No.

In the
Supreme Court of the United States

Christine Todd Whitman, in her official capacity as Governor of the State of New Jersey, James Weinstein, in his official capacity as the Commissioner of the New Jersey Department of Transportation, Col. Carson Dunbar, in his official capacity as the Superintendent of the New Jersey State Police, John J. Farmer, Jr., in his official capacity as the Attorney General of the State of New Jersey,

Petitioners,

v.

American Trucking Associations, Inc., and US Xpress, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether State highway safety regulations, which reflect the exercise of a core State governmental function, which are proven to protect the lives and safety of residents and the motoring public, and which have an unintended, incidental effect on interstate commerce are subject to strict scrutiny analysis under the dormant Commerce Clause?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit was filed on February 21, 2006 (App., *infra*, 1a-19a) and is reported at 437 F.3d 313 (3rd Cir. 2006). The first opinion of the district court in this matter was filed on March 22, 2001, (App., *infra*, 53a-72a) and is reported at 136 F. Supp. 2d 343 (D.N.J. 2001). The second opinion of the district court in this matter was issued on March 24, 2004, (App., *infra*, 26a-52a) and is unreported.

JURISDICTION

The Court of Appeals' judgment was entered on February 17, 2006. (App., *infra*, 20a-21a). On May 16, 2006, Justice Souter entered an order extending to June 21, 2006, the time within which petitioners were permitted to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, §8, cl.3.

The relevant New Jersey Department of Transportation regulations at issue in this appeal are N.J. Admin. Code §16:32-1.1, *et seq.* and appear at length in the Appendix, *infra*, at 74a-78a.

STATEMENT OF THE CASE

A. Factual Background

In the 1980s, in response to the trucking industry's desire to use 102-inch wide trucks and double tractor trailer combinations ("Restricted Vehicles"), the federal government required States to establish a connected National Network of interstate highways on which these larger trucks could legally and safely travel. New Jersey complied with the federal directive and established a network of interstate highways and other roads for the safe passage of commercial traffic in the State.[1] The National Network consists of 545.7 miles of roads in New Jersey, including sections of I-76, I-78, I-80, I-95, I-287, I-295, I-676, NJ 42, NJ 81, US 130, US 322, NJ 440, the New Jersey Turnpike, and the Atlantic City Expressway (the "National Network"). N.J. Admin. Code tit. 16:32-1.4(a) (1999).

Because of the significant threat to health and safety posed by large trucks on increasingly crowded local roads, on or about July 16, 1999, the New Jersey Department of Transportation ("NJDOT") adopted emergency highway safety regulations (the "Regulations") applicable to Restricted Vehicles. The Regulations were adopted as final effective September 15, 1999. On June 18, 2001, the Regulations were amended. N.J. Admin. Code tit. 16:32-1.2 (2001).

Under the Regulations as amended, Restricted Vehicles which do not have an origin or destination in New Jersey must use the National Network when traveling in New Jersey. N.J. Admin. Code tit. 16:32-1.6 (1999). Restricted Vehicles that are engaged in purely intrastate commerce or in interstate commerce that includes an origin or destination in New Jersey are able to use the National Network, as well as a series of

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[1] The National Network roads in New Jersey are designated at 23 C.R.F. Part 658 App. A.

roadways ancillary to the National Network, many of which meander through populated areas thick with non-commercial traffic (the "NJ Access Network"). N.J. Admin. Code tit. 16:32-1.5(a)(1999). In addition, the Regulations permit all trucks to leave the National Network and NJ Access Network for short trips to access food, fuel, repairs and rest. N.J. Admin. Code tit. 16:32-1.4 (1999); N.J. Admin. Code tit. 16:32-1.6 (1999).

Penalties for violating the Regulations include a mandatory fine of no more than $400 for the first violation; a mandatory fine of $700 for the second violation; and a mandatory fine of $1,000 for each subsequent violation. N.J. Stat. Ann. 39:3-84.3 (West 2004).

The purpose of the Regulations is to reduce the number of large trucks on local roads in order to protect the health, safety, and welfare of New Jersey residents and individuals from other States using New Jersey's roadways. N.J. Admin. Code tit. 16:32-1.4(c)(1999); N.J. Admin. Code tit. 16:32-1.5(e) (1999). "The state's aim is to reduce accidents and motorist deaths from truck-related collisions by reducing the number of large trucks on local roads which are mostly 'two and four-lane, undivided streets, some lined with commercial establishments and homes, and others remote, winding roads in rural areas.'" *American Trucking Ass'ns v. Whitman*, 136 F. Supp. 2d 343, 351-352 (D.N.J. 2001).

Truck traffic in New Jersey rose by 1.5 billion vehicle miles traveled between 1991 and 1998. (37a). There were approximately 20,000 accidents involving trucks in New Jersey in 1997, with an increase of between 5-10% in 1998. *Ibid.* Truck accident rates are approximately twice as high on state and county highways (likely to be part of the NJ Access Network) than on Interstate Highways (likely to be part of the National Network). (37a) Studies reveal that prior to enactment of the Regulations, a significant number of large trucks traveling on non-interstate highways, as many as 25% on some routes, had no destination or origin in New Jersey. (37a).

American Trucking Associations ("ATA") is a non-profit, national trucking trade association representing more than 2,000 members, including trucking companies, trucking company suppliers, and individuals involved in the trucking industry. (34a). ATA filed this action on behalf of its members. *Ibid.* Plaintiff US Xpress, Inc., a Nevada corporation, is an interstate motor carrier based in Tennessee. *Ibid.* USX regularly engage in interstate commerce in New Jersey, often through use of Restricted Vehicles. *Ibid.*

Defendants are former New Jersey officials sued in their official capacities. Defendant Honorable Christine Todd Whitman was the Governor of New Jersey at the time that the Complaint was filed. (27a). Defendant James Weinstein was the Commissioner of the New Jersey Department of Transportation, defendant John J. Farmer, Jr., was the Attorney General of New Jersey, and Colonel Carson Dunbar was the Superintendent of the New Jersey State Police at the time that the Complaint was filed. *Ibid.*

Plaintiffs filed suit in the United States District Court of the District of New Jersey against New Jersey officials to block implementation of the Regulations. Plaintiffs alleged jurisdiction in the trial court based on 28 U.S.C. §1331, and claimed that the Regulations violate the Commerce Clause, U.S. Const. art. I, sec. 8, cl. 3, because they are facially discriminatory, as Restricted Vehicles engaged in New Jersey commerce are not subject to all of the restrictions contained in the Regulations. (27a-33a). In addition, plaintiffs allege that the Regulations violate the Commerce Clause because they unreasonably burden interstate commerce by increasing fuel consumption, travel time and tolls for Restricted Vehicles engaged in non-New Jersey interstate commerce. *Ibid.* Additional Constitutional claims were alleged in the initial pleadings but abandoned by plaintiffs prior to trial.

B. District Court Proceedings

After cross-motions for summary judgment, on March 22, 2001, the District Court issued an Opinion holding that the Regulations were not facially discriminatory. 136 F. Supp. 2d 343. Judge Cooper correctly reasoned that the Regulations are not facially discriminatory because "[w]hile the Regulations make a distinction between trucks with and without an origin or destination in New Jersey . . . the Regulations apply evenhandedly without regard to citizenship of the truck driver or owner." *Id.* at 350. The restrictions established in the Regulations apply "with equal force to all truck drivers." *Ibid.*

The trial court, however, denied summary judgment, holding that a trial was necessary to develop a record with respect to whether the Regulations impose actual increases in time and expense on interstate truckers not imposed on intrastate truckers. *Id.* at 351. As the court noted, "[e]vidence of a *significant* expense to out-of-state trucking not suffered by in-state trucking would demonstrate that the Regulations discriminate in their effect against out-of-state interests." *Ibid.* (footnote omitted)(emphasis added).

In addition, the trial court held that if, after accumulation of an evidentiary record, the Regulations were found to discriminate in effect against interstate commerce, the heightened scrutiny standard would be applied to determine if the Regulations violate the Commerce Clause. *Ibid.* Under that standard, the Regulations would be upheld "if the defendants were to demonstrate that no alternative, nondiscriminatory means exist to accomplish their legitimate local purpose." *Ibid.* "Assuming, on the other hand, that we find the Regulations are not discriminatory, we will apply the highly deferential standard of review . . . and uphold the regulations absent a showing that the safety benefits are slight, problematic or illusory." *Id.* at 352.

After a five-day bench trial, the trial court, on March 24, 2004, issued an Opinion and Order invalidating the Regulations

as violative of the Commerce Clause. (App. *infra*, 24a-52a). The trial court found that the predicted health and safety benefits from implementation of the Regulations had proven accurate. The court found that the Regulations would have resulted in 12 fewer truck accidents in New Jersey in 1997 and nine fewer in 1998. (42a). As the trial court held, the "evidence circumstantially establishes that the Regulations have improved the safety of New Jersey's roads by resulting in fewer truck accidents in New Jersey." (42a). Yet, the court gave these benefits no weight when assessing the constitutionality of the Regulations.

At trial, defendants' expert offered testimony that the Regulations, while causing an increase in tolls for interstate truckers, would result in a new positive economic impact on them because the savings in tolls from the use of the NJ Access Network is nullified or outweighed by the additional miles and time travel associated with the use of these roads. Plaintiffs' expert disputed this contention and offered testimony that the Regulations would have a total net impact of $19.64 million per year on the tens of thousands of truckers who drive billions of highway miles through New Jersey each year. (38a). The trial court, after expressing skepticism about the methodology used by plaintiffs' expert, accepted his opinion.

The trial court held that this unintentional, incidental impact on interstate commerce was, in effect, sufficient to render the Regulations *per se* invalid. New Jersey's constitutional interest in fulfilling its core governmental function of protecting the health and safety of its citizens and those who travel through the State, the success of the Regulations in carrying out that important mission, and the unintentional nature of the effect that the Regulations had on interstate commerce were overlooked by the trial court.

C. The Court of Appeals Decision

The Third Circuit compounded the trial court's error. The Court began its analysis by holding that a "state law that discriminates against interstate commerce faces 'a virtually per se rule of invalidity' under the dormant *Commerce Clause.*" *American Trucking Ass'ns v. Whitman*, 437 F.3d 313, 318 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Thus, the appeals court applied the heightened scrutiny standard to New Jersey's Regulations, despite the fact that the trial court had found only an unintentional effect on interstate commerce from rules that successfully carried out the State's important interest in saving lives and protecting people and property. *Id.* at 318-319. Glossing over any deference that might be paid to a State's effort to effectuate a core governmental purpose, the lack of any intent to favor intrastate economic interests, and the reserve of power vested in the States by the Constitution, the Third Circuit merely held that "[i]f a regulation discriminates against interstate commerce on its face or in effect, then heightened scrutiny applies." *Id.* at 319.

The appeals court relied on this Court's purported holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), that any "statute that did not explicitly seek to *regulate* interstate commerce but nonetheless did so 'by its practical effect and design' was subject to heightened scrutiny." *American Trucking, supra*, 437 F.3d at 319 (quoting *C & A Carbone, supra*, 511 U.S. at 394). Applying this unnecessarily restrictive standard, the Court of Appeals held that the Regulations had a discriminatory effect on interstate commerce and that nondiscriminatory alternatives were available to New Jersey to carry out the salutary purpose of the Regulations. *Id.* at 323-324.[2]

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[2] Although the Court of Appeals stayed the issuance of a mandate on its judgment for 45 days, (22a-23a), that time has expired and the Regulations presently cannot be enforced. The

REASONS FOR GRANTING THE WRIT

This Court Should Grant the Writ to Settle an Important Question of Federal Law: Whether the Dormant Commerce Clause Requires Strict Scrutiny Analysis of State Highway Safety Regulations Proven to Protect the Health And Safety of Citizens and the Traveling Public, but Which Have an Unintended, Incidental Effect on Interstate Commerce.

New Jersey enacted highway safety regulations to divert large tractor trailers from congested local roads, where these trucks had caused fatalities, injuries, and property damage in numerous accidents. These regulations proved effective by reducing loss of life and bodily harm from accidents between passenger vehicles and tractor trailers. However, because the regulations had an unintended, incidental effect on interstate commerce, the Third Circuit found them to be virtually *per se* invalid under the dormant Commerce Clause and applied strict scrutiny analysis before striking down these important safeguards.

Neither New Jersey's constitutional interest in exercising its core governmental function of protecting its citizens and the people traveling through the State, nor the unintended nature of the regulations' effect on interstate commerce were considered by the Court of Appeals in reaching its decision, despite suggestions in this Court's precedents that those considerations are a necessary component of dormant Commerce Clause analysis. The lower court's error likely stemmed from the absence of a clear holding from this Court that State highway

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NJDOT has reinstated the highway rules that were in place prior to adoption of the Regulations. Those rules were reinstated only in response to the Third Circuit's decision and NJDOT desires to reinstate the Regulations invalidated by the Court of Appeals if victorious in this Court.

safety regulations are entitled to a deferential standard of review and should be invalidated under the dormant Commerce Clause only if the justifications offered for the regulations are a pretext for discrimination and the benefits derived from the regulations are trivial. In the absence of such precedent the States' crucial interests will be stymied and the constitutional balance between the reserve of power vested in the States in our Constitutional framework of government and the need to protect interstate commerce will tilt too far from the constitutional objective of State sovereignty.

The Commerce Clause authorizes Congress to "regulate Commerce . . . among the several States . . . ." U.S. Const. art. 1, § 8, cl. 3. The dormant Commerce Clause is a "judicial creation" that presumes that the Clause "not only empowers Congress to regulate interstate commerce, but also imposes limitations on the States in the absence of congressional action . . . ." *C & A Carbone, supra,* 511 U.S. at 401 (O'Connor, J., concurring). The essence of the Clause is that one State, in its dealings with other States, may not "place itself in a position of economic isolation . . . ." *City of Philadelphia, supra,* 437 U.S. at 623 (quotations omitted). Nor may a State enforce "economic protectionism" by penalizing interstate commerce for the benefit of similar intrastate economic activity. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

This Constitutional limitation, however, is tempered by the States' vital interest in carrying out core governmental functions. This Court has recognized that the States retain authority to regulate commerce in matters traditionally of local concern. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981). Highway safety is a peculiarly local subject, and this Court has upheld State regulations in this area that apply equally to intrastate and interstate commerce, even though they have an unintended, indirect impact on interstate commerce. *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 523 (1959). State regulations that touch on safety and, in particular, highway safety have a strong presumption of validity. *Id.* at 524. "Indeed, if safety justifications are not

illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.'" *Kassel, supra*, 450 U.S. at 670 (quoting *Raymond v. Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978)(Blackmun, J., concurring)). "In no field has this deference to state regulation been greater than that of highway safety regulations." *Raymond, supra,* 434 U.S. at 443.

In *Bibb, supra*, this Court likened state highway safety regulations to quarantine legislation, game laws, and other areas where the States have "exceptional scope for the exercise of . . . regulatory power," noting that the Court has sustained State measures even though they "materially interfere with interstate commerce." 359 U.S. at 523-524. Policy decisions about such local concerns are for the State legislatures and will not be second guessed unless the total effect of the law as a safety measure in reducing accidents and casualties is so slight that it does not outweigh the national interest in avoiding interference that seriously impedes interstate commerce. *Ibid.*

This Court's precedents, however, do not articulate a clear definition of the States' authority under the dormant Commerce Clause in this crucial area. Significantly, dormant Commerce Clause opinions of this Court in the past two decades have rarely been unanimous, frequently generating concurring and dissenting opinions disputing the standard applied by the majority, as well as the result of the analysis. See, for example, *C & A Carbone, supra*; *Granholm v. Heald*, 544 U.S. 460 (2005); *Camps Newfound/Owatona, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). Justice Thomas--joined by then-Chief Justice Rehnquist and Justice Scalia--in his lengthy dissent in *Camps Newfound*, questioned the textual and historical basis for the increasing limitations on States' regulation of local matters under dormant Commerce Clause jurisprudence. In his dissent, Justice Thomas cited scholarly commentary that "the Court has set no conscious standard but has rather, in an imperial way, decided whether each particular state action presented to it was or was not an invalid regulation of interstate

commerce." 520 U.S. at 611 n4. (internal quotations and citation omitted).

This lack of a precise rule is a disservice to the States in the execution of core governmental functions and results in decisions like that of the Court of Appeals below. Important State regulations, proven to be effective in protecting the lives and health of citizens, are cast aside because of an unintended, indirect effect of the regulations on interstate commerce. Such rulings both undermine the States' position in our governmental framework and expand the dormant Commerce Clause beyond the bounds necessary to prevent States from engaging in economic protectionism.

The Court has applied two lines of analysis when examining State legislation under the dormant Commerce Clause. Where a State law is facially discriminatory or its clear purpose is economic protectionism, heightened scrutiny applies, and the legislation is often considered *per se* invalid. *City of Philadelphia*, *supra,* 437 U.S. at 624. Defendants do not dispute the validity of this line of cases.

On the other hand, where "other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted" a more flexible approach. *Ibid.* In the second category of cases the deferential test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), applies:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to its putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local

interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In this case, the Court of Appeals held that the deferential standard for State highway safety regulations did not apply because the Regulations were both facially discriminatory and had a discriminatory effect, even though the court recognized both that the Regulations were accomplishing their important, non-discriminatory purpose, and that the effect on interstate commerce was unintended and incidental. The court rejected defendants' argument that State highway safety regulations are entitled to a more accommodating standard of review. The Court of Appeal held that the State's position was rejected by this Court in *C & A Carbone, supra,* over extending the holding in that case to say that "a statute that did not explicitly seek to *regulate* interstate commerce but nonetheless did so 'by its practical effect and design' was subject to heightened scrutiny" even for highway safety regulations. *American Trucking, supra,* 437 F.3d at 319 (quoting *C & A Carbone, supra,* 511 U.S. at 394). However, nothing in *C & A Carbone*, a waste flow case, indicates that this Court was disapproving of the deferential standard that it previously applied to highway safety regulations.

Instead, it is the prevailing principles animating the two multi-Justice opinions in *Kassel, supra,* neither of which was denominated as the Opinion of the Supreme Court, that serve as the controlling precedent in this area. On the one hand is the four-Justice plurality opinion of Justice Powell, which employs a balancing test that acknowledges the strong presumption of validity given to regulations "that touch upon safety -- especially highway safety . . . ." 450 U.S. at 670. Under this analysis, such regulations must be upheld unless the salutary purpose for which the regulations were designed is only marginally furthered by a law which so substantially interferes with commerce as to be invalid under the Commerce Clause. *Ibid.*

On the other hand, is then-Justice Rehnquist's three-Justice opinion, which rejects the balancing test articulated by Justice Powell. Instead, recognizing that "[t]hose challenging a highway safety regulation must overcome a strong presumption of validity," he stated that the Court should not "directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to 'outweigh' the former.'" *Id.* at 690-91 (Rehnquist, J., dissenting)). In then-Justice Rehnquist's view, this Court is limited "to determin[ing] if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce." *Id.* at 698. A highway safety regulation will be invalidated under this analysis only "if the safety benefits from the regulation are demonstrably trivial while the burden on commerce is great." *Id.* at 692. Two other Justices issued a concurring opinion that set forth a less deferential test in which highway safety regulations are presumptively invalid if they impact on interstate commerce. *Id.* at 679-80 (Brennan, J., concurring).

Under either rule articulated by the fractured *Kassel* Court, State highway safety regulations that are not intended to discriminate against interstate commerce are not subjected to strict scrutiny. Yet, because of the absence of a controlling majority in that case and no clear articulation of a standard for reviewing regulations of this nature, the courts of appeals lack guidance in this important area, leaving the States subject to an unjustified reduction of their authority under the Constitution.

As this Court has recognized, "[a]lthough the States surrendered many of their powers to the new Federal government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States,* 521 U.S. 898, 918-19 (1997)(quoting The Federalist No. 39). This dual system is "one of the Constitution's structural protections of liberty." *Id.* at 921. Thus, "it is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928. Included in the "sphere of authority" that remains with the States is the

exercise of police power. This includes the protection of public health, safety and welfare *See Medtronic v. Lora Lohr,* 518 U.S. 470, 475 (1996)("throughout our history the several States have exercised their police powers to protect the health and safety of their citizens."); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985)(describing police powers as "primarily and historically . . . matter[s] of local concern").

Few things are more essential to the purpose of State government than the protection of the lives and safety of citizens. Highway safety regulations, proven in this case to have saved lives and insulated persons from injury, are a quintessential example of the exercise of State police power. Application of the strict scrutiny standard to such laws merely because they have an unintended, incidental effect on interstate commerce threatens the ability of the States effectively to exercise their Constitutional powers. Without a clear decision from this Court recognizing the Constitutional dimension of the State's authority when highway safety regulations are examined under the dormant Commerce Clause, the lower courts lack the guidance needed to protect properly the Constitutional balance between State sovereignty and the protection of interstate commerce.

For
certiorari sh

Dated: June

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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