing RhodeWorks tolls have net-positive impact on Rhode Island because it generates

revenue from out-of-state actors), RI0420078 (draft REMI report finding same), OMB0007658 (article discussing out-of-state trucks paying majority of RhodeWorks tolls), RI0000882 (Level 3 Traffic Study examining origin-destination data for trucks).

The one RhodeWorks cap that might appear to benefit trucks traveling in interstate commerce—which limits to $20 the total amount of tolls imposed on a vehicle making a "border-to-border" trip through the state on I-95 to $20 (R.I. Gen. Laws 42-13.1-4(c))—in reality provides no savings to any vehicle. Currently, a truck proceeding from Connecticut to Massachusetts on this route would pass five gantry locations, paying a total of $17.75 to do so, ***less*** than the total amount of charges required to qualify for the cap. Although RIDOT's expert witnesses have imagined that this aggregate price could be ***informed*** by the $20 statutory cap and that the State hypothetically could have priced the border-to-border trip above $20 (*see* Saraf Rep at ¶ 18), it has not done that in fact. Instead, by implementing the tolls in amounts below $20 in the aggregate across the various I-95 gantries, RhodeWorks offers the benefits of lower toll prices to through trips and local trips alike, with all trucks paying the same toll rate at the various I-95 gantries even if they are not "making a border-to-border through trip." The through-trip cap therefore is, in its practical operation, no cap at all. RIDOT's designated 30(b)(6) witness, Mr. John Paul Verducci, acknowledged that he could not identify any situation in which the $20 through trip toll cap actually benefitted any vehicle. *See* Verducci Tr., at 37:8-17. Indeed, all agree that Rhode Island has ***never*** priced the aggregate gantries along the I-95 corridor above $20. Consequently, the border-to-border cap is a nullity. Peters Rep. ¶¶ 164-65; Peters Reply Rep. ¶ 47.

The other RhodeWorks caps, however, actually do operate as advertised and disproportionately benefit Rhode Island trucks at the expense of interstate through traffic. As

noted, RhodeWorks includes a "per-day" cap that "limit[s] the assessment of tolls upon the same individual large commercial truck … to once per toll facility per day in each direction." R.I. Gen. Laws 42-13.1-4(b). This cap disproportionally benefits vehicles travelling within the State because local trucks are far more likely than are those based out-of-state to make multiple trips on the same road in the same direction during a single day; trucks travelling in interstate commerce on long-haul trips rarely take multiple trips in the same direction on the same road in a single day. Peters Rep. at ¶¶ 175-183. Rhode Island's witnesses have readily recognized this reality. As Jonathon Womer, former director of the Rhode Island Office of Management, acknowledged: "[I]f a company was located near a gantry, they might use or go through a gantry [at a] disproportionately higher rate just because of their physical location of their business." *See* Womer Dep. Tr., at 82:21-24; *see also* Small Report ¶ 47. The companies located near gantries necessarily are Rhode Island companies. Peters Rep. ¶ 177. The data bears this out. In July 2020, for example, when the "per-day" toll cap represented approximately 54.6% of all toll cap discounts assessed under RhodeWorks, Rhode Island trucks received 47.8% of the savings from that cap even though those trucks were responsible for only 18.6% of the toll transactions. *Id.* at ¶ 180.

The RhodeWorks maximum daily cap of $40 per day for a single vehicle also disproportionately benefits local vehicles travelling in Rhode Island. R.I. Gen. Laws 42-13.1-4(d). Rhode Island's existing tolls are priced at an average of approximately $4.00 per toll, so most vehicles would need to pass through at least 10 tolls in a single day to benefit from the daily cap. Peters Rep. at ¶ 167. Unsurprisingly, local vehicles are far more likely to benefit from such a cap, as they are more likely to pass many Rhode Island tolls in the same day than are interstate commercial trucks traversing the State. Indeed, the $40 toll cap was designed to be set

at twice the value of the through-trip cap. This ensures that interstate trucks that pass through the state twice in one day—once in each direction—will not benefit from the cap, while in-state trucks that drive through many gantries will gain the benefit. Again, this is clearly reflected in the data. In July 2020, Rhode Island-plated vehicles that hit the $40 cap saved an average of 40.36% of their toll costs, while out-of-state trucks saved only 29.48% of their toll costs. *Id.* at ¶¶ 77-78.

B. The RhodeWorks tolling scheme exempts truck classes more likely to belong to Rhode Islanders, while tolling the classes of truck more likely to belong to out-of-staters

As noted above, RhodeWorks completely exempts from tolling all straight trucks (those in FHWA Classes 4-7). Rhode Island imposes no tolls on any of these vehicles regardless of their weight, load per axle, frequency of using the tolled bridge facilities, other contributions to the state's transportation budget, or approximate contributions to bridge or roadway damage. Pages 25-26, *supra*. Although the vehicles in these categories vary significantly from one another in terms of weight, configuration, and frequency of bridge use, all have one thing in common: they are far more likely than are the tolled classes of FHWA Class 8 and larger trucks to be owned by residents of Rhode Island. According to data from the Federal Motor Carrier Safety Administration (FMCSA), vehicles in Classes 4-7 comprise a larger portion of Rhode Island traffic than do Class 8 and above vehicles. RI0230244 (Level 2 Study finding single-unit trucks make up 4.5% of traffic); Peters Reply Rep. ¶ 34 (explaining that Class 5-7 trucks take more trips than Class 8 and above trucks). Available data also reflects that approximately 57.5% of Class 4-7 vehicles observed at RhodeWorks gantries bore Rhode Island plates. *See* Peters Reply Rep. ¶ 28. By contrast, the share of Rhode Island plates for trucks in FHWA Classes 8 and above was far lower during the same period, at approximately 20.32%. *Id.* And according to Global Positioning System (GPS) tracking data collected by the American Transportation Research Institute (ATRI), vehicles in Class 8 and above are more likely than are other trucks to be

engaged in interstate commerce, as 75% of these vehicles were travelling to or from out-of-state locations while only 25% remained intrastate. *Id.* at 9; 47-54.

Thus, by exempting class 4-7 straight trucks, RhodeWorks benefits the categories of truck that are most likely to belong to Rhode Islanders. In so doing, the RhodeWorks tolling regime disproportionately targets those large commercial trucks that are principally engaged in interstate commerce.

C. RIDOT's placement of tolling gantries favors in-state trucks

The RhodeWorks tolling program also disproportionately burdens interstate vehicles by placing toll gantries in locations that primarily capture out-of-state trucks. From the outset, RIDOT sought to design RhodeWorks to raise the bulk of its toll revenue from out-of-staters. The record reveals that RIDOT selected those interstate highway corridors that it wished to toll ***first***, without regard to the condition or needs of the bridges on those routes as compared to bridges elsewhere in the State. Regan Dep. Tr. at 48:6-56:22 (RIDOT selected corridors and locations for tolling; Id. at 62:25-63:7 (RIDOT was interested in tolling bridges, many of which were on the interstate); RI0395302 (RIDOT corridor analysis for truck tolling). RIDOT then placed toll gantries at locations along those routes that had the largest volume of out-of-state traffic, including at locations nearest to the State's borders. Of at least 17 possible toll locations that RIDOT considered, the gantry locations that were actually implemented tended to have significantly higher volumes of out-of-state traffic than did the locations that RIDOT ultimately rejected. Peters Rep. ¶ 18. For example, RIDOT placed ten of its twelve operational toll gantries on the only three interstate highways that cross the state, which trucks travelling in interstate commerce must traverse to reach out-of-state destinations. *Id.* In July 2020, the tolls from these three interstate highway corridors accounted for approximately 92% of the total revenue RhodeWorks collected. *Id.*

PROPOSED CONCLUSIONS OF LAW

The RhodeWorks tolls violate the Commerce Clause in three respects.

First, they discriminate against out-of-state payers. The structure of the tolls and the exclusion of smaller trucks means that RhodeWorks has a discriminatory ***effect*** on out-of-state payers and on trucks that engage in interstate commerce; that impact is confirmed by data obtained in discovery.

Second, the State acted with an ***intent*** to discriminate when it gave RhodeWorks its discriminatory structure, a motivation that both independently establishes RhodeWorks' unconstitutionality and supports the conclusion that the tolls have a discriminatory effect.

Third, the tolls are not based on a fair approximation of the toll payers' use of the tolled bridges. On the face of it, the tolls are not fairly allocated between different classes of users: larger trucks pay 100 percent of the tolls, even though other classes of vehicle make substantial (indeed, much more substantial) use of the tolled bridges, thereby imposing very significant costs on the State. In addition, and relatedly, this allocation means that larger trucks pay much more than their fair share of bridge costs. Because the RhodeWorks tolls thus do not fairly approximate use of the tolled bridges, they impose an unconstitutionally undue burden on interstate commerce.

I. THE CONTROLLING COMMERCE CLAUSE PRINCIPLES

The standards that govern here are settled. As a general matter, the dormant aspect of the Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" (*New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)) or that "unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). *See, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994); *Trailer Marine Transport Corp.*, 977 F.2d 1, 10 (1st Cir. 1992); *Cohen v. R.I.*

Tpk. & Bridge Auth., 775 F. Supp. 2d 439, 446 (D.R.I. 2011). "'This "negative" aspect of the Commerce Clause' prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tennessee Wine & Spirits Retailers*, 139 S. Ct. at 2459 (internal citation marks omitted).

As the Supreme Court has emphasized, enforcement of Commerce Clause limits on state authority is crucial "because removing trade barriers was a principal reason for adoption of the Constitution." *Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2460. The Court has made this point repeatedly, explaining that its "dormant Commerce Clause cases reflect a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id*. at 2461 (internal quotation marks and citations omitted); *see*, *e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201-202 (1994). Avoiding state rules that are discriminatory or that place undue burdens on interstate commerce is important not only to prevent "economic isolationism" (*Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997)), but also to prevent the development of resentment between states "and the retaliatory acts of other States that may follow." *Id*. at 577. Thus, close Commerce Clause scrutiny of state legislation reflects both "the importance of the national interest in a unified economy" and "the lack of power of affected non-residents of the state to protect themselves through the state's political process." *Trailer Marine*, 977 F.2d at 10.

Of special importance here, the Supreme Court and the First Circuit have held that particular rules are used to resolve Commerce Clause challenges to user fees, including highway tolls. Such a fee is constitutionally permissible under the Commerce Clause only "if it (1) is

based on some fair approximation of use of the facilities [for which the fee is paid], (2) is not excessive in relation to the benefits conferred [on the user], and (3) does not discriminate against interstate commerce." *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 369 (1994); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 716-17 (1972); *Cohen*, 775 F. Supp. 2d at 447.[1]

The RhodeWorks tolls fail both the discrimination and fair-approximation elements of this user-fee test.

II. THE RHODEWORKS TOLLS UNCONSTITUTIONALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE

"Because the presence of discrimination … swiftly dispose[s] of" the question whether a statute violates the dormant Commerce Clause (*Cohen*, 775 F. Supp. 2d at 446), we begin with that consideration. Here, too, the controlling principles are clear.

At the outset, "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose … or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (internal citation omitted). In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Env't. Quality*, 511 U.S. 93, 99 (1994).

If a restriction on commerce is discriminatory, "it is virtually *per se* invalid." *Oregon Waste Systems*, 511 U.S. at 99. As the Supreme Court has repeatedly explained in the most emphatic terms, "there is no 'de minimis' defense to a charge" of discrimination under the Commerce Clause. *Camps Newfound/Owatonna*, 520 U.S. at 581 n.15 (citations and internal quotation marks omitted); accord, *e.g.*, *Oregon Waste Systems*, 511 U.S. at 100 n.4; *Maryland v.*

[1] This Court has recognized that the "excessiveness" prong of this test is not applicable in this case as a consequence of federal legislation.

Louisiana, 451 U.S. 725, 760 (1981) ("We need not know how unequal [a] [t]ax is before concluding that it … discriminates"); *Trailer Marine*, 977 F.2d at 11 ("Once a state regulation … is found to *discriminate* against interstate commerce, it is presumptively invalid."); *see also Cohen*, 775 F. Supp. 2d at 445 n.6 ("Supreme Court precedent clearly establishes that the *degree* of an alleged violation, no matter how minimal, does not preclude scrutiny under the Commerce Clause."). The Court applies this rule categorically and without exception; in *Oregon Waste Systems*, for example, the Court held the challenged fee unconstitutional even though, as the dissent observed, the excess paid by out-of-staters amounted to an average of just 14 cents a week. *See* 511 U.S. at 115-16 (Rehnquist, J., dissenting). In the Court's view, the magnitude of the discriminatory effect was beside the point: "[T]he degree of a differential burden or charge on interstate commerce 'measures only the ***extent*** of the discrimination' and 'is of no relevance to the determination whether a State has discriminated against interstate commerce.'" *Id*. at 100 n.4 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

The State has not contended that, if discrimination is present, RhodeWorks could survive application of the governing test. And here, the RhodeWorks program discriminates against interstate commerce in ***both*** effect ***and*** purpose.

A. The RhodeWorks Tolls Discriminate Against Interstate Commerce In Their Effect

The discriminatory ***effect*** of the RhodeWorks regime is manifest. That is true as a matter of law and as a matter of fact.

1. The RhodeWorks tolls have a discriminatory impact on interstate commerce as a matter of law

As a matter of law, the RhodeWorks toll caps give the tolling scheme a structure that must be deemed discriminatory in effect. Those caps make the system function much like a set of flat daily charges for the privilege of using Rhode Island's bridges and roads. As noted, a truck

will pay only once per day for traveling through a given toll gantry, no matter how many times it passes that point; it will pay a set, capped amount for traveling the length of I-95[2]; and it will pay no more than $40 per day, no matter how many miles it drives back and forth through Rhode Island (or how many toll gantries it passes) that day. *See* pages 27-31, *supra*.

This regime necessarily will have a discriminatory effect on out-of-state and interstate travelers. Compare two identical trucks that travel the same number of miles and make the same number of bridge crossings in a day, one doing so exclusively in Rhode Island and the other passing through Rhode Island as part of an interstate journey. The RhodeWorks toll caps mean that the local truck will pay for the privilege of using Rhode Island's roads at a lower effective rate per mile and per bridge-crossing than will the interstate truck. The two trucks will pay the same amount at particular gantries. But for that payment, the local truck likely will have made greater (perhaps vastly greater) use of the State's bridges as compared to the truck that is passing through as part of an interstate trip. And generally speaking, the more a truck travels in interstate as opposed to intrastate Rhode Island commerce, the greater the disparity in the effective rate per mile will be. The point is not debatable: As the First Circuit has explained when evaluating a flat charge for use of highways, it is "intuitively obvious[] that on average [a] flat tax[] represent[s] a much higher per mile charge on out-of-state trucks than on [in-state] trucks for miles traveled in [the taxing State]." *Trailer Marine*, 977 F.2d at 11.

For this reason, the Supreme Court and the First Circuit—as well as other courts across the Nation (*see Am. Trucking Ass'ns, Inc. v. Sec'y of Admin.*, 613 N.E.2d 95, 101 (Mass. 1993) (citing cases))—have held a variety of similar flat truck charges to violate the Commerce Clause. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), the landmark decision

[2] As explained above, however, this cap is a nullity in practice. *See* page 30, *supra*.

in this area, the Supreme Court invalidated flat annual charges that Pennsylvania imposed on trucks using its roads. In contrast to fuel consumption taxes that "are directly apportioned to the mileage traveled in Pennsylvania," the Court explained, the "inevitable effect" of flat taxes "is to threaten the free movement of commerce by placing a financial barrier around the State," which "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" 483 U.S. at 283, 284, 286-87. And in *Trailer Marine*, the First Circuit applied the *Scheiner* principle to invalidate a flat charge imposed by Puerto Rico on truck trailers, noting that the fee was "facially neutral" but "clearly discriminatory in impact" because transient trailers (which were shipped into and out of Puerto Rico) "pay[] the same flat fee as local trailers … even though the transient trailers are presumptively going to impose far lower costs … [on Puerto Rico] than locally based trailers." 977 F.2d at 10.

Thus, as *Trailer Marine* emphasized, it is immaterial that a charge with such a structure superficially applies in the same manner and amount to in-state and to out-of-state trucks. The fees invalidated in *Scheiner*, *Trailer Marine*, and the numerous other decisions following them were phrased so as to apply the same charge to all affected vehicles, but all were impermissible because their structure had the practical effect of discriminating against vehicles traveling interstate. *See Scheiner*, 483 U.S. at 286, 291. Likewise, it was beside the point that not all vehicles were affected in the same way, so that some in-staters ended up paying more in the aggregate, or more per mile, than some out-of-staters; it remains the case that, "'[i]n the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.'" *Scheiner*, 483 U.S. at 291 (quoting *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

To be sure, the RhodeWorks caps are not wholly identical to flat annual fees like those invalidated in *Scheiner* and *Trailer Marine*; they apply on a daily basis per gantry, or for all tolls, rather than on an annual basis. But the RhodeWorks caps share the essential characteristics that made those other flat fees unconstitutional. Because a truck pays the same toll no matter how many times it passes through the same gantry in a day, the charge is not based "'on a relevant measure of actual road use.'" *Scheiner*, 483 U.S. at 291 (citation omitted). And "[i]n the general average of instances," the tolls necessarily fall more heavily on interstate than on intrastate travel. That impact may be less pronounced under the RhodeWorks tolls than under a flat annual cap, but it is just as inevitable.

The point is proved by application of what the Supreme Court has labeled the "internal consistency test," which the Court applies to determine whether a levy has an unconstitutionally discriminatory effect. The test "'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 562 (2015) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)); *see Scheiner*, 483 U.S. at 284. And here, there can be no doubt that interstate commerce would be disadvantaged if every State adopted a tolling regime like Rhode Island's, allowing trucks to traverse the same toll gantry repeatedly for a single daily charge and capping the daily tolls paid to the tolling State no matter how many bridges the tolled vehicle crossed or how many miles it traveled in-state that day.

Under such a scheme, a truck that confines its operation to Rhode Island and travels back and forth through a single gantry would pay only a single toll, and would pay no more than $40 per day, no matter how many miles it travels in the State. An identical truck that travels an

identical number of miles on the same day or passes through toll gantries the same number of times, but does so as part of an interstate journey (say, up I-95 from Pennsylvania to Maine, traversing seven States), will pay many times that amount simply because it crossed state lines while making the trip, becoming subject to additional charges in each State it enters. "'[T]he cumulative effect does not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one t[oll].'" *Scheiner*, 483 U.S. at 284 n.16 (citation omitted). The precise amount of the inter- and intra-state differential would turn on the particulars of a given trip (*i.e.*, how many toll gantries the trucks traversed and the toll charged at each individual gantry), but "the inference [of discrimination] is so compelling that only the amount of the discrimination, and not its fact, can be plausibly contested." *Trailer Marine*, 977 F.2d at 10. Presumably for this reason, it appears that no state ever has imposed, and no court ever has upheld, a toll cap like the ones applied by RhodeWorks.

And for that same reason, the RhodeWorks caps are different in crucial respects from toll frequency discounts, like the one upheld by the First Circuit in *Doran v. Massachusetts Turnpike Authority*, 348 F.3d 315 (1st Cir. 2003), and to which Rhode Island has analogized the RhodeWorks caps. Under the Massachusetts system at issue in *Doran*, which offered discounts at specified toll plazas to travelers who purchased a transponder sold by the Commonwealth (*see id*. 316-17), "[t]he frequent driver will receive a greater amount of discounts than the infrequent driver, but he or she will, of course, also pay a correspondingly greater amount in tolls." *Id*. at 319. As the First Circuit thus explained:

> The tolls in issue here, in contrast [to the fees in cases like *Scheiner*], are imposed on a *per-use basis*. They are imposed only when the driver actually uses the toll plazas or tunnels and are *directly proportional to that use*. As the *Scheiner* court put it, "[s]o long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate [drivers] pay according to the facilities in

> fact provided by the State," and the program places no undue burden on interstate commerce.

Id. at 320 (quoting *Scheiner*, 483 U.S. at 291) (emphasis added). The First Circuit added: "Thus, … the program does not fail *Scheiner*'s internal consistency test. … As the Court put it, if more than one state adopted a similar discount program, the Commerce Clause is satisfied where the programs would 'maintain state boundaries as a neutral factor in economic decision-making.'" *Id*. (quoting *Scheiner*, 483 U.S. at 282-83). That was the case in Massachusetts, where "the tolls are assessed uniformly in direct proportion to use of the toll facilities." *Id*. at 321.

This case is decisively different. The RhodeWorks tolls are ***not*** "directly proportional to use," based on "'a relevant measure of actual road use,'" or assessed "in direct proportion to use of the toll facilities"; they do not vary with use at all (at a single gantry) or once a cap is reached (on a daily basis). Consequently, there is no doubt that RhodeWorks fails the Supreme Court's internal-consistency test. That is fatal to RhodeWorks.

2. The record establishes that the RhodeWorks tolls have a discriminatory effect on interstate commerce.

The data confirms what we expect from the tolls' structure: The caps result in out-of-state trucks in fact paying proportionately more than otherwise similarly situated in-state trucks. The caps thus produce "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at 99.

As described above, in a characteristic month, July 2020, Rhode Island-plated vehicles accounted for only 18.6% of recorded RhodeWorks toll transactions, but received 39.9% of the money saved by the toll payers under the caps. During the same time period, out-of-state trucks travelling in interstate commerce paid 91.74% of the full toll amount they would have been charged in the absence of the toll caps, while local vehicles paid an average of just 76.89% of the full fare amount. Rhode Island trucks therefore saved 23.11% of the total tolls they would have

been assessed absent the caps, while out-of-state trucks saved only 8.26% of their total tolls due to the toll caps. *See* pages 28-29, *supra*.

Looking at the individual caps shows a similar effect. In that same month, when the "once per toll facility per day in each direction" cap represented approximately 54.6% of all toll cap discounts assessed under RhodeWorks, intrastate vehicles received 47.8% of the savings from the cap even though those vehicles were responsible for only 18.6% of the toll transactions. And the $40 per day cap had an analogous effect: Rhode Island-plated vehicles that hit the $40 cap saved an average of 40.36% of their toll costs, while out-of-state trucks saved only 29.48% of theirs. *See* page 31, *supra*.

Like RhodeWorks' discriminatory structure, the tolls' documented discrimination-in-effect between in-state and out-of-state toll payers requires invalidation of the tolls. The amount of the differential is immaterial: As noted above, there is no *de minimis* exception to the dormant Commerce Clause. Accordingly, because the RhodeWorks tolls discriminate against interstate commerce in effect, a finding of unconstitutionality must follow.

3. The exclusion of class 7 and smaller trucks from the RhodeWorks tolls also has a discriminatory effect on interstate commerce

Apart from the caps, RhodeWorks discriminates against interstate truckers in another respect: Smaller trucks are immune from the tolls, giving in-staters an additional competitive advantage.

First, there is no denying the profound advantage given smaller trucks over larger ones under the RhodeWorks scheme: Class 7 and smaller trucks pay no tolls at all.

Second, the size of a truck is a very good proxy for its home state; Class 7 and smaller trucks are much more likely than are larger ones to be registered in Rhode Island. *See* page 13, 25-27, *supra.* And in fact, the exclusion of smaller trucks from RhodeWorks disproportionately

benefits in-staters. *See* pages 27-28, *supra*. As a consequence, the State chose to structure RhodeWorks in a way that gives a benefit to a class of vehicles that is disproportionately composed of in-staters and that imposes a burden on a class that is disproportionately composed of out-of-staters.

This did not occur by happenstance. The State gerrymandered the tolls to drop smaller trucks specifically to give a benefit to local businesses. *See* pages 8-11, *supra*. No programmatic reason for exempting these trucks was articulated, and none exists—except that the exempted trucks are more likely to be operated by local businesses and more likely to confine their operations to local or intrastate commerce.

Third, smaller trucks compete with class 8 and larger trucks for certain types of loads and trips. *See* pages 3, 35, *supra*. Accordingly, this is a case in which there is "an in-state commercial interest that is favored, directly or indirectly, by the challenged statute[] at the expense of out-of-state competitors." *Cohen*, 775 F. Supp.2d at 447 (citation omitted).

Fourth, there is no material difference between class 8 and smaller trucks that supports this differential treatment. The weight per axle of smaller trucks may be as large, or even larger, than that of class 8 trucks; and, as noted, smaller trucks make ***greater*** use of Rhode Island's bridges and roads than do class 8 trucks. *See* pages 12-15, *supra*.

In this respect, given that class 8 trucks and smaller trucks carry the same sorts of freight at least to some degree, there is no need for plaintiffs to offer proof that particular out-of-state class 8 trucks lost business to particular in-state smaller trucks as a consequence of the discriminatory tolls. The First Circuit has explained that "[s]uch an imbalance in favor of local interests … over similarly situated non-resident interests … is a proper concern of the Commerce Clause whether or not the market participants are direct business rivals." *Trailer Marine*, 997

F.2d at 11. Thus, a "particularized showing" that the discrimination affected an identified customer "is not required." *Camps Newfound/Owatonna*, 520 U.S. at 581 n.15. *See also Bacchus*, 468 U.S. at 269 (assertion that favored local products "do[es] not constitute a present 'competitive threat'" to out-of-state products does not defeat Commerce Clause discrimination claim). So for this reason as well, the RhodeWorks scheme violates the Commerce Clause.

4. Rhode Island officials intended the RhodeWorks tolls to discriminate against interstate commerce

In addition, the RhodeWorks legislation was put in its current form with the purpose of discriminating against interstate commerce—that is, with the intent to disproportionately burden out-of-staters and interstate commerce, and to export to other states the burden of supporting Rhode Island's bridge-repair budget. That discriminatory intent is an independent basis for finding RhodeWorks unconstitutional. And even if that were not so, that the Legislature intended RhodeWorks to discriminate provides strong support for concluding that the tolls discriminate in effect.

a. Discriminatory intent makes a state law unconstitutional under the Commerce Clause

To begin with, proof of discriminatory purpose by itself requires invalidation of state legislation under the Commerce Clause.

First, the Supreme Court has repeatedly stated that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of ***either*** discriminatory purpose ***or*** discriminatory effect." *Bacchus*, 468 U.S. at 270 (1984) (internal citations omitted; emphasis added); *see also, e.g., Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 344 n.6 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) ("A court may find that a state law constitutes 'economic protectionism' on proof of either discriminatory effect or of discriminatory purpose.") (citations omitted); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53

(1977). In *Bacchus*, for example, the Court held that the legislation at issue had both a discriminatory purpose and a discriminatory effect, but explained that "[e]xamination of the State's purpose" was "sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." 468 U.S. at 270.

Second—and unsurprisingly, given the Supreme Court's unequivocal statements on the subject—lower courts, including the First Circuit, routinely acknowledge that state laws are subject to strict scrutiny under the Commerce Clause if they are "found to have been motivated by a 'discriminatory purpose.'" *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 400 (3d Cir. 1987).[3]

[3] *See Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 14 (1st Cir. 2010) (holding that statute had both discriminatory effect ***and*** purpose: "That [the challenged statute] discriminates against out-of-state wineries in its effects strengthens the inference that the statute was discriminatory by design."); *Alliance of Auto. Mfrs. v. Gwadowsky*, 430 F.3d 30, 37 (1st Cir. 2005) (holding that the plaintiff failed to carry its "burden of demonstrating that the statute was animated by a discriminatory purpose"); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001) ("[W]e must determine whether the statutory provisions at issue would discriminate against [municipal solid waste] generated outside Virginia in their practical effect ***or*** were enacted for the purpose of discriminating against [municipal solid waste] generated outside Virginia. … If the answer to ***either*** question is yes, we apply strict scrutiny analysis.") (emphasis added); *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (holding that strict scrutiny applied because "most of the provisions at issue here are not close calls—they clearly discriminate against out-of-state waste either facially, in effect, ***or in purpose***") (emphasis added); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 214 (5th Cir. 2019) (remanding for district court to reweigh evidence of discriminatory purpose); *Jones v. Gale*, 470 F.3d 1261, 1269 (8th Cir. 2006) (holding that the statute discriminated on its face and explaining "that there is another, ***independent reason*** for concluding that it burdens out-of-state interests: The initiative has a discriminatory intent.") (emphasis added); *S.D Farm Bureau v. Hazeltine*, 340 F.3d 583, 597 (8th Cir. 2003) (striking down statute on the basis that it had a discriminatory purpose); *SDDS, Inc. v. State of S.D.*, 47 F.3d 263, 270 (8th Cir. 1995) (holding that strict scrutiny applied because state measure "had a discriminatory purpose" and, "[a]lternatively," because it was "discriminatory in its effect"); *Safeway Stores, Inc. v. Bd. of Agric.*, 590 F. Supp. 778, 785 (D. Haw. 1984) (finding that Milk Control Act had a discriminatory purpose and opining that "[a] finding of invalid purpose alone would be sufficient to hold the Board of Agriculture's application [of the statute] unconstitutional," but analyzing the statute's effects "[f]or the sake of completeness").

Indeed, as the leading commentator in this area has explained: "If we ask which feature makes protectionist legislation antithetical to the very idea of federal union, the answer is obvious. It is the protectionist purpose, the unvarnished intention of taking something away from other states just to enjoy it at home." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1126 (1986).[4]

It is no answer that the First Circuit, in the course of addressing privilege issues in this case, expressed some doubt that a Commerce Clause violation could be established by proof of discriminatory intent with no corresponding showing of disparate effect. *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 89-90 (1st Cir. 2021). The Court of Appeals there had no occasion to decide the legal relevance of proof of discriminatory intent in establishing a Commerce Cause claim. The issue in that appeal was the availability of discovery into intent from individual state officials, which the court concluded would likely be insufficiently probative to justify the adverse impact that such discovery would have on comity interests: "[E]vidence that will likely bear on the presence or absence of discriminatory effects in the actual results of RhodeWorks toll collections is more probative and more readily discoverable than evidence relating to legislative intent." *Id.* at 90. But even so, the First Circuit plainly recognized that evidence of discriminatory intent may be used to establish a Commerce Clause claim, going so far as to describe the preferred method for establishing intent: "[W]hen evaluating whether a state statute was motivated by an intent to discriminate against interstate commerce, we ordinarily look first to statutory text, context, and legislative history, as well as to whether the statute was closely tailored to achieve the [non-discriminatory] legislative purpose." *Id.* (citations and internal quotation marks omitted). Accordingly, "[e]xamination of the State's purpose in this case is

[4] Both the Supreme Court and the First Circuit have cited this article with approval. *See Scheiner*, 483 U.S. at 285 n.20; *Family Winemakers*, 592 F.3d at 14.

sufficient to demonstrate" that the RhodeWorks tolls run afoul of the Commerce Clause. *Bacchus*, 468 U.S. at 270.

Third, as this last point suggests, even if discriminatory intent standing alone is insufficient to establish inconsistency with the Commerce Clause, evidence of that intent still is relevant and highly material in this suit. Statutes presumptively effectuate their purpose; proof that a state acted with the intent to discriminate therefore tends to show that the resulting law in fact had a discriminatory effect. Of course, it is possible to imagine unusual circumstances in which laws enacted with a discriminatory purpose do not actually result in discrimination in fact. *See Alviti*, 14 F.4th at 89. But that surely will be the very rare case. Courts repeatedly have noted the close association between intent and effect. *See, e.g.*, *Norfolk S. Corp*, 822 F.2d at 400 ("[W]e believe the 'discriminatory effect' cases are best regarded as cases of purposeful discrimination."); *see also id.* at 400 n.18 ("[W]e conclude that a discriminatory effect, as distinct from incidental burden, evidences purposeful discrimination."); *Family Winemakers of Cal.*, 592 F.3d at 14 ("That [the challenged statute] discriminates against out-of-state wineries in its effects strengthens the inference that the statute was discriminatory by design."); Regan, *supra*, 84 Mich. L. Rev. at 1033 (a "case where the protectionist purpose produces no protectionist effect" is "unlikely but imaginable"). Consequently, evidence that the State enacted RhodeWorks with the intent to benefit in-staters at the expense of out-of-staters would strongly bolster Plaintiffs' showing that the tolls actually had that effect.

b. State officials enacted RhodeWorks with discriminatory intent

Here, the evidence of discriminatory intent is overwhelming.

In fact, the intent to discriminate was express: Gov. Raimondo and other high-ranking state officials made no secret of their intent to structure RhodeWorks so as to impose disproportionate burdens on out-of-staters. This case therefore presents one of "'the rare

instance[s] where a state artlessly disclose[d] an avowed purpose to discriminate against interstate [commerce]." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S 333, 350 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). "[W]e need not guess at the legislature's motivation" (*Bacchus*, 468 U.S. at 271): The state officials responsible for the enactment of the RhodeWorks scheme were candid about their intent to place the bulk of the burden for maintaining Rhode Island's bridges on out-of-state entities while sparing local users of those facilities from that burden—with the explicit goal of exporting the state tax burden to out-of-state payers.

- Gov. Raimondo, state legislators, and RIDOT officials repeatedly said at they supported RhodeWorks and gave the program its form with the specific goal of placing the principal burden on out-of-state and interstate payers. *See* pages 14, 19, *supra*.
- Those officials pointed repeatedly to the disproportionate effect of the toll caps on out-of-state trucks, citing over and over again the CDM Smith finding that those trucks would pay a high percentage of the tolls. *See* pages 13-14, *supra*.
- In excluding class 7 and smaller trucks from the tolls, state officials repeatedly made clear that their goal was to protect local truckers and other businesses; in contrast, there was no reference to, and there is no evidence that those officials gave consideration to ***any*** other distinction between categories of trucks. *See* pages 14, 19, *supra*.

Evidence obtained in discovery—and the structure that state officials gave RhodeWorks—confirms the intent of those officials to export Rhode Island's toll burden to out-of-staters.

- Throughout the process by which state officials formulated the RhodeWorks program, they focused their research and development efforts almost exclusively on assessing the proportion of tolls that varying approaches would impose on out-of-state rather than in-state vehicles. There was no programmatic reason to make such an assessment, other than the goal of placing as much of the toll burden as possible on out-of-state and interstate vehicles. *See* pages 14-17, *supra*.
- In contrast to the extensive effort invested in determining the proportion of toll payments that would be made by out-of-state vehicles, state officials made no serious effort—indeed, they made no real effort at all—to justify the imposition of tolls only on the largest trucks. *See* pages 14-17, *supra*.
- The evidence shows that state officials likewise chose tolling locations with the goal of obtaining the largest possible return from vehicles traveling interstate, a goal that also has no connection to any interest in repairing Rhode Island's bridges. See pages 6-8, *supra*.
- Rhode Island officials gave RhodeWorks a truck-only tolling structure that is unique in the United States, and apparently is unprecedented, before then also excluding from tolling those trucks that are most likely to be owned by in-staters. And they limited the tolls by implementing a series of caps that also appears to be unique. These choices can be explained only as an effort to impose disproportionate burdens on out-of-state and interstate-truckers. *See* page 25-26, *supra*.

Consequently, there can be no serious doubt that state officials intended RhodeWorks to discriminate against interstate commerce, which alone establishes the programs'

unconstitutionality. And in any event, that intent, implemented over the lengthy course of the tolling program's development, had its intended effect: RhodeWorks has a forbidden "discriminatory impact on interstate commerce." *Hunt*, 432 U.S. at 352.

III. THE RHODEWORKS TOLLS ARE NOT BASED ON A FAIR APPROXIMATION OF USE

In addition, and separately, the RhodeWorks tolls fail the *Northwest Airlines* requirement that a user fee be "based on some fair approximation of use of the facilities [for which the fee is paid]." *Nw. Airlines v. Cty. Of Kent, Mich.*, 510 U.S. 355, 369 (1994). Although the State "need not demonstrate that the fee exactly equals the cost of maintenance or the benefits conferred," the charge ***must*** "'reflect a fair, if imperfect, approximation of the use of the facilities for whose benefit they are imposed.'" *Cohen*, 775 F. Supp. 2d at 449-50 (quoting *Evansville-Vanderburgh*, 405 U.S. at 717. Here, the tolls cannot satisfy that standard.

A. Fair-Approximation Principles

The fair-approximation requirement helps to effectuate the Commerce Clause principle that state fees not impose an undue burden on interstate commerce. *See generally Industria y Distribuction de Alimentos v. Trailer Bridge*, 797 F.3d 141, 147 (1st Cir. 2015); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 97 (2d Cir. 2009) ("*Selevan I*"). Because the test limits only fees that are paid by entities engaging in interstate commerce, interstate businesses pay more than their fair share when the amount collected does not fairly approximate either use of the facility for which the fee is paid or the cost of operating the facility that is fairly attributable to the payer. When the charge exceeds that amount, interstate users by definition are paying for something that they do ***not*** use and that local users ***do*** use. For some of the same reasons that have led the Supreme Court to make use of the internal consistency test, fees that do not fairly approximate use threaten to divide the country into preferential trade areas and thus to Balkanize the national

economy, as each jurisdiction that imposes such a fee extracts more than its fair share from interstate travelers.

Fees that exceed the fair approximation limit impose other potential burdens on interstate commerce as well. If one jurisdiction may impose such a fee, others may, too. In the aggregate, the accumulation of such disproportionate fees will impose duplicative and possibly crushing burdens on interstate commerce. *See generally Scheiner*, 483 U.S. at 292-92 ("'because it operates in other States there is a danger—and not a fanciful danger—that the interstate carrier will be subject to the privilege taxes of several States, even though his entire use of the highway is not significantly greater than that of intrastate operators who are subject to only one privilege tax'") (citation omitted). By the same token, fees that do not fairly approximate use make it easy for states to impose disguised burdens on entities engaged in interstate commerce, giving states a method to extract payments from out-of-staters for benefits that the state does not provide. *See Trailer Bridge*, 797 F.3d at 144 (in user fee context, Commerce Clause "inhibits economic protectionism between the states") (citation and internal quotation marks omitted); *id*. at 147 (*Evansville* test "is essentially a short-hand test for determining whether a user fee infects interstate commerce").

In applying the user-fee test, the First Circuit has explained that fair approximation is "essentially a question of allocation"; "we ask whether the government is charging each individual entity a fee that is ***reasonably proportional to the entity's use, and whether the government has reasonably drawn a line between those it is charging and those it is not***." *Id.* at 145 (emphasis added). That standard also can be drawn from *Northwest Airlines*, which upheld the charge challenged in that case because it distinguished between those who "actually use" the facility and those who do not; and *Evansville*, which describes the test as calling for "a measure

of the relative use of the facilities." 405 U.S. at 719. *See also N.H. Motor Trans. Ass'n v. Flynn*, 751 F.2d 43, 47 (1st Cir. 1984) (Breyer, J.) (fee "helped to apportion costs fairly among … users"); *Selevan I*, 584 F.3d at 98 (each user pays a "fair share"); *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 259-61 (2d Cir. 2013) (*Selevan II*) (same); *Janes v. Triborough Bridge & Tunnel Auth.*, 977 F. Supp.2d 32, 340 (S.D.N.Y. 2013) (upholding fee that "fairly approximates usage patterns on bridges"). Thus, the test ultimately looks to "whether the challenged method for imposing charges fairly apportions the cost of providing a service." *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81, 98 n.25 (D. Conn. 2008), *aff'd*, 567 F.3d 79 (2d Cir. 2009).

This test has two related components. ***First***, it asks whether all users who contribute in a substantial way to the facility's costs make a proportional payment—that is, "whether the government has reasonably drawn a line between those it is charging and those it is not." And ***second***, it asks whether the percentage of the aggregate fee paid by the payer relates in a fair way to its use of the facility for which the charge is imposed—that is, whether the charge "is reasonably proportional to the entity's use." The allocation need not be precise, but it must draw reasonable lines, a requirement that is implicit in the term "fair approximation."

Applying this test, courts have upheld excluding from a fee those entities that do not actually use the facility or service for which the fee is charged; the courts reason that the fact that the excluded entity does not benefit from the charge reasonably "accounts for this distinction." *Northwest Airlines*, 510 U.S. at 369. But a state may not require certain users to pay the entirety of the fee when excluded users share in the benefits: "There must be a 'rational relationship' between the method used to establish the fee and the benefits that are realistically available to those who pay them." *Am. Trucking Ass'ns, Inc. v. N.Y. Thruway Auth.*, 199 F. Supp. 3d 855,

878 (S.D.N.Y. 2016), vacated on other grounds, 238 F. Supp.3d 527 (S.D.N.Y. 2017). Thus, for example, entities may not be required to pay for benefits that they do not use and that instead benefit other users. *See, e.g.*, *Bridgeport & Port Jefferson Steamboat Co.*, 567 F.3d at 87-88; *N.Y. Thruway*, 199 F. Supp. 3d at 878.

B. RhodeWorks Fails The Fair-Approximation Standard

Here, the RhodeWorks tolls do not fairly approximate use of the tolled facilities, for three reasons.

1. RhodeWorks' allocation of costs to large trucks does not fairly approximate use

Requiring large trucks to pay the entirety of the tolls necessarily results in those trucks paying expenses that are fairly attributable to other users; because most users of the tolled bridges pay no fee at all, by definition the State has not "reasonably drawn a line between those it is charging and those it is not." *Trailer Bridge*, 797 F.3d at 145. Obviously, Rhode Island cannot defend RhodeWorks on the ground that class 8 and larger trucks are the only users of the bridges; as noted above, trucks in classes 8 and above accounted for less than four percent of all vehicles traveling on the tolled routes. *See* Page 27, *supra*. Nor can the State say that only large trucks impose the costs that are paid out of the RhodeWorks tolls; vehicles in classes 1-7 that are excluded from the tolls contribute substantially to costs of bridge maintenance and construction.

a. The generally accepted highway cost-allocation methodology

The State evidently now bases its defense of RhodeWorks on the proposition that the stresses caused by vehicles passing over a bridge are the ***only*** relevant bridge cost. *See* Expert Report of A. Nowak, ¶¶ 4-6. But that view is wrong; indeed, it is irrational. In fact, there are numerous additional factors that play critical roles in road and bridge deterioration, all of which

were ignored by RIDOT and all of which impose costs that are properly borne, in part, by vehicles in classes 1-7.

This conclusion not only is self-evidently correct; it follows from the principles that are generally used by states and the federal government to fairly allocate road and bridge costs commensurate with all vehicles' use of these facilities. This HCAS methodology is the dominant approach to highway cost allocation. Since 1937, "at least 84 [highway cost allocation] studies have been performed in 30 states." *See* National Academies of Sciences, Engineering, and Medicine 2008: State Highway Cost Allocation Studies, at 3. The HCAS method is mandated by statute for federal highway cost allocation and is used and recommended by the Federal Highway Administration (FHWA). *See* FHWA Cost Allocation Study Report Final, https://www.fhwa.dot.gov/policy/hcas/final/one.cfm.

At the core of the congressional mandate to FHWA to conduct HCAS is the desire to evaluate the equity of each state's federal highway user fee structure. *See id*. In particular, the 1978 mandate required that alternative highway user fee structures be evaluated to identify options that could improve overall user fee equity. "Equity" refers to the proper allocation of costs and resulting user fees (including taxes or tolls) that are commensurate with the incremental costs that each vehicle imposes on the roads over which it drives. *See id*. According to the FHWA: "In general, the closer the match between user fees and highway cost responsibilities for each vehicle class, the more equitable the user fee structure. Cost allocation studies often examine alternative highway user fee structures that could bring user fee payments by each class closer to that user's highway cost responsibility." *Id*. The goal is that each highway user should appropriately share in contributing toward funding highway facilities, commensurate with their use.

To assess and achieve this equity in allocation, the HCAS methodology uses a so-called "cost-occasioned, incremental" approach. The "cost-occasioned" element examines how the physical and operational characteristics of each vehicle class are related to costs of repair for pavement and other infrastructure projects, including bridges. *See* Potiowsky Report at ¶ 20. It thus looks at each vehicle class and the costs associated with its use of the roadway facility. *See id*. at ¶ 27. The "incremental method" then allocates responsibility for highway costs by comparing the costs of constructing and maintaining facilities for the lightest class of vehicles only, and then successively for each increment of larger and heavier vehicles. *See, e.g.*, ECONorthwest, Highway Cost Allocation Study 2019-2021 Biennium: Oregon Highway Cost Allocation Supplementary Documents (2019-2021). The HCAS methodology may vary slightly by state, but all states use the common approach of allocating costs using the incremental method. Expert Report of Potiowsky at ¶ 42.

b. Rhode Island's aberrational bridge cost-allocation methodology is irrational

Had Rhode Island used this well-established industry standard for cost allocation, it would have found commercial trucks to be responsible for only a small fraction of the costs associated with Rhode Island's bridges. But Rhode Island never conducted a HCAS or other data-driven analysis of bridge cost allocation. Indeed, apart from seeking out data *ex post* that could be used to justify Mr. Garino's impulse to toll commercial trucks, Rhode Island collected no data at all to support its cost allocation.

Instead, in the context of this litigation, Rhode Island's lawyers and retained experts have attempted to offer a wholly new methodology to justify Rhode Island's assignment of all bridge costs to FHWA Class 8 and above trucks, which Rhode Island's expert Kenneth Small dubs the "consumptive approach." Expert Report of K. Small at ¶ 31. The theory behind this approach is

that there are a finite number of times that bridges can be crossed by heavy trucks before they are "consumed" and can no longer be used, and thus it is appropriate to assign all costs associated with the bridge to heavy trucks. *Id.* There is no evidence that RIDOT actually considered this consumptive approach when implementing RhodeWorks; it is an entirely *ex post* justification for tolling the vehicle class that is primarily owned by out-of-staters.

But even if taken seriously and viewed on its own terms, the "consumptive approach" is seriously flawed: it overlooks all of the many contributing factors to bridge costs that have nothing to do with heavy vehicles. While some causes of bridge damage undoubtedly come from heavy vehicle use, most do not. These include:

- Increased traffic volumes and congestion are among the most significant causes of bridge costs, as functionally obsolescent bridges need to be widened or strengthened to accommodate greater numbers of vehicles. Increased congestion is caused by ***all*** of the vehicles using the bridge and cannot properly be allocated to just one class of vehicles. See Potiowsky Report at ¶¶ 52-54 That is why the HCAS methodology, for example, allocates costs associated with congestion to all vehicle classes commensurate with the extent to which each class contributes to traffic volumes.

  Indeed, passenger vehicles comprise approximately 94% of the traffic on Rhode Island's roads, and those vehicles are predominantly Rhode Island plated vehicles. *See* pages 12, 24, *supra*. Among other costs imposed by passenger vehicles, those vehicles contribute to congestion, and the need for road and bridge widening. In fact, certain of the tolled bridges, including the Viaduct bridge (which accounts for almost half of the RhodeWorks bridge repair budget), are being replaced in

substantial part to address the greater volume of traffic those bridges now carry. *See* Vavrik Rep. at ¶ 32; Vavrik Reply Report at ¶ 25. Passenger vehicles are predominant users of the roads and bridges, and substantially contribute to the need to repair and replace bridges, and yet they are not charged any tolls. The exclusion from the tolling regime of those users of the facility who are most likely to impose political discipline on the designers of the user fee is a hallmark of actions targeted at interstate commerce. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994).

- Likewise, the "consumptive approach" posited by Rhode Island's experts fails to account for the extent to which ambient and environmental factors contribute to the "consumption" of Rhode Island's bridges. It is undeniable that bridges and roads deteriorate from exposure to the elements and other environmental reasons, even if they are not being used by vehicles. Particularly in places with variable temperatures like Rhode Island, weather and corrosion are the among the most common causes of damage to bridges and roadways. See, e.g., RI0347706 at 7708 (RIDOT email noting that most surface damage "is due to repeated loading, and block cracking is a combination of repeated loading and repeated shrinkage of the asphalt due to cold weather… On limited access highways… eventually ice and snow plows break the friction course mix apart, causing potholes only in the friction course layer.") Indeed, weather-related factors contribute much more to reducing the service life of a bridge than do material fatigue factors from vehicle damage. Vavrik Reply Rep. ¶ 61. Corrosion, freeze-thaw attack, spalls, rust, and erosion are all among the types of damage to bridges caused by weather. Vavrik

> Rep. ¶ 61.[5] [T]he increase of costs and the advanced deterioration RIDOT sees in bridges because of a lack of maintenance is much like homeowners may face if they do not fix their roof…The cost of delay here is *far greater* than replacing a few shingles.") (emphasis in original). The state's chronic failure to conduct relatively inexpensive routine maintenance is a major contributor to material fatigue in its bridges. *See* Vavrik Rep. at ¶41. Under the HCAS approach, the costs of such maintenance are treated as common costs allocated to all classes of vehicles because such costs prolong the use of the bridge for all users and benefit all classes of vehicles equally.

None of this is controversial: The GAO Report on which the RhodeWorks legislative findings rely acknowledges that "highway deterioration stems from many causes which are not readily controllable including weather, lack of maintenance funds, and the inevitable maintenance process." RI0419314 at RI0419316. These cost factors are no more attributable to large trucks than they are to other categories of vehicle, and spending to address them is no less beneficial to those vehicles than it is to large trucks.[6] Consequently, the differential treatment in

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[5] In at least one draft response to Roads and Bridges Magazine, RIDOT said "the most typical advanced pavement distress we get on flexible (all asphalt) pavements is alligator cracking and block cracking. Alligator cracking is due to repeated loading, and block cracking is a combination of repeated loading and repeated shrinkage of the asphalt due to cold weather… On limited access highways… eventually ice and snow plows break the friction course mix apart, causing potholes only in the friction course layer." RI0347706 at 7708. A PolitiFact Report in the Providence Journal called this to RIDOT's attention, with one giving RIDOT's damage calculation for trucks a "half true" rating precisely because they did not consider any environmental factors. RI0364012.

[6] The State has implicitly acknowledged this is true of class 6 and 7 trucks. Rhode Island originally included classes 6-7 among the tolled vehicles in early versions of the RhodeWorks bill. RI0320929 at RI0320937 (May 27, 2015 proposed RhodeWorks legislating subjecting class 6 and above vehicles to tolls). Indeed, RIDOT estimated that class 6 and above trucks cause over 83 percent of damage to roads and bridges (*see id*. at 1601). Similarly, analysis conducted by RIDOT staffer Andrew Koziol concluded that in recent years the damage caused by trucks in

RhodeWorks between larger trucks (which pay 100 percent of tolls) and smaller vehicles (which pay nothing) does not "'reflect rational distinctions among different classes' of motorists." *Cohen*, 775 F. Supp. 2d at 450 (quoting *Evansville-Vanderburgh*, 405 U.S. at 718-19).

2. RhodeWorks requires large trucks to pay far more than their fair share of costs

Relatedly, the RhodeWorks scheme is not a fair "measure of the relative use of the facilities." *Evansville-Vanderburgh*, 405 U.S. at 718-19. Large trucks pay 100 percent of the tolls, but are responsible for only a small portion of the costs of the tolled facilities. This circumstance is analogous to a law requiring a class of user to pay for something from which it draws no benefit, which courts uniformly have invalidated under the fair-approximation requirement; here, too, large trucks in Rhode Island are paying costs that are properly attributable to others, and therefore are making payments from which they draw no benefit.

The evidence shows that across the nation, FHWA and many states estimate that trucks in classes 8 and higher account for roughly 25-30% of road system costs. *See* Vavrik Rep. ¶ 35. Adjusting for the smaller proportion of Class 8+ trucks in Rhode Island and for the more urban nature of Rhode Island, a reasonable estimate suggests that Class 8+ trucks may be responsible for in the range of 11-14% of total costs. *See id*. With respect to the specific project bridges for which the RhodeWorks tolls are applied—the "tolled facilities"—trucks account for approximately 21%-24% of the bridge costs using the methodologies employed by the FHWA

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classes 5-7 ***increased*** while damage caused by trucks in classes 8 and above ***decreased***. RI0364048 at 4049 (emphasis added). Once the tolling regime shifted to Class 8 and above, Mr. Koziol estimated that Class 8+ trucks cause 70% of damage, implicitly acknowledging that even by Mr. Koziol's estimates, Class 6 and 7 trucks account for at least 13 percent of the damage to Rhode Island infrastructure. Yet those trucks to not contribute at all to the toll revenues.

and other state DOTs. When those numbers are adjusted to account for the traffic patterns experienced in Rhode Island, trucks account for in the range of 9-11% of the costs. *Id*. at ¶ 36.

Rhode Island's experts urge that such "point estimates" may not be taken in isolation, but that instead the Court must consider the "prediction intervals" and "confidence bounds" surrounding such point estimates; based on their re-calculations of Mr. Vavrik's data, they contend that Class 8+ trucks on average may be responsible for 22% of costs (adjusting projections based on the percentage of urban land), or 31.5% of costs (based on vehicle miles traveled), with an upper bounds of 42% and 49% tolerance interval. Expert Report of Rose Ray at ¶¶ 11, 44. But even that 22-31.5% estimate is less than half the one originally asserted by the State and relied upon by the Legislature. And, in any event, requiring a category of vehicles that is responsible for no more than one-third of use to pay for ***all*** of it is not a fair "measure of the relative use of the facilities." *Evansville-Vanderburgh*, 405 U.S. at 718-19.

Thus, whatever the precise percentages, there can be no doubt that the vehicles exempted from the RhodeWorks tolls bear substantial responsibility for imposing maintenance costs on, and derive substantial benefits from use of, the tolled facilities. Autos (and smaller trucks) therefore must bear a substantial share of Rhode Island's maintenance costs if the RhodeWorks charges are to fairly approximate use. Because they do not, on the face of it the RhodeWorks tolls fail the *Northwest Airlines* test.

3. The RhodeWorks caps eliminate the necessary connection between the amount paid and actual use of the tolled bridges

In addition, the RhodeWorks toll caps also substantially eliminate the connection between the amount paid and the use of the tolled facility. There is no denying this reality: A truck that travels through a given toll gantry ten times in a day will pay the same amount as one that travels through it once, while the $40 daily cap means that trucks that accumulate vastly different daily

mileage on Rhode Island roads will pay identical aggregate tolls. On the face of it, this regime ***necessarily*** means that "each user" does ***not*** "pay[] some approximation of his or her fair share of the state's cost for maintaining the [facility]." *Selevan*, 584 F.3d at 98. As the Supreme Court explained in holding that flat truck charges that do not vary with mileage traveled are invalid under the user-fee test, such charges "do not even purport to approximate fairly the cost or value of the use of [the charging State's] roads." *Scheiner*, 483 U.S. at 290. Or as the Supreme Judicial Court of Massachusetts put it: "[I]t is apparent that [such a] fee does not vary based on any 'proxy for value' obtained from the [State]." *Am. Trucking Ass'ns, Inc. v. Sec'y of Admin.*, 613 N.E.2d 95, 102 (Mass. 1993).

C. The State's Defenses Of RhodeWorks On Fair-Approximation Grounds Are Unpersuasive

Over the course of this litigation, the State has offered a number of defenses for its approach. All are wrong.

1. RhodeWorks cannot be saved by deference to legislative findings

When the Legislature enacted RhodeWorks, it made a finding referring to RIDOT's statement that large trucks are responsible for 70 percent of the damage to Rhode Island's bridges. *See* page 24, *supra*. The State has urged the Court to defer to that finding. But legislative deference cannot win the case for the State.

Even if it is assumed that some degree of deference to a legislature is appropriate—*but see, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 923-29, 33-39 (2000) (making no reference to deference in resolving a constitutional challenge to legislation)—courts ***must*** exercise independent judgment on, and have ultimate responsibility for deciding, questions of fact that bear on the constitutional validity of legislation.

In particular, as a general matter it is clear that the purported exercise of legislative judgment on issues of fact may not insulate a statute—or the factual judgments that determine the constitutionality of the statute—from meaningful judicial review. Almost a century ago, Justice Brandeis stated the general understanding: "[W]here a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity." *Whitney v. Cal.*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring). In subsequent years, the Supreme Court, and other courts, repeatedly have stated that rule, as to a range of constitutional claims: "[W]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 129 (1989). *See, e.g.*, *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality op.) ("[C]ourts must review legislative factfinding under a deferential standard. … But they must not place dispositive weight on those findings, for the courts retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake .") (internal quotation marks omitted); *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007) (same); *Latta v. Otter*, 771 F. 3d 456, 469 (9th Cir. 2014) (same); *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1071 (D. Alaska 2014) (same); *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."); *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992) ("we are still obliged in the end to *review* the government's policy—both the judgment of law that the policy is constitutional and the findings of fact that underlie it").

That logically must be so. There is no principle of constitutional adjudication more fundamental than that "[i]t is emphatically the province and duty of the judicial department" to determine the validity of a law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is the

courts' role to settle the constitutionality of legislation; when constitutionality turns on the factual circumstances, a court must make the ultimate determination as to the controlling facts. Otherwise, "the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809).

On this, it does not matter whether the legislature made express factual findings in support of the legislation. Even if there is no explicit finding, the legislature must at least implicitly have based the enactment on factual judgments. *See Whitney*, 274 U.S. at 374 (Brandeis, J., concurring). Courts make their own factual determinations in cases challenging the constitutionality of such laws. And it cannot be the case that announcement of an unsupported—or pretextual—legislative factual finding precludes meaningful judicial review. As then-Judge (now-Justice) Thomas put it for the D.C. Circuit: "We know of no support … for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison,* … that has not been the law." *Lamprecht*, 958 F.2d at 392 n.2. *Accord, e.g., Morrison*, 529 U.S. at 614 ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation").

Courts may give special weight to legislative determinations involving complex "predictive judgments" that are intertwined with questions of policy or trade-offs between competing public values. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997). But courts do not defer—and certainly do not defer dispositively—when a defined factual standard determines constitutionality. In such cases, a court may take account of the legislative judgment,

just as it would the factual conclusions of any other entity that has an informed view. And the court will consider the basis and strength of factual support for a legislative judgment, as it will for other relevant factual conclusions. *See, e.g. Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002) (plurality op.). But when a factual conclusion is necessary to establish constitutionality, the court must make its own factual determination: "[I]n finding a substantial basis to support Congress' conclusion… [w]e examine first the evidence before Congress and then the further evidence presented to the District Court … to supplement the congressional determination." *Turner Broad.*, 520 U.S. at 196.

That is the situation here. RhodeWorks is unconstitutional if the tolls do not fairly approximate the toll payers' use of the tolled facilities. The resolution of that inquiry turns on factual showings and determinations. Although the fair-approximation standard is not precise, that standard's application rests on factual judgments that have a discernible empirical foundation: However inexact, a test looking to "fair approximation of use" requires consideration of "actual[] use" of the facility for which a fee is imposed that "accounts for th[e] distinction[s]" between users. *Northwest Airlines*, 510 U.S. at 369. Courts routinely resolve this inquiry by looking to showings made in the record. *See, e.g.*, *Bridgeport & Port Jefferson Steamboat Co.*, 567 F.3d at 88 (charge was invalid because "nothing in the record" satisfied fair approximation test); *Selevan II*, 711 F.3d at 259-61 (finding charge constitutional on review of the record); *see also Northwest Airlines*, 510 U.S. at 369-70 & n.16 (noting district court's unchallenged finding that user fee was invalid in part because fee-payers were overcharged for certain services); *Doran v. Mass. Tpk. Auth.*, 348 F.3d 315, 321 (1st Cir. 2003) (tolls were constitutional because they "have not been shown to be excessive"). Indeed, in *Cohen*, this Court rejected the Commerce Clause claim in part because the plaintiff "ha[d] proffered no evidence of a clearly

excessive burden" within the meaning of *Northwest Airlines* (775 F. Supp.2d at 450), an observation that would have been beside the point unless showings on the record ***could*** establish a violation of the *Northwest Airlines* requirements.

Moreover, objective indicia show that deference is especially unwarranted here: The method by which RIDOT made its determination of the amount of bridge damage properly attributable to large trucks, which the Legislature then endorsed, may charitably be described as haphazard and amateurish. Rather than engage in a close analysis of the facts—as does the federal government and all other states when they allocate costs to the various users of bridges and highways—RIDOT:

- Started with its preferred conclusion (that is, toll only trucks, and then toll only the largest trucks). *See* pages 14-17, *supra*.
- Looked on Google for a way to justify that approach, making no serious effort to determine the cost allocation actually and properly attributable to large trucks in Rhode Island (or, indeed, anywhere). *See* pages 9, 24, *supra*.
- Ended up identifying a method that is not used by ***any*** other jurisdiction in allocating bridge costs and that is inconsistent with industry standards. *See* pages 9-11, *supra*.

If anything, this case calls for application of what might be termed a principle of anti-deference: a cost allocation figure generated through Rhode Island's bizarre method is presumptively ***wrong***.

2. RhodeWorks may not be saved on the ground that the State also uses additional sources of funds to maintain Rhode Island's bridges

The Court must make its own independent review of the record to satisfy itself that the constitutional requirements are satisfied. When it does, it should find that the State's 70 percent truck responsibility figure is incorrect, as a matter of fact and as a matter of law.

As a matter of fact, for reasons already addressed, trucks are responsible for a vastly lower proportion of bridge costs than the State asserts and then RhodeWorks requires them to pay. The alternative analysis used by Rhode Island to reach its different conclusion—which wholly disregards numerous elements of the cost of maintaining bridges, and assumes that daily use of the tolled bridges by millions of cars and tens of thousands of class 7 and smaller trucks has no impact on bridge costs—is simply not reasonable. This is not a close call.

In this respect, when the constitutional test asks whether the charge is based on a "fair approximation of the use of the facilities," the relevant "facilities" here are the specific bridges for which the tolls are collected. That point should not be controversial. RIDOT itself made the point in its memoranda of understanding with the FHWA Rhode Island Division Office and in the accompanying correspondence, where RIDOT identified the RhodeWorks bridges as the tolled facilities, represented that the toll rates charged to toll payers would "represent a fair approximation of the use of such Project Bridge by large commercial trucks," and stated that it "intends that the tolls collected on each Project Bridge will be used to pay the replacement and reconstruction costs relating to the portion of the damage caused to each such Project Bridge by large commercial trucks." Ex. A to Dkt.39-1, at 2. It is not a fair approximation of use to exclude from the tolls used to maintain the bridges other users who also contribute to bridge maintenance costs.

As a matter of law, even if it is assumed that the State's 70 percent large-truck responsibility figure is accurate, trucks pay more than that; they pay 100% of the tolls, and therefore by definition pay more than their fair share. That disparity is fatal to RhodeWorks: A charge fails the *Northwest Airlines* test when it unquestionably exceeds a fair approximation of the payer's costs, even if the percentage of the payers' payments that is used to pay other users' costs is relatively small. *See N.Y. Thruway*, 199 F. Supp.3d at 879 (charge was unconstitutional even though only 9-14% of receipts were used to pay costs that did not benefit payer; when payments do not benefit the payer, the fee "cannot possibly fairly approximate Plaintiffs' use of the facilities for which that 9-14% of their tolls pay") (internal quotation marks omitted).

Moreover, it is legally immaterial that the State purports to make up the difference by paying a portion of bridge costs out of general state or federal funds. The user-fee inquiry must focus on the fee and ***its*** allocation, and the distinction drawn by the ***fee itself*** between those who pay and those who do not—not on other, unrelated sources of funds that the State contributes to upkeep of the tolled facility. Once the inquiry looks more broadly—to other state taxes and fees, to federal contributions, and so on—imprecision becomes inevitable, duplicative burdens on interstate commerce unavoidable, and manipulation by the State likely.

The Supreme Court made precisely that point when rejecting a similar argument in defense of the state charge in *Scheiner*. As the Court explained, the charge in that case could not be justified as a "'rational restructuring of the burdens' simply because it arguably benefits a class of [in-state] truckers that pays more to use the State's highways than does another class of highway users." 483 U.S. at 288-89. The Court was unequivocal on the point: "[I]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would

plunge the Court into the morass of weighing comparative tax burdens. … ***The flat taxes must stand or fall on their own***." *Id*. at 289 (citation and internal quotation marks omitted; emphasis added).

The Court reached the same conclusion in the closely analogous context of the compensatory tax doctrine, which addresses attempts by states to justify discriminatory taxes that fall on out-of-staters by arguing that the state imposes different but similar taxes on in-staters, for which the discriminatory tax compensates. For such a defense to prevail, the Court insists on a very close parallel between the charges. Among other things, "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies] for each other.'" *Oregon Waste Systems*, 511 U.S. at 103 (citation omitted). That kind of parallel between the RhodeWorks tolls and other sources of state revenue used to maintain state transportation facilities cannot possibly be established here.

The reason the Court has adopted that rule applies with full force in this case. Allowing the charging state to justify its fee on the ground that the levy "'compensate[s] for charges purportedly included in general forms of interstate taxation would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general tax funds.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 335 (1996) (quoting *Oregon Waste*, 511 U.S. at 105 n.8). The Supreme Court "declined" … 'to open such an expansive loophole.'" *Id*. This Court should do the same now.

CONCLUSION

For the foregoing reasons, the Court should find that the RhodeWorks tolls are unconstitutional under the Commerce Cause.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2022, a true copy of the within document was filed electronically, and it is available for viewing and downloading from the ECF system by all counsel of record.

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