17-737 (L)

(consolidated with 17-873)

United States Court of Appeals for the Second Circuit

AMERICAN TRUCKING ASSOCIATIONS, INC., WADHAMS ENTERPRISES, INC., LIGHTNING EXPRESS DELIVERY SERVICE INC., WARD TRANSPORT & LOGISTICS CORP., on behalf of themselves and all others similarly situated, AMERICAN BUS ASSOCIATION, DATTCO, INC., STARR TRANSIT CO., INC., on behalf of themselves all others similarly situated,
Plaintiffs-Appellants,

(*caption continued on inside cover*)

On appeal from final judgments of the United States District Court for the Southern District of New York, Case Nos. 1:13-cv-08123 and 1:17-cv-00782, Hon. Colleen McMahon

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., WADHAMS ENTERPRISES, INC., LIGHTNING EXPRESS DELIVERY SERVICE INC., WARD TRANSPORT & LOGISTICS CORP., AMERICAN BUS ASSOCIATION, DATTCO, INC., AND STARR TRANSIT CO., INC.

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– v. –

NEW YORK STATE THRUWAY AUTHORITY, NEW YORK STATE CANAL CORPORATION, THOMAS J. MADISON, JR., in his official capacity as Executive Director of the New York State Thruway Authority, HOWARD MILSTEIN, in his official capacity as Chair of the New York State Thruway Authority/Canal Corporation Boards of Directors, DONNA J. LUH, in her official capacity as Vice-Chair of New York State Thruway Authority/Canal Corporation Boards of Directors, E. VIRGIL CONWAY, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, RICHARD N. SIMBERG, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, BRANDON R. SALL, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, J. RICE DONALD, JR., in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, JOSE HOLGUIN-VERAS, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, BILL FINCH, in his official capacity as Acting Executive Director of the New York State Thruway Authority, JOANNE M. MAHONEY, in her official capacity as Chair of the New York State Thruway Authority/Canal Corporation Boards of Directors, ROBERT L. MEGNA, in his official capacity as a member of the New York State Thruway Authority/Canal Corporation Boards of Directors, STEPHEN M. SALAND, in his official capacity as a member of the New York State Thruway Authority/Canal Corporation Boards of Directors,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

American Trucking Associations, Inc., and the American Bus Association are national trade associations. Neither has any corporate parents, affiliates, or subsidiaries, and no publicly held corporation owns ten percent or more of either's stock.

Wadhams Enterprises, Inc.; Lightning Express Delivery Service Inc.; Ward Transport & Logistics Corp.; DATTCO, Inc.; and Starr Transit Co., Inc., are privately held companies. None has any corporate parents, and no publicly held corporation owns ten percent or more of the stock of any of them.

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INTRODUCTION

The Commerce Clause of the U.S. Constitution bars States from imposing highway tolls in amounts that do not fairly approximate the toll-payers' use of the highways or are excessive in comparison with the governmental benefit conferred—unless Congress has evinced an unmistakably clear intent to free the States from the strictures of the Commerce Clause. In these consolidated cases, *American Trucking Associations, Inc. v. New York State Thruway Authority* ("*ATA*") and *American Bus Association v. New York State Thruway Authority* ("*ABA*"), the district court first held that the defendants had violated the Commerce Clause by using tolls collected from interstate truckers traveling on the New York State Thruway to fund the State's separate Canal System. But the court subsequently held that Congress had evinced an unmistakably clear intention to authorize the Thruway Authority to engage in this otherwise unconstitutional toll-diversion scheme.

That decision is wrong. The Supreme Court has repeatedly and forcefully explained that Congress may be found to have excused a State from the strictures of the Commerce Clause only when Congress "affirmatively contemplate[d] otherwise invalid state [action]" and its intent to permit the State to engage in such otherwise unconstitutional conduct is

"unmistakably clear." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). That standard is not satisfied here. The federal legislation on which the district court premised its finding of congressional authorization lifted a federal ***statutory*** bar on certain state highway tolls and imposed ***limits*** on the use of any toll revenues left over after payment of highway maintenance and construction costs. But both the statute and its legislative history "indicate[] no consideration or desire to alter the limits of state power otherwise imposed ***by the Commerce Clause***." *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 304 (1953) ("*Cal. PUC*") (emphasis added). The district court's contrary conclusion cannot be squared with settled constitutional doctrine and rests on the sort of speculation about congressional intent that the Supreme Court consistently has held to be insufficient.

The district court also erred for a second reason. Defendants first raised their congressional-authorization argument more than three years into the *ATA* litigation, after the district court had issued a summary judgment decision holding that the Thruway's tolls violated the Commerce Clause. The district court's determination that defendants had not waived the congressional-authorization argument in *ATA* by failing to raise it during many years of litigation was based on a manifestly erroneous under-

standing of waiver doctrine. Accordingly, if this Court concludes that the district court's decision on the merits is correct—which would necessitate affirmance in *ABA* (No. 17-873), where there is no issue of waiver—it should nonetheless reverse and remand in *ATA* (No. 17-737) for application of the correct waiver standard.

JURISDICTION

The district court had subject matter jurisdiction over both *ATA* and *ABA* under 28 U.S.C. §§ 1331 and 1343 because plaintiffs' claims arise under 42 U.S.C. § 1983 and the Commerce Clause of the U.S. Constitution (U.S. Const. art. I, § 8, cl. 3). The district court entered final judgment in *ATA* on February 28, 2017 (JA 244-45), and plaintiffs in that case filed their notice of appeal on March 14, 2017 (JA 246). The district court entered final judgment in *ABA* on April 6, 2017. JA 275-76. Plaintiffs in *ABA* filed their notice of appeal on March 28, 2017, after the district court ordered that the case be dismissed but before the clerk entered judgment (JA 273-74); pursuant to Federal Rule of Appellate Procedure 4(a)(2), that notice of appeal is "treated as filed on the date of and after the entry" of the judgment. Fed. R. App. P. 4(a)(2). This Court's jurisdiction over both cases rests on 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Congress, in enacting the Intermodal Surface Transportation Efficiency Act of 1991, evinced an "unmistakably clear" intent to excuse the New York State Thruway Authority from its obligation to abide by the strictures of the dormant Commerce Clause.

2. Whether the district court applied the wrong legal standard in *ATA* when it determined that defendants did not waive the argument that Congress authorized the New York State Thruway Authority to depart from the strictures of the dormant Commerce Clause.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs filed the *ATA* complaint in the U.S. District Court for the Southern District of New York on November 14, 2013. Plaintiffs filed the *ABA* complaint in the same court on February 1, 2017. Both cases are class actions brought on behalf of certain payers of highway tolls to the New York State Thruway Authority (interstate truckers and interstate bus companies, respectively) that, plaintiffs allege, were unconstitutional under the Commerce Clause of the U.S. Constitution.

The district court initially granted partial summary judgment for plaintiffs in *ATA*, holding that the tolls collected from interstate truckers

were unconstitutional. JA 67-111. During class-certification briefing, however, some three years after initiation of the litigation, defendants moved for the first time to dismiss *ATA* on the ground that Congress authorized the Thruway Authority to collect tolls that would otherwise violate the Commerce Clause. In a decision that has not yet been published (JA 231-43), the district court (McMahon, C.J.) granted defendants' motion to dismiss. The court then dismissed *ABA* in an endorsed memorandum, relying on the reasoning of its decision in *ATA*.

B. Statutory Background

The federal statute at issue in this case is one of a long series of federal laws that limited the imposition of tolls on federally funded highways. The earliest federal highway funding statutes provided flatly that roads constructed pursuant to those laws "shall be free from tolls of all kinds." Federal Aid Road Act of 1916, ch. 241, § 1, 39 Stat. 355, 356 (1916). *See also* Federal Highway Act of 1921, ch. 119, § 9, 42 Stat. 212, 214 (1921). Subsequently, the Federal-Aid Highway Act of 1956, which created the Highway Trust Fund for purposes of constructing a federal, toll-free Interstate Highway System (*see* Pub. L. No. 84-627, § 209, 70 Stat. 374, 397), permitted toll roads to be incorporated into the Interstate system so as to speed its completion, but forbade the use of any federal funds for con-

structing or improving such roads. *See* Pub. L. No. 84-627, § 113(a), 70 Stat. 374, 384 (1956). Thus, "[f]ederal law continued to explicitly prohibit toll charges on roads built with Federal-aid highway funds" because "[t]oll roads were seen as an impediment to interstate commerce." Linda M. Spock, Transp. Research Bd., *Tolling Practices for Highway Facilities* 7 (1998).

More recent federal enactments continued to impose limits on highway tolling. Section 129 of title 23, enacted when Congress codified federal highway law in 1958, conditioned federal aid for the construction of toll bridges and tunnels on the tolling authority and its state highway department entering into a so-called "tripartite agreement" with the Department of Transportation. The agreement was required to provide that toll revenues would be used to repay the costs of construction—and to specify that tolling would cease after repayment of those costs. Act of Aug. 27, 1958, Pub. L. No. 85-767, § 129, 72 Stat. 885, 902-03. The Surface Transportation Assistance Act of 1978 ("STAA") made a similar exception to the toll ban, this time for highways, conditioning the allocation of funds from the Highway Trust Fund on entry into a tripartite agreement providing that the toll road would "become free to the public upon the collection of tolls sufficient to liquidate the cost of the toll road or any bonds out-

standing at the time … and the cost of maintenance and operation and debt service during the period of toll collections." Pub. L. No. 95-599, § 105, 92 Stat. 2689, 2692-93 (1978). If a toll road did not become a free road once the state tolling authority had collected sufficient tolls to retire its debt, the authority would be required to repay the federal funds it had received. *Id.*[1]

Against this background, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), the statute at issue here, in 1991. ISTEA freed States from the repayment obligation, providing that, at the request of any state authority subject to a tripartite agreement, "the Secretary [of Transportation] shall modify such agreement to allow the continuation of tolls … without repayment of Federal funds." JA

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[1] In the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Congress created a Toll Facilities Pilot Program, under which nine States were allowed to receive federal funding for a portion of the costs of constructing or reconstructing toll roads outside the Interstate system. *See* Pub. L. No. 100-17, § 120(a), 101 Stat. 132, 157-58 (1987). The statute envisioned that toll revenue would be used for highway construction and maintenance. *See* U.S. Gov't Accountability Off., GAO/RCED-91-46, Highway Financing: Participating States Benefit Under Toll Facilities Pilot Program 7 (1990) (finding that under the Pilot Program "tolls are helping the participating states to increase the total amount of state funds available for highway construction" and that "[t]olls will also provide the states with funds to maintain the roads when completed").

183 (§ 1012(a)(6) (now codified at 23 U.S.C. § 129(a)(6))). The statute also provided that the state authority would be required to agree that all toll revenues collected on the federally funded highway "will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility"; then, if the State certifies that the tolled facility is being adequately maintained, "the State may use any toll revenues in excess of amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under [Title 23]." JA 183 (§1012(a)(3) (now codified at 23 U.S.C. § 129(a)(3))).

At the same time, as a part of that same statutory section, Congress enacted the particular provision of ISTEA that governs this case. That provision, ISTEA Section 1012(e), specifically addresses toll collection on the Thruway (and at Maryland's Fort McHenry Tunnel), using terms that generally parallel those appearing in ISTEA §§ 1012(a)(3) and (a)(6). In particular, Section 1012(e) both permits the continuation of tolls on the Thruway without repayment of federal funds (as previously had been required under STAA) and specifies the uses to which excess tolls (*i.e.*, those left over after maintenance and construction costs have been paid) may be put. It provides:

> (e) SPECIAL RULE FOR CERTAIN EXISTING TOLL FACILITY AGREEMENTS.—***Notwithstanding sections 119 and 129 of title 23, United States Code***, at the request of the non-Federal parties to a toll facility agreement reached before October 1, 1991, regarding the New York State Thruway or the Fort McHenry Tunnel under section 105 of the Federal-Aid Highway Act of 1978 or section 129 of title 23, … ***the Secretary*** **[*of Transportation*]** ***shall allow for the continuance of tolls without repayment of Federal funds***. Revenues collected from ***such*** tolls, after the date of such request, in excess of revenues needed for debt service and the actual costs of operation and maintenance shall be available for (1) any transportation project eligible for assistance under title 23, United States Code, or (2) costs associated with transportation facilities under the jurisdiction of such non-Federal party, including debt service and costs related to the construction, reconstruction, restoration, repair, operation and maintenance of such facilities.

JA 185 (emphasis added).

As the emphasized language reflects, this provision freed the Thruway Authority of its obligation under the STAA to repay federal funding if it wanted to continue to collect tolls after paying off its debt. But Congress also conditioned exercise of this new right on the Thruway Authority's use of any surplus tolls collected only for specified purposes: transportation projects eligible for federal assistance (which includes the New York Canal System) and other transportation facilities under the jurisdiction of the Thruway Authority. As we discuss further below, the question in this case

is whether this language also frees the Thruway Authority of Commerce Clause restraints on tolling, as the district court held.

C. The New York State Thruway And New York State Canal System

The New York State Thruway is a tolled highway whose mainline begins in New York City and runs through Albany and Buffalo. JA 28. The original Thruway mainline was completed in 1956 (JA 145); other highways connected to the mainline—including the Cross Westchester Expressway, the Berkshire Connector (which connects the Thruway to the Massachusetts Turnpike), and the Niagara Thruway (which runs from the Thruway mainline near Buffalo to the Canadian border near Niagara Falls)—were added to the Thruway Authority's jurisdiction later. *Id.* Pursuant to the STAA, the Thruway Authority, the State of New York, and the federal government entered into a tripartite agreement in 1982 that allowed the Thruway Authority to receive federal resurfacing and restoration funds. JA 132-37. The agreement subdivided the Thruway into eight segments, each of which would become toll-free upon collection of tolls sufficient to retire the Thruway's bonds (the latest of which was scheduled to mature in 1996). JA 133-35.

The Thruway is a "major artery of interstate commerce in the Northeast" United States and a particularly "critical route for commercial truck-

ers serving the region." *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 795 F.3d 351, 354 (2d Cir. 2015). Commercial truckers, in turn, are a key source of funding for the Thruway Authority's operations. Although commercial vehicles constituted about 10% of traffic on the Thruway during the period covered by this lawsuit, about 37% of the Thruway Authority's toll revenue came from commercial truckers. JA 75.

In 1992, the New York State Legislature directed the Thruway Authority to take over management of the New York Canal System—a 524-mile system of waterways that includes the Erie Canal. JA 69; *see* 1992 N.Y. Laws 3948-49. The Canal System was once used for commercial transportation, but is now "a tourist attraction, offering visitors recreational activities … as well as educational activities about the barge canals and the history of Upstate New York." JA 76. The Legislature's purpose for the transfer, as the district court put it, was to "remove the expense of maintaining the Canal System and its assets from the backs of New York State taxpayers" by financing canal operations out of Thruway revenues rather than out of the State's general fund. JA 70.[2] The district court

[2] In 2016, the Legislature again transferred control of the canals, this time from the Thruway Authority to the New York Power Authority. *See* N.Y. Canal Law § 5. There is no dispute that plaintiffs retain claims for

deemed it beyond dispute that the Canal System provides no benefit to the commercial truckers who use the Thruway. JA 76-77.

In the legislation that effected the transfer, the Legislature declared that "the thruway authority's involvement in the canals … must be achieved in a manner which does not adversely impact the thruway." 1992 N.Y. Laws 3949. That directive, however, was not fulfilled. The Canal System proved to be an albatross for the Thruway, causing it immediate financial difficulties that only grew with time.

Indeed, in the two decades following the canal takeover, the Canal System consumed "more than $1.1 billion of Thruway resources." Office of the State Comptroller, *Assessment of the Thruway Authority's Finances and Proposed Toll Increase* 2 (Aug. 2012) ("Comptroller's Report"), perma.cc/2PL6-E6UL. Thus, as the district court found, it is undisputed that "somewhere between 9 and 14% of Thruway toll revenues are used to fund Canal System expenses not otherwise covered by other sources each year." JA 74. Since the canal takeover, the Thruway Authority issued bonds on at least nine occasions (including to refinance its original bonds, which had been scheduled to be retired in 1996) and increased tolls four

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damages accrued during the period when the Thruway Authority bore responsibility for the canals.

times between 2005 and 2010. Comptroller's Report at 1, 5. Even with all of these measures, by 2012 the Thruway Authority's expenses had far outstripped its revenues, causing the state Comptroller to conclude that the Canal System had "diminished the [Thruway] Authority's ability to pursue its core mission" (*id.* at 2) and "contributed to the deterioration of the Authority's financial condition" (*id.* at 8).

D. The Current Litigation

1. The ATA *lawsuit*

a. The Supreme Court has articulated a three-part, conjunctive test for determining whether a user fee imposed on businesses engaged in interstate commerce complies with the "dormant" Commerce Clause. Under this test, a fee is constitutional only if it "is based on some fair approximation of use or privilege for use … and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972); *accord Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 362-63 (1994).[3]

[3] The three prongs of this test are closely related. As the Supreme Court has explained, unlike a valid "user fee" that is based on some fair approximation of use and is related to the governmental benefit conferred, a fee that serves other purposes will, "[i]n the general average of instanc-

b. In November 2013, plaintiff American Trucking Associations, Inc., and three of its members brought a class action against defendants, the Thruway Authority and certain of its officials, alleging that defendants violated the Commerce Clause by using Thruway tolls to fund the canals. JA 22-45. Specifically, plaintiffs alleged that defendants' toll regime failed the *Evansville-Vanderburgh* test because the tolls collected from interstate truckers were not fairly related to the truckers' use of the Thruway and were excessive in relation to the benefits received by the truckers. Plaintiffs sought injunctive relief, as well as damages for the excessive tolls collected within the applicable statute of limitations.

The district court initially dismissed the complaint under Fed. R. Civ. P. 19(b), holding that the State of New York was a "necessary and an indispensable party" to the case. *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 2014 WL 4229982, at *4 (S.D.N.Y. Aug. 6, 2014). But this Court reversed that decision, concluding that New York had no interest that would be impaired if the case were litigated in the State's absence. *See Am. Trucking Ass'ns*, 795 F.3d at 360-61.

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es,'" be less valuable to the interstate than to the intrastate payer, and therefore will "discriminate[] against interstate commerce." *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 291, 292 (1987).

After the case was remanded, plaintiffs moved for summary judgment on the issue of defendants' liability. JA 12 (Dkt. 33). Defendants filed both an opposition and a cross-motion for summary judgment, contending that plaintiffs' claims were barred by the statute of limitations and laches and, on the merits, that the toll-diversion scheme did not fail any of the prongs of the *Evansville-Vanderburgh* test. They did not contend that Congress had excused them from abiding by the strictures of the dormant Commerce Clause.

In August 2016, the district court granted partial summary judgment for plaintiffs, finding that the Thruway tolls violated the fair-approximation and excessiveness prongs of the *Evansville-Vanderburgh* test. *See* JA 103, 108, 111. The court explained that, because interstate truckers "derive no benefit" from the canals, "the 9-14% of their toll payments that fund canal operations cannot possibly 'fairly approximate' [their] 'use' of" the canals. JA 103. And it held that "[t]here can … be absolutely no question that the tolls paid by the plaintiff class are 'excessive' in relation to the benefits that the truckers are receiving in their capacity as truckers, because between 9-14% of what the truckers pay in tolls is used for a purpose other than giving them and other motorists access to a well maintained and trooper-patrolled highway that will enable and expedite[]

their trips." JA 104. For both of these reasons, the court concluded, the diversion of tolls was unconstitutional.

c. Following the grant of summary judgment, the parties began discovery and briefing on the issue of class certification, and the court instructed the parties to be prepared for trial on the question of damages in March 2017. JA 17 (Dkt. 72). But on January 26, 2017—only a week before the completion of class-certification briefing, five months after the district court's decision granting summary judgment, and ***more than three years*** after the case began—defendants filed a motion to dismiss the case based on an entirely new argument. Specifically, defendants contended that, in enacting Section 1012(e) of ISTEA, Congress had authorized the Thruway Authority to collect tolls that would otherwise fail the *Evansville-Vanderburgh* test. Defendants offered no excuse for their failure to raise the issue of congressional authorization in a timely manner, other than that their counsel "recently discovered" that Congress had enacted Section 1012(e) "25 years ago" (Defs.' Mem. in Support of Mot. to Dismiss 1 ("Defs.' Mem.") (*ATA* D. Ct. Dkt. 102)), but they maintained that the argument nonetheless had not been waived.

The district court acknowledged that "Plaintiffs had made a massive investment of time and money in order to pursue their Dormant Com-

merce Clause claim" and that the court itself "had expended hundreds of hours wading through masses of briefs, records, and reports—all in order to decide an issue that could have been speedily dispatched" if Congress really had freed the Thruway Authority from the strictures of the Commerce Clause. JA 242. Nevertheless, the court held that defendants had not waived the congressional-authorization argument because "[w]aiver is the conscious and voluntary relinquishment of a *known* right" and "[t]here is no doubt in this Court's mind that neither the [New York] Attorney General nor anyone familiar with this lawsuit at the Thruway Authority" was aware that Congress (ostensibly) had exempted the Authority from the duty to comply with the Commerce Clause. JA 241 (emphasis in original).

On the merits, the district court recognized that, "[i]n case after case, the Supreme Court, the Second Circuit, and other courts have struck arrangements that violated the Dormant Commerce Clause because funds paid by out-of-staters for one purpose (say, maintaining the New York State Thruway, on which Plaintiffs drive) were used for a different purpose, one that the payors do not use (in this case, restoration and upkeep of the historic barge canals in Upstate New York, and their preservation for limited transportation and unlimited educational and recreational

purposes)." JA 232. But the court nevertheless held that, in enacting ISTEA, "Congress decided, with great specificity, to exempt the … Thruway Authority's expenditure of excess toll revenues on the [canals] from the reach of the Dormant Commerce Clause." JA 242. The court reasoned that Congress implemented this plan through the language of ISTEA Section 1012(e), which the court read to "expressly authorize[] the use of such funds for the 'construction, reconstruction, restoration, repair, operation and maintenance' of 'transportation enhancement activities' … a term that includes the historic canals and their adjacencies." JA 237.[4] The court opined that "[t]here is nothing at all vague about the language of ISTEA" and that "nothing in ISTEA caps the amount of excess toll revenue that can be used to support transportation enhancement activities." *Id.*

The court also stated that this reading of the statutory language found support in the legislative intent. Although the court did not point to anything in either the legislative history of ISTEA or in the public record that supported this conclusion, it hypothesized that New York Senator Daniel Patrick Moynihan and Governor Mario Cuomo had concocted a "scheme by which the decrepit canals … could be restored to their former

[4] The district court concluded that the Canal System was a project eligible for assistance under Title 23 (JA 234-35 (citing ISTEA § 1007(c))), a determination that is not at issue in this appeal.

glory," "all without bothering the State's already overburdened taxpayers," by using Thruway toll booths as ATMs for the canals. JA 233. But, the court continued, while Senator Moynihan and Governor Cuomo "were hatching their plan to use excess Thruway toll revenues to repair and maintain the canals and their environs, it apparently occurred to them, or to the people who were advising them, that the arrangement they proposed might run afoul of the Dormant Commerce Clause." *Id.* To circumvent this constitutional impediment, the court went on, "Senator Moynihan, a master of the legislative process, inserted an amendment into" ISTEA that provided the necessary authorization. JA 234. Then, the court concluded, "in perfect accord with Congress' unmistakable intent, millions of dollars" in Thruway tolls were diverted to the canals. JA 235. Having found the requisite congressional authorization for the otherwise unconstitutional toll-diversion scheme, the court vacated its summary judgment order and dismissed the case.

2. The ABA *lawsuit*

On February 1, 2017, while the *ATA* case was still pending, the American Bus Association and several of its members filed a parallel action against defendants on behalf of the interstate bus industry. Soon after the district court dismissed *ATA*, it entered an order dismissing the *ABA*

case "[f]or substantially the reasons discussed by the court" in its decision in *ATA*. JA 272.

SUMMARY OF THE ARGUMENT

I. Although Congress may authorize States to engage in conduct that would otherwise violate the Commerce Clause, its intent to do so must be "unambiguous"—*i.e.*, "unmistakably clear." *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *Wunnicke*, 467 U.S. at 91. In other words, "the legislative history or language of the statute [must] evince[] a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (quoting *Cal. PUC*, 345 U.S. at 304). The district court's conclusion that defendants satisfied this clear-statement requirement is wrong.

Read in context, the language of ISTEA Section 1012(e) is most reasonably understood to lift the prior ***statutory*** limit on state tolls, allowing defendants to "continu[e]" tolls in their existing form and specifying the uses to which "excess" tolls could be put when, as predictably may happen, more toll revenue is collected in a given year than is needed to pay for highway maintenance and construction. Nothing in the statutory text makes it expressly or unambiguously clear that Congress also meant to

exempt defendants from the strictures of the Commerce Clause. Moreover, the district court's contrary reading of the statutory language, if correct, would necessarily mean that Congress intended the materially identical language in ISTEA Section 1012(a) to exempt highway authorities across the Nation from the strictures of the Commerce Clause—a radical change in federal policy regarding highway tolls that Congress cannot plausibly be thought to have effectuated without any discussion or explanation. But insofar as there is any doubt or ambiguity about how ISTEA should be read or as to what Congress intended, the Supreme Court has instructed that it must be resolved ***against*** a finding of congressional authorization.

In fact, however, the history of Section 1012(e) confirms that Congress did not intend to override the dormant Commerce Clause. The evolution of the bill that became Section 1012(e) shows that Congress was focused on lifting the prior statutory tolling ban and limiting the uses that could be made of any excess tolls collected. So far as the legislative record reflects, no Member of Congress in either the Senate or the House, and no one else involved in the legislative process, made any reference to the Commerce Clause or suggested that Thruway tolls could be used as a limitless source of revenue to operate the canals. To the contrary, what evi-

dence exists compels the conclusion that both Congress and New York State officials were focused exclusively on lifting the statutory tolling ban.

And even if it were assumed (counter-factually) that Senator Moynihan subjectively intended to make Thruway tolls a significant and continuing source of funding for canal operations, as the district court speculated, nothing in the statutory text or legislative history would have alerted other Members of Congress to his ostensible intent. Accordingly, Section 1012(e) could not have manifested the necessary ***collective*** congressional determination to exempt defendants from the strictures of the Commerce Clause.

II. At a minimum, the district court should have allowed the claims in *ATA* to go forward. In that case, defendants waived the congressional-authorization argument by failing to raise it during more than three years of litigation, while the costs to the parties and burdens on the judicial system mounted.

The district court held that there was no waiver because "[w]aiver is the conscious and voluntary relinquishment of a *known* right" and defendants were unaware of the congressional-authorization argument until shortly before they raised it. JA 241. But the "conscious and voluntary" standard applies only to waivers of legal ***rights*** (such as contract rights).

That standard is inapplicable to legal ***arguments***—and, indeed, would wreak havoc on the judicial system if it were. It is well settled that parties waive legal arguments by failing to make them at the appropriate time. Accordingly, in the event that the Court rejects our contention that the congressional-authorization standard is not satisfied here, it should remand *ATA* to the district court with instructions to reexamine the waiver issue under the correct standard.

ARGUMENT

I. IN ENACTING ISTEA, CONGRESS DID NOT EVINCE AN "UNMISTAKABLY CLEAR" INTENT "TO ALTER THE LIMITS OF STATE POWER OTHERWISE IMPOSED BY THE COMMERCE CLAUSE."

The district court recognized that, when Congress seeks to lift the limitations of the dormant Commerce Clause, it "must be clear about its intentions." JA 233. The court found that standard satisfied here, for two related reasons. It believed that "[t]here is nothing at all vague about the language of ISTEA," which it read to permit New York to use ***any*** "amount of excess toll revenue … to support" the canals (JA 237); and it opined that Congress subjectively ***intended*** to free defendants from the strictures of the Commerce Clause, an intent that it thought to be manifested in Senator Moynihan's ostensible "scheme" to "use excess Thruway toll revenues to repair and maintain the canals." JA 233.

Both of these propositions, however, are wrong. Read in the context of the full statutory text, Section 1012(e) implements a congressional intent to lift, not the strictures of the dormant Commerce Clause, but the federal ***statutory*** requirement that States repay federal funding as a condition of continuing to charge tolls after paying off their highway bonds. The statutory background and purpose, meanwhile, confirm that Congress did ***not*** intend to exempt highway authorities from the Commerce Clause; so far as tolls are concerned, the congressional discussion of ISTEA's relevant provisions focused on lifting the statutory repayment obligation and permitting the continuation of previously existing tolls, while making literally no mention of the Commerce Clause. And if there is any doubt or ambiguity on these points, the constitutional policy requires that it be resolved ***against*** finding that Congress exempted the States from the strictures of the Commerce Clause.

A. Congress Must Make Its Intent To Exempt States From Compliance With The Dormant Commerce Clause "Unmistakably Clear."

The principles that govern here are settled. The dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). As relevant here, and as explained above (at page 13), the Clause prohibits the

States from imposing tolls that either are excessive in relation to the benefit received by the toll-payers or do not fairly approximate the toll-payers' use of the facilities for which the tolls are charged. *See Nw. Airlines*, 510 U.S. at 362-63; *Evansville-Vanderburgh*, 405 U.S. at 716-17.

The Supreme Court has recognized, however, that Congress, in its constitutional role as the regulator of interstate commerce, has the authority to lift the restrictions of the dormant Commerce Clause and "permit the states to regulate the commerce in a manner which would otherwise not be permissible." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). But the Court has made clear time and again that special interpretive constraints limit the exercise of this authority: "Congress must manifest its ***unambiguous intent*** before a federal statute will be read to permit or to approve … violation of the Commerce Clause." *Wyoming*, 502 U.S. at 458 (emphasis added). Although the Court has not required the use of any particular "talismanic" words to satisfy this requirement, it has insisted that, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Wunnicke*, 467 U.S. at 91. This means that "the legislative history or language of the statute [must] evince[] a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'"

New England Power, 455 U.S. at 341 (quoting *Cal. PUC*, 345 U.S. at 304). The Court has stated this rule repeatedly—in the most forceful terms. *See*, *e.g.*, *Granholm v. Heald*, 544 U.S. 460, 482 (2005) (requiring "clear congressional intent to depart" from Commerce Clause principles); *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (text of the statute or legislative history must indicate that "Congress wished to validate state laws that would be unconstitutional without federal approval").

This standard—that Congress must "***affirmatively contemplate*** otherwise invalid state legislation" (*Wunnicke*, 467 U.S. at 91 (emphasis added))—"is mandated by the policies underlying dormant Commerce Clause doctrine" (*id.* at 92). Specifically,

> [u]nrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. … On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Id. Accordingly, "when Congress has not expressly stated its intent and policy to sustain state legislation from attack under the Commerce Clause,

[the courts] have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power*, 455 U.S. at 343 (quotation marks and citation omitted).

This principle has real consequences for courts addressing claims that Congress lifted Commerce Clause restraints. Any doubt about the congressional intent must be resolved ***against*** finding authorization to depart from Commerce Clause limits; it is the State that has the "burden of demonstrating a clear and unambiguous intent on behalf of Congress" to excuse what otherwise would be "fatal defects under the Commerce Clause." *Wyoming*, 502 U.S. at 458, 459. And even when the statutory text plausibly ***could*** be read to permit state action that would otherwise violate the Commerce Clause, that result is impermissible when the text also "readily can be construed" to preserve Commerce Clause limits and "expresses no clear congressional intent to depart from" those limits. *Granholm*, 544 U.S. at 482. Ambiguity in the statute or its policy therefore precludes a finding of congressional authorization.

Given the clarity of this principle, it is no surprise that the Supreme Court repeatedly has rejected arguments that Congress evinced the requisite unmistakably clear intent to exempt state action from the Commerce

Clause.[5] In contrast, the Court has found that Congress displaced dormant Commerce Clause requirements on only a handful of occasions, all occur-

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[5] *See, e.g.*, *Granholm*, 544 U.S. at 482 (Webb-Kenyon Act did not express "clear congressional intent to depart from the principle … that discrimination against out-of-state goods is disfavored"); *Wyoming*, 502 U.S. at 457-58 (Federal Power Act does not contain a sufficiently "unambiguous" indication of congressional intent to "exempt from scrutiny under the Commerce Clause" Oklahoma's requirement that Oklahoma power plants buy at least 10% of their coal from mines in Oklahoma); *Maine*, 477 U.S. at 139 ("Maine identifies nothing in the text or legislative history of the [1981 Lacey Act] Amendments that suggests [that] Congress wished to validate state laws that would be unconstitutional without federal approval."); *Wunnicke*, 467 U.S. at 91-93 (federal restrictions on export of unprocessed timber harvested from federal lands in Alaska was not an unmistakably clear indication of congressional intent to authorize Alaska to impose a ban on the export of unprocessed timber from state lands); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959-60 (1982) (finding no congressional authorization for state restrictions on extraction of ground water for export out of state because, although congressional statutes "demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws" (footnote omitted)); *New England Power*, 455 U.S. at 341 (finding no congressional authorization for state restrictions on interstate power transmission because "[n]othing in the legislative history or language of the [Federal Power Act] evinces a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause" (quotation marks omitted)); *Lewis*, 447 U.S. at 49 ("[W]e find nothing in [the] language or legislative history [of the Bank Holding Company Act of 1956] to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation."); *Cal. PUC*, 345 U.S. at 304 (finding no congressional authorization for state regulation of interstate power transmission because the statute at issue "indicate[d] no consideration or desire to alter

ring more than thirty years ago and all in circumstances in which the statutory text ***expressly*** lifted constitutional restrictions on state authori-

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the limits of state power otherwise imposed by the Commerce Clause" and was "not based on any recognition of the constitutional barrier"); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 409 (1994) (O'Connor, J., concurring in the judgment) (although references in Resource Conservation and Recovery Act and its legislative history "indicate that Congress expected local governments to implement some form of flow control[,] … they neither individually nor cumulatively rise to the level of the 'explicit' authorization [of discrimination against interstate commerce] required by our dormant Commerce Clause decisions"); *Mid-Atl. Bldg. Sys. Council v. Frankel*, 17 F.3d 50, 52 (2d Cir. 1994) (holding that statute prohibiting States from enacting "any regulation of commerce which imposes a vehicle length limitation of less than forty-eight feet on the length of [a] semitrailer unit" was not an unmistakably clear indication of congressional intent to "give[] the states plenary authority to regulate trailers longer than 48 feet" and explaining that "[i]f Congress had intended the states to have complete dominion over" such trailers, "it could have so specified" (first alteration in original).

ty (as in the leading such cases, involving the McCarran-Ferguson Act)[6] or Congress itself was responsible for the limitation on interstate commerce.[7]

B. ISTEA Does Not Evince An "Unmistakably Clear" Intent To Authorize The Collection Of Tolls That Would Otherwise Violate The Commerce Clause.

Against this background, the district court's conclusion that ISTEA is one of those "few unique federal statutes" (*Cal. PUC*, 345 U.S. at 304) that excuse States from the strictures of the dormant Commerce Clause is simply wrong. ISTEA does ***not*** authorize the conduct challenged in this

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[6] *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) (McCarran-Ferguson Act authorized states to regulate and tax the insurance business notwithstanding the Commerce Clause by declaring that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States") (quoting 15 U.S.C. § 1011); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.,* 451 U.S. 648, 653 (1981) (same).

[7] *See Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (Bank Holding Company Act authorized States to implement limited waivers of the congressional ban on acquisition of banks across state lines); *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 213 (1983) (Congress and Department of Housing and Urban Development authorized state and local governments to discriminate in the allocation of federal funds); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155-56 (1982) (alternative holding that Commerce Clause limits were displaced because challenged tribal tax "need[ed] special federal approval to take effect," meaning that it "comes to us in a posture significantly different from a challenged state tax").

case: the exaction of Thruway tolls at rates designed to ensure that toll revenues are sufficient to fully fund the Canal System. The text of the statute—which is most plausibly read to ***preserve*** existing Commerce Clause limitations on tolls—contains no unambiguous indication that Congress intended to excuse States from the strictures of the Commerce Clause in general or the *Evansville-Vanderburgh* standard in particular. And nary a word of the statute's legislative history supports the district court's theory that Senator Moynihan and Governor Cuomo "scheme[d]" to enact Section 1012(e) as a mechanism for funding the canals through ever-upwardly spiraling highway tolls. Instead, in relevant part, Congress's purpose in enacting ISTEA was to relieve state highway authorities of the obligation to repay federal funding as a condition of continuing to collect tolls after retiring their toll roads' debts—not to remove constitutional limits on the imposition of tolls for unrelated purposes.

1. The text of ISTEA does not evince an "unmistakably clear" congressional intent to remove Commerce Clause restraints on state tolls.

To begin with, the text of Section 1012(e) does not remove constitutional restrictions on the Thruway Authority's use of toll revenues collected from businesses engaged in interstate commerce. The provision states in full:

> (e) SPECIAL RULE FOR CERTAIN EXISTING TOLL FACILITY AGREEMENTS.—Notwithstanding sections 119 and 129 of title 23, United States Code, at the request of the non-Federal parties to a toll facility agreement reached before October 1, 1991, regarding the New York State Thruway or the Fort McHenry Tunnel under section 105 of the Federal-Aid Highway Act of 1978 or section 129 of title 23, … the Secretary [of Transportation] shall allow for the continuance of tolls without repayment of Federal funds. Revenues collected from such tolls, after the date of such request, in excess of revenues needed for debt service and the actual costs of operation and maintenance shall be available for (1) any transportation project eligible for assistance under title 23, United States Code, or (2) costs associated with transportation facilities under the jurisdiction of such non-Federal party, including debt service and costs related to the construction, reconstruction, restoration, repair, operation and maintenance of such facilities.

JA 185. In support of its ruling, the district court focused exclusively on the second sentence of this provision. The court believed that this sentence sought, "with great specificity, to exempt the New York Thruway Authority's expenditure of excess toll revenues on the New York State Canal System from the reach of the Dormant Commerce Clause." JA 242. But the court was mistaken, for several reasons.

First, the district court read the second sentence of Section 1012(e) in isolation from the remainder of the provision, affording no significance to ISTEA's broader text. Yet it is well established that "statuto-

ry language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *accord*, *e.g.*, *Henson v. Santander Consumer USA Inc.*, 2017 WL 2507342, at *4 (U.S. June 12, 2017); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 213 (2d Cir. 2012); *United States v. Farhane*, 634 F.3d 127, 142 (2d Cir. 2011). And read in context, Section 1012(e) relieves state highway authorities of the requirement in prior statutes that they repay federal funds if they continue to collect tolls after retiring their bonds, while imposing ***limits*** on the uses to which those tolls could be put.

Thus, the first sentence of Section 1012(e) provides that, "[n]otwithstanding" other ***statutory*** provisions that require repayment of federal funds if a state highway authority continues to impose tolls after retiring its bonds and covering maintenance costs, upon a highway authority's request the Secretary of Transportation shall "allow for the ***continuance*** of tolls without repayment of Federal funds." JA 185 (emphasis added). The second sentence, upon which the district court relied, then provides that "[r]evenues collected from ***such*** tolls … in excess of revenues

needed for debt service and the actual costs of operation and maintenance shall be available for" specified purposes (including various transportation-related projects and facilities, among them the canals). *Id.* (emphasis added).

The most natural reading of this language is that Congress, having lifted the statutory repayment obligation, expected any post-ISTEA tolls to be substantially similar in nature and purpose to pre-ISTEA levies. That is strongly suggested by use of the term "***continuance*** of tolls" in Section 1012(e)'s first sentence. The ordinary meaning of "continuance" in this context is "[t]he act or fact of continuing," while to "continue" means "[t]o go on with a particular action or in a particular condition" or "[t]o remain in the same state." Webster's II New Riverside University Dictionary 305 (1988); *accord* The American Heritage Dictionary of the English Language 408 (3d ed. 1992) (defining "continue" as "[t]o go on with a particular action or in a particular condition" or "[t]o remain in the same state, capacity, or place").

Words as used in statutes must be given their ordinary meanings. *See, e.g., Henson*, 2017 WL 2507342, at *5; *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). And the ordinary meaning of "continuance" certainly doesn't include geometric increases that radically

change both the purpose and the magnitude of the act being "continued." Thus, for example, if someone were taking a cup of water a day from a stream, and the stream's owner said "I authorize the continuance of your taking water from the stream," the owner could not reasonably be understood to have authorized the user to divert enough water to run a hydroelectric plant. "Continuance" therefore would be a very odd word choice if Congress had meant, not merely to allow tolls to go on "in a particular condition" or to "remain in the same state," but instead to authorize state highway authorities to exact tolls at rates far above those necessary for debt service and maintenance so as to fully fund entirely unrelated projects.

That conclusion is reinforced by the references to "such tolls" and "in excess of revenues needed" in Section 1012(e)'s second sentence. "Such" is an adjective of limitation that refers to the "tolls" that Congress allowed to be continued in the first sentence of Section 1012(e). And "in excess of revenues needed" implies that "such tolls" will be set to produce the "revenues needed" but might result in some "excess." Had Congress intended to allow highway authorities to convert their toll plazas into limitless funding sources for unrelated projects, it surely would not have used the terms "such tolls" and "in excess of revenues needed" and instead would have

specified that, upon request, highway authorities could set tolls at any level and use the ensuing revenues for the specified purposes. *See, e.g.*, *Mid-Atl. Bldg. Sys. Council*, 17 F.3d at 52 ("If Congress had intended the states to have complete dominion over these oversized trailers, it could have so specified; we decline to imply a delegation from congressional silence.").

Moreover, the words Congress chose make perfect sense when considered against the constitutional backdrop. At the time of ISTEA's enactment in 1991, Congress presumptively knew that state tolling authority was subject to the dormant Commerce Clause test set forth in *Evansville-Vanderburgh* (decided in 1972). Under *Evansville-Vanderburgh*, tolls must fairly—"if imperfect[ly]"—approximate the toll-payers' use of the tolled facility and not be excessive in relation to the governmental benefit conferred. 405 U.S. at 717. The tolls that Congress permitted to "continue" therefore necessarily would have been roughly calculated to pay for highway maintenance, and ***could not*** have been used to fund unrelated projects.

At the same time, however, because it is impossible for tolling authorities to predict with exactitude at the beginning of a fiscal year either the precise amount of traffic their highway will carry or the precise cost of maintaining that highway, Congress would have anticipated that a state

highway authority that continued to collect tolls after paying off its bonds and covering the toll road's operating costs could be left with a modest surplus (or deficit). And Congress also would have understood that if the surplus resulted from "a fair, if imperfect, approximation" of the toll-payers' use of the tolled facilities, the Constitution would not require that the surplus be refunded to the toll-payers. *Evansville-Vanderburgh*, 405 U.S. at 717.

Accordingly, Congress addressed the uses to which highway authorities could put any surplus revenue resulting from the inevitable "imperfect" toll formula, instructing that "[r]evenues collected from ***such*** tolls … in excess of revenues needed for debt service and the actual costs of operation and maintenance" would be "available" for projects eligible for federal funding under Title 23 or other "transportation facilities." JA 185 (emphasis added). This language operates as a ***limitation*** on what state highway authorities may do with excess toll revenue. The language thus follows ***from*** governing Commerce Clause doctrine (which contemplated some imprecision in the assessment of tolls) and cannot reasonably be construed as authorization to disregard the strictures of the Commerce Clause—much less an unmistakably clear one.

Second, this reading is confirmed by the broader language and structure of ISTEA. Simultaneously with the enactment of Section 1012(e), which applies only to the Thruway and the Fort McHenry Tunnel in Maryland, Congress enacted a similar provision that addressed virtually ***all*** other federally funded toll roads. This provision also lifted the prior statutory repayment obligation and specified the uses to which revenue from tolls could be put, using language that, in relevant part, does not differ materially from that in Section 1012(e). Thus, like Section 1012(e), ISTEA Section 1012(a)(6) directed the Secretary of Transportation "to allow the continuation of tolls … without repayment of Federal funds" upon the request of state authorities. JA 183. And like Section 1012(e), Section 1012(a)(3) also addressed the uses to which "excess" highway tolls could be put, providing that such toll revenues must "be used first for debt service," for "reasonable return on investment," "and for the costs necessary for the proper operation and maintenance of the toll facility," and adding that a State "may use any toll revenues in excess of [those] amounts ... for any purpose for which Federal funds may be obligated by a State under [Title 23]." *Id.*

If the district court's reading of Section 1012(e) as a carte blanche for the Thruway Authority to disregard the strictures of the Commerce Clause

were correct, it necessarily would follow that in Section 1012(a) Congress gave ***all*** highway authorities across the Nation the same carte blanche, allowing them to collect tolls in limitless amounts that are wholly unrelated to use of the tolled facility by the toll-payers. But that cannot be what Congress intended. Such an approach would turn federal policy on its head, moving it from one that had long prohibited or severely limited tolls on federally funded highways to one that broadly permitted use of highway tolls as a general source of revenue for unrelated transportation projects. It is hardly likely that Congress meant to effect this radical and far-reaching change in such a backhanded way, with ***no*** public discussion (as we discuss further below (at pages 43-53)), and by tucking it into a single sentence of a vastly longer statute addressing many other things. As the Supreme Court has put it, Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). But given the structure of Sections 1012(a) and (e), the district court's reasoning would require that conclusion.

Third, the district court dismissed our statutory-interpretation arguments on the ground that "nothing in ISTEA caps the amount of excess toll revenue that can be used to support transportation enhancement activities" such as the canals. JA 237. But although perhaps true as a literal

matter, that rationale reflects confusion over the applicable standard. The question here is not whether Congress barred excessive state tolls, or even whether Section 1012(e) plausibly could be read to permit them; it is whether Congress "expressly stated its intent and policy" to immunize defendants' toll-diversion scheme "from attack under the Commerce Clause." *New England Power*, 455 U.S. at 343.

The necessity of showing an ***affirmative*** congressional intent to free state highway authorities from the strictures of the Commerce Clause is demonstrated by the Supreme Court's holding in *Granholm*. That case involved a Commerce Clause challenge to Michigan and New York laws that allowed in-state wineries to ship wine directly to in-state consumers but restricted out-of-state wineries' ability to engage in the same conduct. The States argued that their discriminatory rules were authorized by the federal Webb-Kenyon Act, which prohibits the shipment of alcoholic beverages from one State to another if the shipper "intended [the beverages] … to be received [or] possessed … in violation of any law of such State." 544 U.S. at 481 (quoting Webb-Kenyon Act, 37 Stat. 699, 699-700 (1913)).

This statutory language, on its face, could defensibly be read to authorize discriminatory state direct-shipment legislation because it appears to effectuate "any" state law restricting interstate alcohol shipments—as

the dissenters on the Supreme Court maintained. *See id.* at 499 (Thomas, J., dissenting) ("The Michigan and New York direct-shipment laws are within the Webb-Kenyon Act's terms and therefore do not run afoul of the negative Commerce Clause."). But the Court disagreed, holding that the Webb-Kenyon Act does not lift the constraints of the dormant Commerce Clause because it "expresses no clear congressional intent to depart from the principle … that discrimination against out-of-state goods is disfavored." *Id.* at 482. "The statute's text does not compel a different result," the Court explained, because the Webb-Kenyon Act "readily can be construed as forbidding 'shipment or transportation' only where it runs afoul of the State's generally applicable laws governing receipt, possession, sale, or use." *Id.* Accordingly, the Court concluded, nothing in the Act "displace[d] the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state." *Id.* at 483.[8]

If the Webb-Kenyon Act (which expressly validates "any" state law regulating alcohol shipments) did not override the Commerce Clause, *a fortiori* ISTEA, with its far more ambiguous references to the "continu-

[8] In contrast, the Court found clear evidence in the history and statutory background that the Webb-Kenyon Act had been enacted specifically to set aside another Commerce Clause limitation, the since-repudiated doctrine that precluded States from regulating direct interstate shipments of goods for personal use. *See* 544 U.S. at 480-82.

ance" of "such" tolls and the collection of "excess" revenue, does not either. For the reasons we have explained, even if Section 1012(e) could be read consistently with the district court's approach, the provision also "readily can be construed" as preserving the "fair, if imperfect, approximation" requirement set forth in *Evansville-Vanderburgh*, while limiting the permissible uses of excess toll revenue—and it therefore ***must*** be read that way.

At the same time, Section 1012(e) bears no resemblance to the few statutes that the Supreme Court has deemed to constitute unmistakably clear indications of congressional intent to lift the strictures of the Commerce Clause: it makes no clear reference to constitutional limits on state authority, as does the McCarran-Ferguson Act, and does not involve affirmative federal restrictions on interstate commerce that States are directed to implement. And there is no indication at all, either in the statutory text or (as we discuss below) in the legislative history, that Congress was addressing the Commerce Clause or "affirmatively contemplat[ing] otherwise invalid state legislation" (*Wunnicke*, 467 U.S. at 91) when it enacted ISTEA. Section 1012(e), in short, "is in no sense an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'" *New England Power*, 455 U.S. at 341 (quoting *S. Pac.*, 325 U.S. at 769).

2. The legislative history of ISTEA gives no indication that Congress intended to free state tolling authorities from the constraints of the dormant Commerce Clause.

The legislative history of ISTEA likewise gives no indication of an "unmistakably clear" intent to free the Thruway Authority from the restrictions of the Commerce Clause. State authority to impose tolls received limited congressional attention during the consideration of ISTEA, which addressed numerous other contentious and highly consequential issues.[9] But the history relating to tolls that does exist confirms that Congress's purpose was ***only*** to protect States from the obligation to repay federal funds when they continued to collect tolls, and to specify the uses that could be made of the revenue when a State collected marginally more in tolls than necessary to operate and maintain the tolled facilities.

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[9] Those issues included, among others: (1) a proposed increase in the gas tax; (2) the creation of a national highway system; (3) the creation of a surface transportation program that would fund not only highway construction but also transit and other projects; (4) adjustment of the apportionment of transportation funding among the States to address fairness concerns raised by so-called "donor" States—*i.e.*, States that contributed far more to the Highway Trust Fund than they received in grants; and (5) pork-barrel projects in numerous congressional districts. *See* Richard F. Weingroff, Fed. Highway Admin., *Creating A Landmark: The Intermodal Surface Transportation Act of 1991*, 65 Public Roads No. 3 (Nov./Dec. 2001), goo.gl/alBdeZ.

a. In the spring of 1991, Senator Moynihan and four cosponsors introduced a bill that ultimately evolved into ISTEA. S. 965, 102d Cong. (introduced Apr. 25, 1991). As originally reported out of committee, and as relevant here, the Senate bill provided ***only*** for cancellation of the federal repayment obligation and made no reference to excess toll revenues ***at all***, reading:

> At the request of the non-Federal parties to any toll facility agreement reached before October 1, 1991 … the Secretary [of Transportation] shall allow for the continuance of tolls without repayment of Federal funds.

S. 1204, 102d Cong., § 112(b) (1991) (as reported by S. Comm. on Env't & Pub. Works). The Senate Report accordingly said nothing about excess toll revenues, describing the bill's language as follows: "States that have signed agreements … relating to toll bridges, toll tunnels, and approaches to toll roads on the Interstate system are relieved of the requirements that these toll facilities become toll free upon collection of tolls sufficient to retire the bonded indebtedness." S. Rep. No. 102-71, at 26 (1991). This omission in itself raises grave doubt about the theory that Senator Moynihan sought to excuse the Thruway Authority from complying with the Commerce Clause as part of a scheme to fund the canal system; if that had

been his goal, he presumably would have included such a provision in the initial bill, of which he was a co-sponsor.

b. The bill subsequently was amended with the addition of language providing:

> ***except that*** revenues collected from such tolls in excess of revenues needed to recover the local share of construction and acquisition costs including debt service and the actual costs of operation and maintenance ***shall be used*** for: (1) any transportation project eligible under this title, or (2) costs associated with transportation facilities under the jurisdiction of said non-Federal party, including debt service and costs related to the construction, reconstruction, restoration, repair, operation and maintenance of said facilities.

137 Cong. Rec. 14,833 (1991) (emphasis added); JA 219. This amendment was proposed by Senators Moynihan, Symms, Burdick, and Chaffee on June 13, 1991, as the committee amendment to the pending Senate bill. *See* 137 Cong. Rec. 14,774 (1991); JA 216. The amendment changed numerous provisions in the Senate bill, among them the provision dealing with existing toll-facility agreements under the 1978 highway law.

The Amendment's language—the precursor to the enacted ISTEA Section 1012(e) text now relied upon by defendants—further undermines the district court's view that Congress in general, or Senator Moynihan in particular, sought to exempt the Thruway Authority from the strictures of

the Commerce Clause, for several reasons. First, it was a proviso tacked onto the existing language, described above, that provided only for cancellation of the federal repayment obligation. Second, it began with the prefatory phrase "except that," which indicated that the added language was a ***limitation*** on the newly created right to continue to charge tolls without repaying federal funds, evincing an intent to restrict the uses to which excess "continuing" tolls could be put. And third, it mandated that excess tolls "shall be used" for the specified purposes, which also ***constrained*** their use.

In context, this language plainly was intended to ***limit*** the uses to which state highway authorities could put what were expected to be modest and occasional excess toll collections, not to authorize expansive new state tolling authority. There was no suggestion that the amendment, which modified a bill that was limited to lifting the statutory repayment obligation, had any additional or broader purpose: one of the amendment's sponsors, Senator Chafee, described it as "largely technical and conforming" (137 Cong. Rec. 14,774 (1991); JA 216); no senator discussed the toll issue at all when the amendment was agreed to; and there was no debate on the amendment, which was adopted by voice vote. *Id*. There is ***no*** evidence that, as the district court believed, it was a "member item" (JA 235)

inserted for purposes of exempting the Thruway Authority (and Fort McHenry Tunnel) from the strictures of the Commerce Clause.

c. Although the final version of Section 1012(e) that emerged from conference differed in technical respects from the amended Senate bill, Congress gave no indication that these differences were meant to expand state tolling authority—let alone that they were intended to override settled constitutional limitations on that authority. Thus, the House bill, in terms that were generally similar to the Senate's (and that were ultimately adopted in Section 1012(a)(3)), provided that toll revenues could be used "***only*** on the toll facility and ***only*** for repayment of … debt, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation, maintenance, and debt service of the toll facility." H.R. 2950, 102d Cong. § 120(d)(3), (e)(3) (as passed by House, Oct. 23, 1991) (emphasis added). "***Thereafter*** the toll revenues may, in addition, be used" for title 23 purposes. *Id.* (emphasis added). This language, which, like the Senate language, focuses on use of toll moneys for purposes related to the toll road, suggests a congressional expectation that any toll collection in excess of that amount would be limited and occasional.

The ultimately enacted language bifurcated the provision, directing what became Section 1012(e) exclusively at the Thruway and Fort McHenry Tunnel, while adopting the language of the House bill in Section 1012(a), which is applicable to all other federally funded highways. As we have explained, however, these provisions are substantially identical in all material respects; they differ only in that Section 1012(a) requires States to certify annually that "the tolled facility is being adequately maintained," while Section 1012(e) spares the Thruway Authority and the Fort McHenry Tunnel from that bureaucratic burden.

And there is no reason to believe that the conference committee sought to work any substantive change in the text that became Section 1012(e) when the Senate and House bills were reconciled. In relevant part, the conference report simply says: "The conference substitute contains the provision allowing all states the option of using federal-aid highway funds on toll road facilities except for Interstate Highways. Other provisions contained in the House bill and Senate amendment thereto have been combined." H.R. Rep. 102-404, at 359 (1991). None of this indicates that Congress gave any attention to the restraints imposed by the Commerce Clause—much less affirmatively intended to relieve state highway authorities of those restraints.

d. In reaching its contrary conclusion, the district court evidently was swayed by defendants' invocation of a field hearing held in Albany, New York, prior to the enactment of ISTEA, at which Senator Moynihan—and only Senator Moynihan—heard testimony from certain state officials, including Franklin White, the Commissioner of the New York State Department of Transportation. *See* Defs.' Mem. 9-10 (citing *Reauthorization of the Federal-Aid Highway Program: Field Hearings Before the Comm. on Env't & Pub. Works and the Subcomm. on Water Res., Transp., & Infrastructure*, 102d Cong. 291 (1991) ("Field Hearing")). During Commissioner White's testimony, Senator Moynihan made two brief asides to him, urging him not to "forget th[e] canal system" (JA 209) and telling him to "keep in mind those beloved canals of ours" (JA 210). But these comments were not directed at Thruway officials, and at neither point did Senator Moynihan (or Commissioner White) suggest that Congress should authorize the Thruway Authority to use the Thruway as the near-exclusive funding source for the Canal System.

Indeed, the most relevant statement made during that hearing, offered by the chairman of the Thruway Authority, supports the view that the Authority's interest was simply to eliminate the statutory repayment obligation:

> Just as we have been helped by receiving [federal] funds, ***we have an interest in eliminating the requirement to reimburse the Federal Government if tolls remain on the Thruway***. I was pleased to learn of Secretary [of Transportation] Skinner's testimony to the Congress that the Administration now supports the ***abolition of the requirement that repayment be made. We do want to work with you to make sure that the Surface Transportation Assistance Act of 1991 eliminates that payback provision***.
>
> We endorsed that change in the law not because we advocate the retention of tolls, but because ***we believe that removing the payback requirement enhances the State's options in deciding the Thruway's future***, particularly in the event that the thrust of the Administration's program is carried through and the State is deprived of the share of funds that it has received in the past.

Field Hearing at 317 (statement of Peter Tufo, Chairman, N.Y. State Thruway Authority) (emphasis added). Here, too, the exclusive focus ***even of the state official seeking statutory relief*** was on the federal repayment obligation—and the future of the Thruway—not on use of the tolling authority to engage in conduct that would otherwise be proscribed by the dormant Commerce Clause.

The district court nevertheless believed Senator Moynihan to be blessing a purported plan to have the Thruway Authority take over and finance the canals, which defendants contended was in the works at the time. But the final report by Governor Cuomo's Thruway Authority Tran-

sition Advisory Council, which defendants cited as their principal evidence of this planned takeover (*see* Defs.' Mem. 9-10), casts further doubt on the idea that any such plan existed. Although the report recommended continuing tolls after 1996, when the Thruway's debt was expected to be retired, the report also expressly stated that:

> The state should resist the temptation to turn the [Thruway] Authority into an automatic teller machine. That course would prevent needed investment in the Thruway and sever the link between what motorists pay and the service they get on the Thruway. Instead, the use of any excess [toll] funds should be limited to priority transportation needs in the Thruway corridor.

JA 157. Thus, far from suggesting that Governor Cuomo and state officials were participants in a "scheme" to fund the canals with Thruway money, defendants' evidence shows that the State assumed that "any excess" toll revenues would be modest and planned to use that excess only on the Thruway or closely related projects.

e. In any event, there is no evidence that ***Congress*** implemented any "scheme" to permit diversion of Thruway tolls. Even if the district court were correct that Senator Moynihan subjectively intended to authorize defendants to divert Thruway money to the canals, and even if Senator Moynihan shared that intent with Governor Cuomo, that would be insuffi-

cient to satisfy the Supreme Court's congressional-authorization test, for two reasons.

First, what matters under the governing standard is what Congress ***collectively*** intended—not what one senator subjectively desired. The Framers gave Congress the authority to displace dormant Commerce Clause restrictions because "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Wunnicke*, 467 U.S. at 92. Only a "collective decision" by representatives of ***all*** the States provides this kind of nationwide consensus. *Id.* Thus, it would not be enough for defendants to prove that Senator Moynihan hoped that ISTEA would enable the unfettered diversion of toll money to side projects like the canals; they must instead prove that ***Congress*** intended that result. They cannot make that showing by pointing to stray remarks by Senator Moynihan. As the Supreme Court put it in rejecting a similar argument based on the statements of a single member of Congress, "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards." *New England Power*, 455 U.S. at 342; *see also, e.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) ("What motivates one legislator to vote

for a statute is not necessarily what motivates scores of others to enact it.").

Second, whatever Senator Moynihan's actual intent, Congress may not be found to have exempted States from compliance with the Commerce Clause unless the plain language of the statute put Congress as a body on clear notice that it was doing so. Only that kind of clear statement of Congress's "intent and policy to sustain state legislation from attack under the Commerce Clause" (*New England Power*, 455 U.S. at 343 (quotation marks omitted)) would suffice to inform members of Congress that their approval of legislation would benefit one State at the expense of interstate commerce. But ISTEA does not do that: as we have explained, far from expressly expanding existing state tolling authority, under its most natural reading Section 1012(e) limits that authority.

f. Finally, the district court observed that an ATA representative had "testified on the proposed legislation (though not, apparently, on the Moynihan member item)" and then went on to muse that "the fact that no one sued to protest funding the canals with Thruway toll monies until twenty years after the practice … should have caused all of us to go looking for some reason why that was so—a reason that could only be found in express congressional authorization for the practice." JA 242. But the ATA

representative's testimony was submitted on April 11, 1991, before the Senate version of the bill that actually became ISTEA was even ***introduced***, let alone amended to regulate the expenditure of excess toll revenues. JA 227. There is thus no basis for the district court's assumption that ATA knew that the legislation would open the floodgates to otherwise unconstitutional tolls yet passively acquiesced. If anything, the contrary assumption is far more credible: if ATA had any inkling that the legislation might be read to authorize States to use highway tolls as a funding source for projects that do not benefit the trucking industry, it surely would have publicly denounced it.

In any event, it should go without saying that speculation about why ATA did not elect to challenge the toll-diversion scheme until 2013—after suffering through four toll increases and the threat of a fifth in the preceding eight years—is hardly a basis for concluding that Section 1012(e) evinces an unmistakably clear intent to alter the limits of state power otherwise imposed by the Commerce Clause. As the Supreme Court has admonished, the courts "have no authority to rewrite [Congress's] legislation based on mere speculation as to what Congress probably had in mind." *New England Power*, 455 U.S. at 343 (quotation marks omitted). Much less may they do so based on speculation about why a trade association—

with its multiple competing priorities—chose not to undertake the "massive investment of time and money" (JA 242) involved in pursuing a constitutional challenge until tolls had been increased to the point of becoming a major impediment to commerce.

Accordingly, the decision below should be reversed.

II. THE DISTRICT COURT APPLIED AN ERRONEOUS STANDARD FOR WAIVER, NECESSITATING, AT MINIMUM, A REMAND IN *ATA* FOR APPLICATION OF THE CORRECT STANDARD.

Even if this Court affirms the district court's dismissal of the complaint in *ABA*, it should reverse and remand in *ATA*. Defendants waived the congressional-authorization argument in *ATA* by failing to raise it for more than three years after the complaint was filed—and for almost six months after the district court granted summary judgment on liability.

By foreclosing parties from making legal arguments that they failed to raise in a timely manner, the doctrine of waiver protects both the parties and the judicial system from the needless expenditure of resources. Defendants here are unquestionably guilty of such a failure: although the congressional-authorization argument rests on a quarter-century-old statute, defendants did not raise it in their initial motion to dismiss, in their opposition to summary judgment, or in their cross-motion for summary judgment. In the interim, as the district court recognized (JA 242), the

plaintiffs in *ATA* incurred substantial litigation expenses and the court itself wasted countless hours considering and resolving numerous motions. This Court also expended resources deciding a prior appeal. This is, accordingly, the quintessential case for holding that a late-raised legal argument has been waived. *See, e.g.*, *BWP Media USA Inc. v. Polyvore, Inc.*, 2016 WL 3926450, at *7 (S.D.N.Y. July 15, 2016) (generally, "where a party fails to raise an argument in his opposition to summary judgment, that argument has been waived" (brackets and quotation marks omitted)); *see also, e.g.*, *Palmieri v. Lynch*, 392 F.3d 73, 87 (2d Cir. 2004) (argument not raised in opposition to summary judgment was "waived").

To be sure, the district court had discretion to reach the merits despite defendants' waiver. But it failed to exercise its discretion properly because it applied an erroneous legal standard. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("An appellate court would be justified in concluding that, in making [an error of law], the district court abused its discretion."). The court reasoned that waiver "is the conscious and voluntary relinquishment of a *known* right" and that defendants thus could not be guilty of waiver because none of their attorneys "actually knew" about the ostensible congressional authorization. JA 241. But as the decision cited by the district court makes clear, the "conscious and volun-

tary" standard does not apply to waivers or forfeitures of ***legal arguments***.

Rather, the "conscious and voluntary" standard governs the question whether a party's conduct causes it to lose a legal ***right*** it otherwise had—a question not presented here. *See, e.g.*, *Merrick v. UnitedHealth Grp. Inc.*, 175 F. Supp. 3d 110, 122 (S.D.N.Y. 2016) (applying this standard to determine whether, by making payments directly to out-of-network healthcare providers, health insurer waived its rights under provision in ERISA plan prohibiting assignment of participants' benefits to out-of-network providers). Nor would it make sense to apply the "conscious and voluntary" standard to legal arguments: if ignorance of a legal argument were enough to preclude its waiver or forfeiture, few arguments would ever be forfeited and judicial proceedings would bog down as parties continued to raise new arguments until late in the game.

The question the district court should have asked is whether "the need to correct a clear error or prevent manifest injustice" justified considering defendants' belated argument. *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)). Had the district court applied that standard, it might well have

chosen not to exercise its discretion to excuse the waiver. At minimum, it might have chosen to excuse the waiver as to the absent class members while enforcing the waiver as to the named plaintiffs, who had invested substantial time and resources in the case and who therefore were greatly prejudiced by defendants' delay in raising the congressional-authorization argument. Accordingly, in the event that this Court holds in *ABA* (in which there is no issue of waiver) that ISTEA embodies an unmistakably clear congressional intent to immunize defendants' toll-diversion scheme from Commerce Clause scrutiny, it should remand *ATA* for further consideration in light of the proper waiver standard.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

/s/ *Evan M. Tager*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for plaintiffs-appellants certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,829 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 26, 2017 /s/ *Evan M. Tager*

CERTIFICATE OF SERVICE

I hereby certify that that on June 26, 2017, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: June 26, 2017 /s/ *Evan M. Tager*