UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

AMERICAN TRUCKING ASSOCIATIONS, INC.; CUMBERLAND FARMS, INC.; M&M TRANSPORT SERVICES, INC.; and NEW ENGLAND MOTOR FREIGHT, INC., *Plaintiffs,*	:	
v.	:	**C.A. No.: 1:18-cv-00378-WES-PAS**
PETER ALVITI, JR., in his official capacity as Director of the Rhode Island Department of Transportation; Rhode Island Turnpike and Bridge Authority *Defendant.*	:	

DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendants Peter Alviti, Jr., in his official capacity as Director of the Rhode Island Department of Transportation ("RIDOT"), and the Rhode Island Turnpike and Bridge Authority ("RITBA") (collectively, "Defendants"), hereby move to dismiss this lawsuit for lack of subject matter jurisdiction.[1] This lawsuit is filed by American Trucking Associations, Inc.; Cumberland Farms, Inc.; M&M Transport Services, Inc.; and New England Motor Freight, Inc. (collectively, "Plaintiffs") pursuant to the Commerce Clause of the United States Constitution and 42 U.S.C. § 1983.

[1] Defendants request oral argument on this motion, which they estimate will last approximately one and half hours. In filing this motion based on subject-matter jurisdiction, Defendants do not waive and expressly reserve the right to advance Rule 12(b) defenses.

INTRODUCTION

Plaintiffs ask this Court to do something that is not only extraordinary but something that it lacks subject-matter jurisdiction to do. Plaintiffs ask this Court to enjoin the State of Rhode Island's collection of state tax revenue and cut off a revenue stream that the Rhode Island General Assembly, through the exercise of its police and taxing powers, has determined is necessary to repair and maintain bridges in structurally sound and good condition for the public's safety. However, the Tax Injunction Act, 28 U.S.C. § 1341, establishes a "broad jurisdictional bar"[2] prohibiting this Court from enjoining or restraining the collection of state tax revenue, including the tolls at issue in this case. Therefore, the Tax Injunction Act prohibits this Court from exercising subject matter jurisdiction. Additionally, principles of federalism and comity, which permeate this case, also preclude the court from exercising its jurisdiction and favor adjudication of these issues in state court. Finally, the Eleventh Amendment to the United States Constitution bars this Court's subject matter jurisdiction. For these reasons and as demonstrated herein, this Court should grant Defendants' Motion to Dismiss for lack of subject matter jurisdiction.

I. FACTUAL BACKGROUND

In 2016, the Rhode Island General Assembly enacted Chapter 13.1 of Title 42, titled "The Rhode Island Bridge Replacement, Reconstruction, and Maintenance Fund Act of 2016" (the "Act"). The Act authorizes the collection of tolls for traveling on Rhode Island bridges and in various provisions identifies the purpose of the legislation, the vehicles subject to tolling, and the uses of the toll revenue.

[2] *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 825 (1997).

A. The Purpose of the Act

Section 42-13.1-2 of the Act sets forth nine legislative findings in support of the Act. Among them is that, according to the Federal Highway Administration's ("FHWA") 2015 National Bridge Inventory ("NBI") data, there are 764 bridges in Rhode Island greater than 20 feet in length. *See* R.I. Gen. Laws § 42-13.1-2(2). The Act states that FHWA has classified 177 of those bridges – or 23 percent – as structurally deficient.[3] *Id*.

For at least the past decade, Rhode Island has depended on three primary sources for funding all transportation infrastructure construction, maintenance, and operations: federal funds, state bond funds, and motor fuel tax revenue. *See* R.I. Gen. Laws § 42-13.1-2(3). Of these sources, federal funds and motor fuel tax revenue are mutable. *Id*. Indeed, since at least 2008, Rhode Island has explored alternative avenues to consistently and reliably raise revenue to improve its transportation infrastructure.

For instance, the 2008 Governor's Blue Ribbon Panel on transportation funding, the 2011 Senate Special Commission on sustainable transportation funding,[4] and the 2013 Special

[3] 23 C.F.R. § 490.405 provides that "[b]eginning with calendar year 2018 and thereafter, structurally deficient as used in §§ 490.411 and 490.413 is a classification given to a bridge which has any component in Poor or worse condition." The determination of "structurally deficient" is significant because certain penalties are assessed to a state if the FHWA determines "for the 3-year period preceding the date of the determination, that more than 10.0 percent of the total deck area of bridges in the State on the [national highways system] is located on bridges that have been classified as Structurally Deficient." 23 C.F.R. § 490.413(a).

[4] In 2011, the General Assembly adopted one of the recommendations made by the 2011 Senate Special Commission. Specifically, the General Assembly created the Rhode Island highway maintenance account and imposed a surcharge of thirty dollars "per passenger car and light truck" upon biennial registration, required a fifteen dollar surcharge per "car and truck" subject to an annual registration, and mandated a thirty dollar surcharge "per operator's license" to be assessed every five years. *See* P.L. 2011, ch. 151, art. 22, § 1. Two years later, the General Assembly delineated other vehicles subject to varying surcharges, all of which were less than the fifteen dollars established in 2011. *See* P.L. 2013, ch. 144, art. 6, § 2. A year later, the General Assembly required that already existing fee assessments would be deposited within the Rhode Island highway

Legislative Commission to study the funding for East Bay bridges all determined that there was "insufficient revenue available from all existing sources to fund the maintenance and improvement of Rhode Island transportation infrastructure." R.I. Gen. Laws § 42-13.1-2(4). Significantly, in the Act, the General Assembly once again noted that "[a]lthough the state is shifting from long-term borrowing to reliance upon annual revenues to fund transportation infrastructure on a pay-as-you go basis, and although a recurring state source of capital funds has been established, *there is still a funding gap between the revenue needed to maintain all bridges in structurally sound and good condition and the annual amounts generated by current dedicated revenue sources*." R.I. Gen. Laws § 42-13.1-2(7) (emphasis added).

As a result of these and other legislative findings, the Act establishes a "special account" known as the "Rhode Island bridge replacement, reconstruction, and maintenance fund," which shall consist of "all those monies received by [RIDOT] under this chapter." R.I. Gen. Laws § 42-

---

maintenance account and dedicated the revenue to the State's transportation improvement program. *See* P.L. 2014, ch. 145, art. 21, § 7.

Through the 2011 legislation, the General Assembly found that "Rhode Island now has, and for some years has had, a serious shortfall of funds available for the upkeep, maintenance and repair of the state's highways, roads, and bridges." R.I. Gen. Laws § 39-18.1-2(1). The General Assembly further determined that "Rhode Island now funds, and for some years has funded, the local twenty percent (20%) match required to bring federal transportation dollars into the state by means of selling bonds" and that "[t]his has proven unsustainable and creates unaffordable debt-serve obligations for future generations of Rhode Island taxpayers." R.I. Gen. Laws § 39-18.1-2(2). Lastly, the General Assembly concluded that "Rhode Island must consider all potential sustainable sources as a vehicle for maintaining and improving the transportation infrastructure of the state," R.I. Gen. Laws § 39-18.1-2(5), and that "[a]dditional stable and secure funding sources are absolutely necessary in order for the state to carry out its essential functions, including the upkeep, maintenance and repair of the state's highway, roads, and bridges, and providing for the continued functioning and reliability of public transit." R.I. Gen. Laws § 39-18.1-2(6). "In order to avoid to the full extent possible the creation of enormous and unaffordable self-service obligations for future generations of Rhode Islanders," the General Assembly determined, "these funding sources should be created on a pay-as-you-go basis, and bonding should be reduced to the fullest extent practicable." *Id.*

13.1-6. These funds expressly include "[t]he monies received through the collection of tolls on bridges in Rhode Island." R.I. Gen. Laws § 42-13.1-6(b)(1).

B. Vehicles Subject to Tolling

The Act authorizes RIDOT to collect tolls for "the privilege of traveling on Rhode Island bridges to provide for replacement, reconstruction, maintenance, and operation of Rhode Island bridges." R.I. Gen. Laws § 42-13.1-4(a). The Act specifies that tolls shall only be collected on large commercial tractors or truck tractors as defined in 23 C.F.R. 658.5, pulling a trailer or trailers, and classified by the FHWA as Class 8 and above. *Id.*; R.I. Gen. Laws § 42-13.1-3(3). The Act provides that tolls "may be implemented utilizing all-electric toll collection methodologies on a cash-less basis, or utilizing any other methodologies determined by the [RIDOT]." R.I. Gen. Laws § 42-13.1-4(a). Tolls on vehicles designated as Class one through Class seven are expressly prohibited. *See* R.I. Gen. Laws § 42-13.1-5. The Act also includes legislative findings setting forth the General Assembly's rationale for imposing tolls upon tractor-trailers only:

> [a]ccording to the U.S. General Accounting Office, just one, fully-loaded five-axle (5) tractor trailer has the same impact on the Interstate as nine thousand six hundred (9,600) automobiles. The department estimates that tractor trailers cause in excess of seventy percent (70%) of the damage to the state's transportation infrastructure, including Rhode Island bridges, on an annual basis. However, revenue contributions attributable to tractor trailers account for less than twenty percent (20%) of the state's total annual revenues to fund transportation infrastructure.

R.I. Gen. Laws § 42-13.1-2(8).

The amount of tolls "shall be determined by the costs of replacement, reconstruction, maintenance, and operation of Rhode Island's system of bridges and/or any portion or portions thereof, including costs associated with the acquisition, construction, operation, and maintenance of the toll facilities and administrative costs in connection therewith." R.I. Gen. Laws § 42-13.1-8.

C. Use of Toll Revenue

The Act authorizes the Director of the RIDOT to "designate any Rhode Island bridge on the National Highway System as a toll bridge in order to facilitate the financing of replacement, reconstruction, and maintenance of Rhode Island's system of bridges." R.I. Gen. Laws § 42-13.1-7. Among the main purposes of the Act is to raise revenue to maintain all bridges in structurally sound and good condition.[5] The Act also establishes a "special account" designated for this revenue[6] and the Act expressly limits the use of this revenue.[7] The Act provides that "[a]ll revenue collected pursuant to [Chapter 13.1 of Title 42] and deposited to the Rhode Island bridge replacement, reconstruction, and maintenance fund shall be used to pay the costs associated with the operation and maintenance of the toll facility, and the replacement, reconstruction, maintenance, and operation of Rhode Island bridges on the National Highway System or any other use permitted under 23 U.S.C. § 129." R.I. Gen. Laws § 42-13.1-9. "Unexpended balances and any earnings thereon shall not revert to the general fund but shall remain in the Rhode Island bridge replacement, reconstruction, and maintenance fund." R.I. Gen. Laws § 42-13.1-6(c).

D. Travel of the Case

On July 10, 2018, Plaintiffs filed suit challenging the constitutionality of the Act and specifically seeking, *inter alia*, "[a] declaratory judgment that Rhode Island truck-toll scheme is unconstitutional" and "[a] permanent injunction enjoining Defendants from continuing to implement or enforce Rhode Island's truck tolls." Complaint, p. 29. Plaintiffs also broadly seek "[a]ny other relief . . . that the Court deems proper." *Id.* The RIDOT was granted an extension of time in which to respond to Plaintiffs' Complaint (until August 24, 2018), and RITBA

[5] *See* R.I. Gen. Laws § 42-13.1-2(7).
[6] *See* R.I. Gen. Laws § 42-13.1-6(a).
[7] *See* R.I. Gen. Laws § 42-13.1-9.

subsequently intervened into this action. This memorandum sets forth the Defendants' joint response, except as to Section II.D., which argues that this lawsuit violates Rhode Island's Eleventh Amendment immunity, an issue advanced only by the State.

II. ARGUMENT

This Court lacks subject-matter jurisdiction over Plaintiffs' Complaint because the Tax Injunction Act and the Eleventh Amendment prohibit this Court from affording Plaintiffs the relief they seek. Additionally, well-recognized principles of federalism and comity preclude this Court from hearing this matter.

A. Standard of Review

The United States Supreme Court has recognized that "two centuries of jurisprudence affirm[s] the necessity of determining jurisdiction before proceeding to the merits." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 98 (1998). In keeping with this principle, a complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if the Court lacks subject matter jurisdiction. *Narragansett Indian Tribe of Rhode Island v. Chao*, 248 F. Supp. 2d 48, 49-50 (D.R.I. 2003). Indeed, "[a]s a court of limited jurisdiction, this Court may not – absent subject matter jurisdiction – proceed with an action." *Ins. Brokers West, Inc. v. Liquid Outcome, LLC*, 241 F. Supp. 3d 339, 342 (D.R.I. 2017) (citing *Belsito Comm'ns, Inc. v. Decker*, 845 F.3d 13, 21 (1st Cir. 2016)). The plaintiff bears the burden of proving subject-matter jurisdiction. *See Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996).

B. The Tax Injunction Act Divests this Court of Subject-Matter Jurisdiction

It is axiomatic that federal courts are not courts of general jurisdiction, but rather have only the power that is authorized through Article III of the United States Constitution and statutes

enacted by Congress. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Some statutes, such as the Tax Injunction Act, divest federal courts of original jurisdiction.

The Tax Injunction Act provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Tax Injunction Act "restricts the power of federal district courts to prevent collection or enforcement of state taxes." *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 825 (1997). The "moorings" of the Tax Injunction Act rest on a "state-revenue-protection" rationale. *Hibbs v. Winn*, 542 U.S. 88, 106 (2004). *See also Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 428 (2010) (Tax Injunction Act "precludes relief that would diminish state revenues").

The Supreme Court has "interpreted and applied the Tax Injunction Act as a 'jurisdictional rule' and a 'broad jurisdictional barrier.'" *Id.*; *see also Bank of New England Old Colony v. Clark*, 986 F.2d 600, 602 (1st Cir. 1993) ("the Act is 'jurisdictional' in nature, and therefore serves to oust the federal courts of jurisdiction in those cases which fall within its reach"). Thus, "when there is doubt as to its applicability, the Supreme Court has directed that the [Tax Injunction Act] be interpreted consistent with its function of limiting federal intrusion into state matters." *U.S. v. County of Nassau*, 79 F. Supp. 2d 190, 192 (E.D.N.Y. 2000) (citing *Jefferson Cty. v. Acker*, 527 U.S. 423 (1999)).

There has long been a federal reluctance to interfere with state taxation and state revenue collection, as this Court has recognized. At the founding of this country, Alexander Hamilton wrote:

> [t]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants . . . .[T]hey would under the plan of the Convention retain that authority in the most absolute and unqualified sense; and . . . an attempt on the part of the national Government to

> abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of its Constitution.

In re Pontes, 310 F. Supp. 2d 447, 451 (D.R.I. 2004) (Smith, J.) (quoting The Federalist No. 32, at 100 (Alexander Hamilton) (Jacob E. Cooke, 1961)) (first alteration added). Years later, the Supreme Court recognized that interference with state taxing power could jeopardize the delicate balance of state-federal relations. *Id*. (referencing *McCulloch v. Maryland*, 17 U.S. 316 (1819)). In 1871, the United States Supreme Court explained the rationale behind such reluctance:

> [i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Dows v. *Chicago,* 11 Wall. 108, 110 (1871). Since that time, Congress and the Supreme Court "repeatedly have shown an aversion to federal interference with state tax administration." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995). "The passage of the Tax Injunction Act in 1937 is one manifestation of this aversion." *Id*. at 586. And, this Court has recognized that among the goals of the Tax Injunction Act is "to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting State government finances." *Burns v. Conley*, 526 F. Supp. 2d 235, 240 (D.R.I. 2007) (Smith, J.) (citing *Hibbs v. Winn*, 542 U.S. 88, 104 (2004)). As this Court explained, the Tax Injunction Act reaches cases "in which state taxpayers seek federal court orders enabling them to avoid paying state taxes or where the taxpayer intends to frustrate the collection of state tax revenue." *Id*. *See also Coors Brewing Co. v. Mendez-Torres*, 678 F.3d 15, 23 (1st Cir. 2012) ("federal judges are bound by the [Tax Injunction Act] and Butler Act, which preclude the diminishment of state revenue").

The Tax Injunction Act also "reflects a congressional concern to confine federal court intervention in state government, a concern prominent after the Court's ruling in *Ex parte Young*,

209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that the Eleventh Amendment is not in all cases a bar to federal court interference with individual state officers alleged to have acted in violation of federal law." *Arkansas*, 520 U.S. at 826-27. "Given the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Id*. at 827.

The First Circuit has similarly observed that the Tax Injunction Act "sweeps more broadly than the letter of its text suggests." *Cumberland Farms, Inc. v. State of Maine*, 116 F.3d 943, 945 (1st Cir. 1997). To that end, the Tax Injunction Act "forbids not only injunctive relief, but also declaratory and monetary relief." *Id*. *See also Nat'l Private Truck Council, Inc.*, 515 U.S. at 590 ("we do not understand § 1983 to call for courts (whether federal or state) to enjoin the collection of state taxes when an adequate remedy is available under state law"). It is well settled that "[t]wo conditions must be satisfied before the [Tax Injunction Act] will deprive a federal court of jurisdiction: first, the challenged impost must constitute a tax; and second, the State must furnish an adequate alternative to the federal-court remedy." *Cumberland Farms*, 116 F.3d at 945.

As demonstrated herein, this Court lacks subject matter jurisdiction because the tolls at issue constitute a tax for purposes of the Tax Injunction Act and Rhode Island state courts furnish an adequate alternative to a federal court remedy. Consistent with that conclusion, this Court previously concluded that the Tax Injunction Act likely would apply in a suit seeking to enjoin the State of Rhode Island's plan to collect tolls on the Sakonnet River Bridge. *See Town of Portsmouth v. Lewis*, 62 F. Supp. 3d 233, 234 (D.R.I. 2014) (Lagueux, J.).

1. This Court Has Concluded that it Likely Would Apply the Tax Injunction Act in a Lawsuit to Enjoin the State's Collection of Tolls on a Rhode Island Bridge

In *Town of Portsmouth*, this Court concluded that it likely would apply the Tax Injunction Act in a suit seeking to enjoin Rhode Island's plan to collect tolls on the Sakonnet River Bridge. In that case, the State defendants (including the RITBA) argued, *inter alia*, that this Court lacked subject matter jurisdiction based upon the Tax Injunction Act because the Sakonnet River Bridge tolls were "revenue raisers" and, therefore, constituted state taxes protected from federal court interference.

The legislation at issue in that case, the East Bay Bridge System Act of 2012, R.I. Gen. Laws § 24-17-1 et seq. (the "East Bay Bridge Act"), "allowed [Rhode Island Turnpike and Bridge Authority] to impose tolls on the Bridge in order to generate revenues to maintain highways and bridges." *Id*. at 235. In enacting the East Bay Bridge Act, the General Assembly recognized that, for decades, Rhode Island had depended on three primary sources for funding all transportation infrastructure construction, maintenance and operations: federal funds, state bond funds, and motor fuel tax revenue. *See* R.I. Gen. Laws § 24-17-2(2). The General Assembly further observed that two of those sources – revenue generated from federal funds and the motor fuel tax – are mutable. *Id*. The General Assembly also recognized that since at least 2008, Rhode Island has explored alternative avenues to consistently and reliably raise revenue to improve infrastructure. Indeed, the East Bay Bridge Act stated that the 2008 Governor's Blue Ribbon panel on transportation funding and the 2011 Senate Special Commission on sustainable transportation funding determined that insufficient revenue was available from existing sources to fund the maintenance and improvement of Rhode Island's transportation infrastructure. *See* R.I. Gen. Laws § 24-17-2(3). Finally, the General Assembly found that:

> [a]lthough the State is shifting from long-term borrowing to annual revenues to fund transportation infrastructure, there is still a funding gap between the revenue needed to maintain all roads and bridges in good condition and the annual amounts generated by current revenue sources.

R.I. Gen. Laws § 24-17-2(5).[8]

Although the Court never squarely decided whether the Tax Injunction Act applied, in a published opinion, this Court explained that "the federal Tax Injunction Act, 28 U.S.C. § 1341, would likely serve to prevent the Court from interfering with the State of Rhode Island's efforts to impose taxes to support its governmental functions."[9] *Town of Portsmouth*, 62 F. Supp. 3d at 236.

Here, the Act is replete with legislative findings that are substantially similar to those in the East Bay Bridge Act. The Act similarly authorizes RIDOT to collect tolls for traveling on "Rhode Island bridges to provide for replacement, reconstruction, maintenance and operation of Rhode Island bridges." R.I. Gen. Laws § 42-13.1-4(a). The Act also references that past gubernatorial and legislative commissions have determined that there "is insufficient revenue available from all existing sources to fund the maintenance and improvement of Rhode Island transportation infrastructure." R.I. Gen. Laws § 42-13.1-2(4). Finally, in a substantially similar finding to that at issue in *Town of Portsmouth*, the Act also recognizes that:

> [a]lthough the state is shifting from long-term borrowing to reliance upon annual revenues to fund transportation infrastructure on a pay-as-you go basis, and although a recurring state source of capital funds has been established, there is still a funding gap between the revenue needed to maintain all bridges in structurally

[8] In *Town of Portsmouth*, the State defendants specifically argued that this legislative finding supported its position that the Tax Injunction Act and principles of comity barred this Court from enjoining collection of tolls on the Sakonnet River Bridge. *Town of Portsmouth*, C.A. 13-267-L, Memorandum in Support of Defendants' Objection to Plaintiff's Motion for Preliminary Injunction (Doc. No. 19) at 11.

[9] This case was ultimately dismissed on mootness grounds. *Town of Portsmouth*, 62 F. Supp. 3d at 234.

> sound and good condition and the annual amounts generated by current dedicated revenue sources.

R.I. Gen. Laws § 42-13.1-2(7). Because the purpose, legislative findings, and effect of the East Bay Bridge Act and the Act are similar, this Court should be guided by its prior determination that the Tax Injunction Act "likely serve[s] to prevent the Court from interfering with the State of Rhode Island's efforts to impose taxes to support its governmental functions." *Town of Portsmouth*, 62 F. Supp. 3d at 236. Accordingly, the Defendants' Motion to Dismiss for lack of subject matter jurisdiction should be granted.

2. The Bridge Tolls Are Taxes for Purposes of the Tax Injunction Act.

The First Circuit has distinguished between a particular assessment or levy, which constitutes a "tax" and implicates the Tax Injunction Act, and a particular assessment or levy, which constitutes a "regulatory fee" and does not implicate the Tax Injunction Act. *See San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico,* 967 F.2d 683 (1st Cir. 1992) (Breyer, J.). In doing so, the First Circuit explained that "[t]he classic 'tax' is imposed by a legislature upon many, or all citizens" and "raises money, contributed to a general fund, and spent for the benefit of the entire community." *Id.* at 685. In contrast, the "classic 'regulatory fee' is imposed by an agency upon those subject to its regulation." *Id*. A "regulatory fee" may have as its purpose "deliberately discouraging particular conduct by making it more expensive," or, a "regulatory fee" may "rais[e] money placed in a special fund to help defray the agency's regulation related expenses." *Id*.

"Courts facing cases that lie near the middle of this spectrum have tended (sometimes with minor differences reflecting the different statutes at issue) to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's cost

of regulation." *Id.; see also Cumberland Farms, Inc.*, 116 F.3d at 947 ("the most salient factor in the decisional mix concerns the destination of the revenues raised by the impost").

The First Circuit's decision in *San Juan Cellular* did not enumerate specific factors that must be considered when determining whether an assessment constitutes a tax for purposes of the Tax Injunction Act. However, in a later decision, the First Circuit described its decision in *San Juan Cellular* as "utilizing an approach that approximated the first three prongs" of a test set forth by the Ninth Circuit in *In re Lorber Indus. of California, Inc.*, 675 F.2d 1062, 1066 (9th Cir. 1982). *See Boston Regional Medical Center, Inc., v. Massachusetts Division of Health Care Finance and Policy*, 365 F.3d 51, 59 (1st Cir. 2004). Under the first three prongs of the Ninth Circuit's test, an assessment constitutes a tax when it is:

> (1) an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (2) imposed by, or under authority of the legislature; [and] (3) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it.

Id. at 59 (citing *In re Lorber*, 675 F.2d at 1066). Application of this three-factor test in this case demonstrates that the bridge tolls constitute a "tax," therefore, the Tax Injunction Act bars this Court's subject-matter jurisdiction.[10]

---

[10] In *Boston Regional Medical Center, Inc.*, the First Circuit also cited the District of Massachusetts Bankruptcy Court's conclusion that "'the thoughts expressed by the panel in *San Juan Cellular* [are] virtually indistinguishable from those expressed by the Ninth and Sixth Circuits in *Lorber* and [*In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994)].'" *Id.* (quoting *In re Ludlow Hosp. Soc'y, Inc.*, 216 B.R. 312, 319 (Bank. D. Mass. 1997)).

In addition to the three factors that the First Circuit has adopted for purposes of a Tax Injunction Act analysis, the Ninth Circuit in *Lorber* also considered a fourth factor: (4) whether the exaction was imposed "under the police or taxing power of the state." *Id.* (citing *In re Lorber*, 675 F.2d at 1066). Thereafter, in *In re Suburban Motor Freight, Inc.*, the Sixth Circuit added a fifth and sixth factor: (5) whether the exaction is universally applied to all similarly situated entities and (6) whether the granting of priority status to a governmental claimant would prejudice private creditors with like claims. *See In re Suburban Motor Freight, Inc.*, 36 F.3d at 488-89. Neither *Lorber* nor *In re Suburban Motor Freight, Inc.* were Tax Injunction Act cases; both were bankruptcy cases.

a. The Act Imposes an Involuntary Burden on Tractor Trailers

The first factor – whether the toll represents an involuntary pecuniary burden (regardless of name) – demonstrates that the bridge tolls are taxes.

An "'involuntary pecuniary burden' [is] a 'non-contractual obligation imposed by state statute upon taxpayers who had not consented to its imposition.'" *Id*. at 60. Here, there is no question that collection of tolls from tractor trailers constitutes an involuntary pecuniary burden. Specifically, R.I. Gen. Laws § 42-13.1-4(a) provides that RIDOT is "authorized to fix, revise, charge, and collect tolls for the privilege of traveling on Rhode Island bridges to provide for replacement, reconstruction, maintenance, and operation of Rhode Island bridges." The Act makes clear that "[t]he tolls shall be collected on large commercial trucks only and shall not be collected on any other vehicle." *Id*. Tolls may only be assessed on vehicles classified as Class 8 and above ("tractor trailers"). *See* R.I. Gen. Laws § 42-13.1-5. Thus, the plain language of the Act makes clear that the bridge tolls represent an "involuntary burden" and the fact that Plaintiffs challenge the bridge tolls through this lawsuit further supports this conclusion. Accordingly, this factor strongly supports the conclusion that the tolls are taxes for purposes of the Tax Injunction Act.

b. The Tolls Have Been Imposed By and Under the Authority of the General Assembly

The second factor – whether the toll was imposed pursuant to legislative (as opposed to regulatory) authority – also demonstrates that the bridge tolls are taxes. Here, there also is no

---

While the First Circuit has never adopted the fourth, fifth, and sixth factors in a Tax Injunction Act case, if the First Circuit were to adopt the fourth and fifth factors from the Ninth and Sixth Circuit's bankruptcy decisions, the bridge tolls still would constitute a tax. The sixth factor has no application to this case.

question that collection of tolls has the imprimatur of the General Assembly, not a regulatory agency. The General Assembly enacted the Act pursuant to both its taxing and police powers, making it clear that the tolls are "imposed by the state legislature rather than by an administrative agency." *Cumberland Farms*, 116 F.3d at 946. Accordingly, this factor also strongly supports the conclusion that the tolls are taxes for purposes of the Tax Injunction Act.

c. The Bridge Tolls Are Assessed for a Public Purpose

The third factor – that tolls be assessed for a public purpose – also demonstrates that the tolls are taxes for purposes of the Tax Injunction Act. A "public purpose" is one that is "for the defraying of expenses or undertakings of a type commonly assumed by the government." *Boston Regional Medical Center*, 365 F.2d at 60. *See also Cumberland Farms, Inc.*, 116 F.3d at 947 ("the most salient factor in the decisional mix concerns the destination of the revenues raised by the impost").

Here, the repair and maintenance of a state's transportation infrastructure – in this case Rhode Island bridges – is a "public purpose" as defined in *Boston Regional Medical Center* as this is an expense and responsibility typically assumed by government.[11] The Act, both through its legislative findings and provisions related to the use of revenue generated from the bridge tolls, makes this "public purpose" clear. *See e.g., Lightwave Technologies, LLC v. Escambia County*, 43 F. Supp. 2d 1311, 1316 (S.D. Ala. 1999) (noting "the revenues raised by the fees at issue in this case inure to the benefit of all Escambia County residents in the form of roads and bridges" and concluding for that reason they were taxes under the Tax Injunction Act).

[11] *See, e.g., DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 365 (R.I. 1996) ("the construction and maintenance of public highways are typically not performed by private individuals"*); Longtin v. D'Ambra Construction Co., Inc.*, 588 A.2d 1044, 1046 (R.I. 1991) ("It cannot be disputed that the reconstruction of Mendon Road, a state highway, is an activity that is performed exclusively by the state.").

In passing the Act, the General Assembly made numerous factual findings manifesting its intention to raise revenue to enable the State to maintain all bridges in structurally sound and good condition for the general benefit of the public. The General Assembly expressly found that the "state of Rhode Island, through the Rhode Island department of transportation * * * funds the reconstruction, replacement, and maintenance of all bridges in Rhode Island, except the Newport Bridge, the Mount Hope Bridge, the Jamestown-Verrazano Bridge, and the Sakonnet River Bridge." R.I. Gen. Laws § 42-13.1-2(1). The General Assembly also found that "for the past several decades, Rhode Island has depended on three (3) primary sources for funding all transportation infrastructure construction, maintenance, and operations: federal funds, state bond funds, and motor fuel tax revenue." R.I. Gen. Laws § 42-13.1-2(3). However, both "federal funds and motor fuel tax revenue, are mutable." *Id*. Indeed, "[t]he 2008 governor's blue ribbon panel on transportation funding, the 2011 senate special commission on sustainable transportation funding, and the 2013 special legislative commission to study the funding for East Bay bridges determined that there is *insufficient revenue available from all existing sources to fund the maintenance and improvement of Rhode Island transportation infrastructure*." R.I. Gen. Laws § 42-13.1-2(4) (emphasis added). Finally, and importantly, the General Assembly found that "[a]lthough the state is shifting from long-term borrowing to reliance upon annual revenues to fund transportation infrastructure on a pay-as-you go basis, and although a recurring state source of capital funds has been established, *there is still a funding gap between the revenue needed to maintain all bridges in structurally sound and good condition and the annual amounts generated by current dedicated revenue sources*." R.I. Gen. Laws § 42-13.1-2(7) (emphasis added).

The Act was enacted to bridge that gap. To that end, the Act authorizes RIDOT "to fix, revise, charge, and collect tolls for the privilege of traveling on Rhode Island bridges to provide

for replacement, reconstruction, maintenance, and operation of Rhode Island bridges." R.I. Gen. Laws § 42-13.1-4(a). The Act also creates a "special account" dedicated solely to revenue generated through the collection of tolls, *see* R.I. Gen. Laws § 42-13.1-6(a), provides that toll revenue shall be used only "to pay the costs associated with the operation and maintenance of the toll facility, and the replacement, reconstruction, maintenance, and operation of Rhode Island bridges on the National Highway System or any other use permitted under 23 U.S.C. § 129," *see* R.I. Gen. Laws § 42-13.1-9, and that toll revenue "shall not revert to the general fund but shall remain in the Rhode Island bridge replacement, reconstruction, and maintenance fund." R.I. Gen. Laws § 42-13.1-6(c).

The General Assembly's findings and the provisions in the Act related to the use of revenue generated from the bridge tolls makes clear that toll revenue is being used to "defray[] expenses or undertakings of a type commonly assumed by the government." *Boston Regional Medical Center*, 365 F.2d at 60. Indeed, the First Circuit has recognized that assessments imposed on trucks to improve and maintain a state's transportation infrastructure confer a public benefit for purposes of the Tax Injunction Act analysis. *See San Juan Cellular*, 967 F.2d at 685 (recognizing that "the Seventh Circuit has called a Wisconsin Department of Transportation charge upon trucks a 'tax,' because the charge was used to help pay for highway construction, a 'general' type of public expenditure" (referencing *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981))).

Even the Plaintiffs recognize that the revenue generated from the tolls in this case are used for the benefit of the public as a whole, "defraying [the] expenses or undertakings of a type commonly assumed by the government." *Boston Regional Medical Center*, 365 F.2d at 60. For example, Plaintiffs acknowledge that "[t]he tolls authorized by Rhode Island . . . will be used for

bridge maintenance and repair." Complaint, ¶ 2. Later, Plaintiffs aver, in relevant part, that although tolls are imposed only on vehicles Class 8 and above, "[a]ll travelers on Rhode Island's bridges and highways benefit from the use of those facilities." Complaint, ¶ 144.

Plaintiffs also suggest that rather than using toll revenue as a "means of repairing and maintaining Rhode Island's bridges," Complaint, ¶ 123, other measures, such as "fuel taxes," could or should be imposed. Complaint, ¶ 124. But notwithstanding the adequacy and long-term viability of Plaintiffs' suggestion, the argument that fuel taxes could be substituted for toll revenue further supports the conclusion that the tolls are taxes for purposes of the Tax Injunction Act. *See May Trucking Co. v. Oregon Dept. of Transportation*, 388 F.3d 1261, 1262 (9th Cir. 2004) ("we hold that the Tax Injunction Act, 28 U.S.C. § 1341, applies to the International Fuel Tax Agreement [], a multi-jurisdictional taxation program in which one state collects taxes imposed by other states");[12] *American Trucking Ass'ns v. O'Neill*, 522 F. Supp. 49, 52-54 (D. Conn. 1981) (concluding, over the arguments of the American Trucking Associations, that a statute imposing a tax on interstate motor carriers that purchased gasoline or diesel fuel in other states but used it while driving in Connecticut was a tax for purposes of the Tax Injunction Act).

Because the safe, reliable, and continued use of Rhode Island's bridges represents a benefit for all users – and because maintenance and construction of bridges is historically a governmental undertaking – the toll revenue is generated for a public purpose, namely "defraying of expenses or undertakings of a type commonly assumed by the government." *Boston Regional Medical Center*, 365 F.2d at 60. Thus, this third factor strongly supports the conclusion that the tolls are taxes for purposes of the Tax Injunction Act.

[12] This Court cited *May Trucking Co*. with approval in *Burns*, 526 F. Supp. 2d at 240.

d. Because the Tolls Are Taxes for Purposes of the Tax Injunction Act the First Condition Established by the First Circuit is Satisfied

Each of the foregoing factors supports the conclusion that the tolls authorized by the Act constitute taxes for purposes of the Tax Injunction Act. While the Defendants submit that this is not a "close case" – especially given that each of the applicable factors weighs heavily in support of the Defendants' position – the First Circuit has noted that "[c]ourts facing cases that lie near the middle of this [Tax Injunction Act spectrum] have tended * * * to emphasize the revenue's ultimate use, asking whether [the assessment] provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation." *San Juan Cellular*, 967 F.2d at 685. Supreme Court precedent – as well as precedent authored by a Judge who is now a Supreme Court Justice – supports this argument.

In *Nat'l Private Truck Council, Inc.*, an Oklahoma state court determined that "third structure" taxes[13] assessed against motor carriers with vehicles registered in any of twenty-five states violated the Dormant Commerce Clause. 515 U.S. at 584. Although restitution was ordered under state law, the court refused declaratory and/or injunctive relief – and therefore also attorneys' fees – on the basis that 42 U.S.C. § 1983 was not applicable. *Id*. at 583. The Supreme Court affirmed this determination, holding "§ 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists." *Id*. at 589.

[13] "Third-structure taxes are described as "nonregistration, nonfuel taxes that are neither apportioned nor prorated," such as "an axle tax, which imposes a flat charge based on the number of axles per vehicle." *Nat'l Private Truck Council*, 515 U.S. at 583 n.1. Other examples include ton-mile taxes based on the truck's weight and miles driven in the taxing state, as well as annual fuel marker fees and trip fees. *Private Truck Council of America v. Oklahoma Tax Comm'n*, 806 P.2d 598, 600-01 (Okla. 1990), *vacated by* 501 U.S. 1247 (1991) (mem).

The significance of *Nat'l Private Truck Council* is two-part. First, at least implicit in the Court's holding is that assessments on trucks, such as a flat charge based on the number of axles or other "third structure" levies, is a "tax" within the meaning of the Tax Injunction Act. Second, even independent of the Tax Injunction Act, "[w]hen a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983 . . . state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy." *Id*. at 592.

An analysis similar to that conducted by the First Circuit was performed in *Hill v. Kemp*, 478 F.3d 1236, 1244-45 (10th Cir. 2007) (Gorsuch, J.), which concerned Oklahoma's specialty license plate program where for (usually) $35.00 motorists could obtain license plates bearing a particular message. While part of the $35.00 fee was used to pay for administration of the license plate program, other revenue was directed to governmental funds and sometimes a portion of these governmental funds were passed-through to non-profit entities. *See id.* at 1240. Examining the definition of a "tax" at the time the Tax Injunction Act was enacted, then-Judge Gorsuch recognized that a "tax" included "[a] charge, esp. a pecuniary burden imposed by authority; specif., a charge or burden, usually pecuniary, laid upon persons or property for public purposes; a forced contribution of wealth to meet the public needs of a government." *Id*. at 1244 (quoting Webster's New International Dictionary of the English Language 2587 (2d ed. 1934)).

Consistent with First Circuit jurisprudence, *Hill* observed that "[i]f revenue is the primary purpose, the imposition is a tax," *id*., and that "[t]he critical inquiry focuses on the purpose of the assessment and the ultimate use of funds." *Id*. at 1245. The Tenth Circuit also applied a three-part test that identified characteristics of a state tax, similar to the test announced in *Boston Regional Medical Center*. Specifically, then-Judge Gorsuch observed:

> [t]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to help defray an agency's regulatory expenses.

Id. Because the specialty license plate program was imposed by the legislature, sought not just to cover administrative expenses but to raise revenue for an array of public purposes, and did not seek to regulate conduct, the Tenth Circuit determined that the fee was a "tax" for purposes of the Tax Injunction Act. *See id*. at 1247 (noting that denying Oklahoma approximately $600,000 a year in license plate revenue would "disrupt a variety of state initiatives").

Similarly, in *Schneider Transport, Inc.*, the Seventh Circuit concluded that truck registration fees were taxes for purposes of the Tax Injunction Act because the registration fees were imposed for "revenue-raising purposes, a characteristic of any tax." 657 F.2d at 132. In so concluding, the Seventh Circuit relied, in part, on the fact that the fees were deposited into the state transportation fund, for transportation purposes, including highway construction. *Id*.

Here, the General Assembly has expressly found that "there is still a funding gap between the revenue needed to maintain all bridges in structurally sound and good condition and the annual amounts generated by current dedicated revenue sources." R.I. Gen. Laws § 42-13.1-2(8). "All revenue collected pursuant to [the Act] . . . shall be used to pay the costs associated with the operation and maintenance of the toll facility, and the replacement, reconstruction, maintenance, and operation of Rhode Island bridges on the National Highway System or any other use permitted under 23 U.S.C. § 129." R.I. Gen. Laws § 42-13.1-9. Because toll revenue is used for the benefit of all bridge users and defrays some of the "expenses or undertakings of a type commonly assumed by the government," the assessment is properly classified as a tax for purposes of the Tax Injunction Act. *See Boston Regional Medical Center*, 365 F.3d at 60; Complaint, ¶¶ 2, 144. *See*

also Hill, 478 F.3d at 1244-45 ("We have no qualms finding in this case that the primary purpose of the special license plate scheme is revenue rather than regulation and thus that it qualifies as a tax under Judge Colley's formulation."). Accordingly, the first condition to satisfying the Tax Injunction Act is met.

3. State Courts Provide an Adequate Alternative to the Federal Court Remedy

Having established that the challenged toll is a tax for purposes of the Tax Injunction Act, this Court must next consider whether "a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In doing so, this Court must consider whether Rhode Island's courts "furnish an adequate alternative to a federal-court remedy." *Cumberland Farms*, 116 F.3d at 945. "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis in original).

The First Circuit has observed that the requirement that a "plain, speedy and efficient remedy" be available in the state courts, "at most, requires assurances that a plaintiff will have an opportunity to make an argument in state court, not that he will win." *Carrier Corp. v. Perez*, 677 F.2d 162, 165 (1st Cir. 1982) (Breyer, J.) (examining this issue under the Butler Act, a close analogue to the Tax Injunction Act).[14] The First Circuit explained that:

> the Supreme Court has specifically held that the words 'plain, speedy and efficient remedy' are to be given a purely procedural interpretation. A state remedy is adequate if it meets 'certain minimal procedural criteria,' which include an opportunity to raise the desired legal objections with the eventual possibility of Supreme Court review of that claim.

[14] The Butler Act is "a close analogue to the Tax Injunction Act . . . applicable to Puerto Rico." *Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1, 5 (1st Cir. 2010). While the two statutes employ different language, they "have been construed *in pari materia*." *Id.*

Id. ("we believe that a plaintiff must demonstrate that the federal claim that it believes the state will not hear differs from the claims that it will hear significantly, and not just theoretically or logically, before a federal court could find that the state remedy is inadequate").

Here, the Rhode Island state courts are vested with jurisdiction to hear the Plaintiffs' federal claims and a "plain, speedy and efficient remedy" exists for Plaintiffs in the state courts. Indeed, Rhode Island courts have already heard similar claims to those presented in this case. In *Seibert v. Clark*, 619 A.2d 1108 (R.I. 1993), the Rhode Island Supreme Court examined the Rhode Island District Court's determination that a decal-fee requirement imposed only upon non-resident motor carriers did not violate the Dormant Commerce Clause. The Rhode Island Supreme Court affirmed in part and reversed in part, with absolutely no discussion that the subject-matter was outside the state court's jurisdiction.

In *Seibert* – as well as in this case – any final state court decision involving federal issues is subject to a writ of certiorari from the United States Supreme Court. *See* 28 U.S.C. § 1257. Therefore, because Plaintiffs can pursue (and be heard on) their federal claims in state court and can seek review in the United States Supreme Court, the Rhode Island state courts provide "a plain, speedy and efficient remedy." *See Pleasures of San Patricio v. Mendez-Torres*, 596 F.3d 1, 10 (1st Cir. 2010) ("we have concluded it is sufficient that plaintiffs are 'free to make a Commerce Clause-based argument in the courts of Puerto Rico, and to pursue those arguments to the Supreme Court of the United States if necessary'"). This Court has also previously determined that Rhode Island's procedures for challenging state taxes satisfies this second condition of the Tax Injunction Act inquiry. *See Black v. Lefebvre,* C.A. No. 05-449 ML, 2006 WL 1582395 * 3 (D.R.I. 2006) (Lisi, J.) (citing *Bank of New England Old Colony, N.A. v. Clark*, 796 F. Supp. 633, 636 (D.R.I. 1992), *aff'd* 986 F.2d 600 (1st Cir. 1993)). For these reasons, the second condition is satisfied and

the Tax Injunction Act precludes this Court from exercising subject-matter jurisdiction over this case.

C. Comity also Constrains this Court From Exercising Subject-Matter Jurisdiction

Separate and apart from the Tax Injunction Act, principles of comity and federalism restrain this Court from hearing this case.

It is well settled that principles of comity and federalism are broader than the Tax Injunction Act's reach. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010).[15] The Supreme Court long ago explained that "[c]omity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Dows v. Chicago*, 11 Wall. 108, 110 (1871). This is because "'[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'" *Id.* Subsequent and independent of the Tax Injunction Act, the Supreme Court has confirmed the "continuing sway of comity considerations." *Levin*, 560 U.S. at 423.

In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), for instance, plaintiffs sought a federal declaration that Louisiana's unemployment compensation tax statute was unconstitutional. Affirming dismissal on comity grounds, the Supreme Court directed that federal courts "not ordinarily restrain state officers from collecting state taxes where state law

[15] For example, principles of comity and federalism dictate that federal courts "may not even render declaratory judgments as to the constitutionality of state tax laws." *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 103 (1981). Likewise, "the principle of comity bars federal courts from granting damages." *Id*. at 107. *See also Cumberland Farms*, 116 F.3d at 945 ("As authoritatively construed, the [Tax Injunction Act] forbids not only injunctive relief, but also declaratory and monetary relief.").

affords an adequate remedy to the taxpayer." *Id*. at 297. The Court continued that federal courts may "in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest" and that "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Id*. at 297-98.

Decades later the National Private Truck Council challenged an Oklahoma assessment aimed at truck drivers as violative of the Commerce Clause and 42 U.S.C. § 1983. *See Nat'l Private Truck Council*, 515 U.S. at 583. Unlike the travel of this case, the National Private Truck Council filed its lawsuit in state court and even though it was awarded relief based upon state law, the state court refused to issue declaratory or injunctive relief pursuant to Section 1983. The Supreme Court affirmed, holding that "§ 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists." *Id*. at 589. "The availability of an adequate legal remedy," the Court explained "renders a declaratory judgment unwarranted." *Id*. at 591.

More recently, the Supreme Court applied these principles in *Levin* where the State of Ohio allowed local distribution companies certain tax exemptions but did not provide similar tax exemptions to a competitor of local distribution companies, *i.e.*, independent marketers. 560 U.S. at 421-22. Rather than seek to reduce their own tax liability – which the Supreme Court observed the Tax Injunction Act would bar – the independent marketers sought a federal court order invalidating the tax exemptions enjoyed by the local distribution companies. *Id*. at 429. Although the remedy sought would have resulted in additional tax revenue to the State of Ohio, the Supreme Court recognized that the comity doctrine is "[m]ore embracive than the [Tax Injunction Act]," and on this basis restrained plaintiffs' lawsuit. *Id*. at 417. The Court noted that "when [it] – on

review of a state high court's decision – finds a tax measure constitutionally infirm, 'it has been our practice,' for reasons of 'federal-state comity,' 'to abstain from deciding the remedial effects of such a holding.'" *Id*. at 427-28 (quoting *American Trucking Assns, Inc. v. Smith*, 496 U.S. 167, 176 (1990) (plurality)). *See id*. at 427 ("With the State's legislative prerogative firmly in mind, this Court, upon finding impermissible discrimination in a State's allocation of benefits or burdens, generally remands the case, leaving the remedial choice in the hands of state authorities.").

The Court observed that "the most obvious way to achieve parity would be to reduce [plaintiffs'] tax liability" but that plaintiffs had not sought such a remedy since the Tax Injunction Act "stands in the way of any decree that would 'enjoin … collection of [a] tax under State law.'" *Id*. at 429 (quoting 28 U.S.C. § 1341). The Court continued that "[a] more ambitious solution would reshape the relevant provisions of Ohio's tax code" and that "[w]ere a federal court to essay such relief * * * the court would engage in the very interference in state taxation the comity doctrine aims to avoid." *Id*. Consequently, the Court concluded that "if the Ohio scheme is indeed unconstitutional, surely the Ohio courts are better positioned to determine – unless and until the Ohio Legislature weighs in – how to comply with the mandate of equal treatment." *Id*. *See id*. at 426-27 ("How equality is accomplished – by extension or invalidation of the unequally distributed benefit or burden, or some other measure – is a matter on which the Constitution is silent."). Since federal courts should not order a particular remedy in state tax legislation challenges, principles of federalism and comity "demand deference to the state adjudicative process." *Id*. at 432. *See also Coors Brewing Co.*, 678 F.3d at 23 ("These limitations on the remedial competence of lower

federal courts counsel that they refrain from taking up cases of this genre, so long as state courts are equipped fairly to adjudicate them.").[16]

Significantly, the *Levin* Court considered a "confluence of factors," which led the Court "to conclude that the comity doctrine controls[.]" *Levin*, 560 U.S. at 432. These three factors concerned: (1) plaintiffs sought "federal-court review of commercial matters over which [the state] enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny;" (2) plaintiffs are "seeking federal-court aid in an endeavor to improve their competitive position;" and (3) the state courts are "better positioned than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the [Tax Injunction Act] does not constrain their remedial options." *Id*. at 431-32. These factors, the Court concluded, "in combination" demand "deference to the state adjudicative process." *Id*. at 432. *See also Coors Brewing Co.*, 678 F.3d at 23-24 (applying three *Levin* factors).

[16] In *Coors Brewing Co.*, the First Circuit explained that comity constrains the exercise of federal jurisdiction in cases implicating a variety of important state interests, including "cases in which the federal courts might unduly interfere with state tax administration." 678 F.3d at 23. The Court of Appeals added that "*Levin* made clear that the rule of comity carries 'particular force' . . . where taxpayers file suit in federal court under either dormant Commerce Clause or Equal Protection theories, alleging that the state has singled them out for discriminatory treatment by taxing them unevenly in comparison to their competitors." *Id*. Among the reasons for this "strict rule" are that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" and that even "'upon finding impermissible discrimination in a State's allocation of benefits or burdens,' it is the Supreme Court's usual practice to remand the case to the state court, 'leaving the remedial choice in the hands of state authorities.'" *Id.* (quoting *Levin*, 130 U.S. at 426-27. As *Levin* explained, this "leaves the interim solution in state-court hands, subject to subsequent definitive disposition by the State's legislature." *Levin*, 560 U.S. at 428. By contrast, if a district court were to find a state tax system unconstitutional, it "lack[s] authority to remand to the state court system . . . and [it is] severely constrained in their choice of remedies." *Coors Brewing Co*., 678 F.3d at 23.

Likewise, here, all three considerations require dismissal of this case on principles of comity and federalism. First, Plaintiffs seek federal court review over commercial matters that the State enjoys wide latitude. The General Assembly's power to derive revenue from taxes comes from "the inherent power of the State to impose taxes" and has been described as "plenary." *In re Opinion to the Governor*, 170 A.2d 908, 909 (R.I. 1961). The General Assembly also has a "wide scope in exercising the police power" provided legislation "bears a substantial relation to the welfare of the general public, protects and conserves constitutional guarantees, and appears to be a reasonable exercise of the power in relation to the purpose involved." *Prata Undertaking Co., v. State Bd. of Embalming & Funeral Directing*, 182 A. 808, 812 (R.I. 1936).

Here, the Act evinces the General Assembly's intent to raise revenue to bridge the "funding gap" necessary to maintain Rhode Island's bridges in a structurally sound and good condition. The State enjoys wide latitude in determining how to fund and maintain its infrastructure and the "Supreme Court has recognized in *Levin* and numerous other cases that states enjoy wide regulatory latitude over the administration of their tax systems." *Coors Brewing Co.*, 678 F.3d at 24. *See also Levin*, 560 U.S. at 417 ("More embracive than the [Tax Injunction Act], the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration.").

Second, Plaintiffs make clear through their Complaint they are seeking to improve their competitive position. Plaintiffs plead, for example, that "[t]ruckers cannot always change their routes . . . meaning that price increases may be necessary to compensate for increased tolling costs and that revenue for trucking companies may decline." Complaint, ¶ 129. The Plaintiffs similarly aver that "costs from the inflated tolls are often also passed on to the businesses that are shipping the goods," Complaint, ¶ 131, and that the tolls "increase businesses' costs for sending goods to

other States, making it less profitable and less desirable for companies to enter or participate in the national market." Complaint, ¶ 132. Here, Plaintiffs seek to "reshape the relevant provisions" of Rhode Island law and invalidate the General Assembly's determination that "[t]he tolls shall be collected on [tractor trailers] only and shall not be collected on any other vehicle." R.I. Gen. Laws § 42-13.1-4(a). If successful, Plaintiffs believe such a determination would "improve their competitive position." *Levin*, 560 U.S. at 431.

Third, as the Supreme Court has already determined, in cases where federal courts may interfere with a state's collection of tax revenue, state courts are "better positioned than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the [Tax Injunction Act] does not constrain their remedial options." *Id.* at 431-32. While Defendants submit that the Act does not violate federal law, the principle that a federal court is constrained in its "remedial options" counters the federal court's assertion of jurisdiction. For these reasons, comity principles require dismissal of this lawsuit.

D. The State's Eleventh Amendment Immunity Bars this Lawsuit

In addition to the foregoing arguments, the State's Eleventh Amendment immunity bars this lawsuit for two independent reasons.

1. The Eleventh Amendment Bars Monetary Damages or Restitution

As pled, Plaintiffs' Complaint can be read as seeking an award of monetary damages or restitution of the monies Plaintiffs have paid in the form of tolls. Such a claim falls squarely within the Eleventh Amendment's protections, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Amend. XI. The Supreme Court has observed that "the Eleventh Amendment

[stands] not so much for what it says, but for the presupposition … which it confirms." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (alteration in original). That "presupposition" confirms "first, that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent.'" *Id*. (alterations in original). Accordingly, "[f]or over a century, [the Court] has reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Id*. (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).[17]

It is firmly established that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651 (1974). In *Edelman*, a complaint was filed seeking declaratory and permanent injunctive relief relating to the manner in which the State of Illinois processed certain benefit applications. The district court granted a permanent injunction ordering that the applications be processed in compliance with federal law on a prospective basis, but then also ordered the State to "release and remit" benefits to applicants who already had been wrongly denied. *Id*. at 656.

On certiorari, the Court rejected arguments seeking to distinguish a claim for "equitable restitution" from "damages," and held that the district court's order that the State of Illinois pay

[17] While a state's Eleventh Amendment immunity may be waived in two ways, neither are applicable here. First, "[a] sovereign's immunity may be waived, and the [United States Supreme] Court consistently has held that a State may consent to suit against it in federal court." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984). In such circumstances, however, "the State's consent [must] be unequivocally expressed." *Id*. Second, Congress may abrogate a state's Eleventh Amendment immunity, but Congress' authority to do so is limited to its Fourteenth Amendment powers. *See Seminole Tribe*, 517 U.S. at 65-72. Here, neither Rhode Island nor Congress has abrogated this State's Eleventh Amendment immunity.

past benefits "*requires payment of state funds*, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but *as a form of compensation* to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." *Id*. at 668 (emphasis added). *See also id*. ("It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.").

In so holding, the Court relied, in part, on its prior opinion in *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945), *overruled on other grounds*, *Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613 (2002)). In *Ford Motor Co.*, a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes, claiming that they had been imposed in violation of the United States Constitution. The *Edelman* Court observed:

> [t]he term "equitable restitution" would seem even more applicable to the relief sought in [*Ford Motor Co.*], since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding [in *Ford Motor Co.*] that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment.

Edelman, 415 U.S. at 669. *See also Ford Motor Co.*, 323 U.S. at 464 ("when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants").

Both *Edelman* and *Ford Motor Co.* support the conclusion that the Eleventh Amendment bars Plaintiffs' claims here. In their Complaint, Plaintiffs state that they "seek both a declaration that the truck-toll system employed by Defendants violates the Commerce Clause of the U.S. Constitution and an injunction against enforcement of that system in the future." Complaint, ¶ 1.

While this statement suggests Plaintiffs seek only prospective relief, other portions of Plaintiffs' Complaint leaves open a claim for monetary damages or restitution. For example, Plaintiffs ask this Court to award "[a]ny other relief for the Plaintiffs that the Court deems proper." Complaint, p. 29.

Moreover, Plaintiffs have alleged that they are incurring *losses* on a daily basis. In their Response to RIDOT's Motion to Extend Time to Respond to the Complaint, Plaintiffs stated: "Plaintiffs *currently* are required to pay unconstitutional tolls and thereby *incur losses* on a daily basis. The more time that passes before this case is adjudicated and the RhodeWorks regime is invalidated, *the greater these losses become*." Doc. 12 at 1-2 (emphases added). Plaintiffs continue that "*they may never be able to recover"* these losses. *Id*. at 2 (emphasis added). Plaintiffs' non-committal representation that they "may" never be able to recover past tolls paid begs the subject-matter jurisdiction question that must be answered: whether Plaintiffs *seek* or *will seek* to recover past tolls paid.

Because a claim for monetary damages or restitution would violate Rhode Island's Eleventh Amendment immunity – and divest this Court of subject-matter jurisdiction – this Court should require Plaintiffs answer this question and to make clear at this juncture whether they seek or will seek monetary damages or restitution. If Plaintiffs respond that they do or will, this Court should dismiss Plaintiffs' claim as barred by the Eleventh Amendment.

2. The Eleventh Amendment Bars Prospective Injunctive Relief

Even if Plaintiffs seek only prospective (and not retroactive) injunctive relief, the Eleventh Amendment still precludes this Court from exercising subject-matter jurisdiction. Although in certain circumstances *Ex parte Young*, 209 U.S. 123 (1908) has been invoked to permit a suit to proceed against a state official to "end a continuing violation of federal law," more recently *Young*

has been described as a "narrow exception to the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 76. *See also Hill*, 478 F.2d at 1256 (Gorsuch, J.) (recognizing the "new gloss" on *Ex parte Young* after *Seminole Tribe*). As such, where Congress has provided a remedial scheme more limited than the remedies *Ex parte Young* offers, such as this case, *Young* does not apply and the Eleventh Amendment bars prospective injunctive relief.

Seminole Tribe concerned a claim that the State of Florida had failed to negotiate in good faith as required by the Indian Gaming Regulatory Act ("IGRA"). The Court determined that the Indian Commerce Clause did not abrogate Florida's Eleventh Amendment immunity and therefore Congress had no constitutional authority to subject a non-consenting state to federal court jurisdiction for a past IGRA violation. Despite the lack of abrogation, since the plaintiffs alleged a "continuing violation of federal law," the Court subsequently considered – and then rejected – the Seminole Tribe's argument that *Ex parte Young* should provide a remedy. The Court held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right" an *Ex parte Young* remedy was not applicable. *Seminole Tribe*, 517 U.S. at 74.[18] Applying this principle to the State of Florida, the Court explained that in these situations "a court should hesitate before casting aside those [statutory] limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id*. Such hesitation is appropriate, the Court observed, because in contrast to the limited remedies provided by the statutory scheme "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id*. at 75. *See also id*. at 75-76 ("the fact that Congress

[18] The Supreme Court analogized *Seminole Tribe* to situations "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right [and] we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe*, 517 U.S. at 74.

chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under [IGRA]").

Similar to *Seminole Tribe* where a detailed statutory scheme was promulgated providing for limited remedies, here Congress enacted the Tax Injunction Act, which "is a complete bar to maintaining [an applicable] action in a federal forum." *Cumberland Farms*, 116 F.3d at 945. Just as an *Ex parte Young* remedy may not circumvent the statutory scheme providing only narrowly circumscribed remedies in *Seminole Tribe*, *Ex parte Young* likewise cannot be used to abrogate the protections Congress codified through the Tax Injunction Act. This precise issue was examined in *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178 (10th Cir. 1998), *overruled on other grounds by Hill*, 478 F.3d at 1258-59, which held in similar circumstances that *Young* was inapplicable.

In *ANR Pipeline Co.*, the plaintiffs asked the court to declare that certain state defendants "have and continue to wrongfully value, assess and retain excessive taxes" and sought recertification "for subject and future tax years [of a] lawful value which comply with state and federal constitutions." *Id*. at 1190. Despite the prospective nature of the relief sought, the Court of Appeals concluded that "[a]ccording to *Seminole Tribe*, we must evaluate whether the equitable relief being sought through the *Ex parte Young* mechanism is broader than the relief Congress has otherwise circumscribed in relevant statutes. If so, the *Ex parte Young* mechanism for avoiding the Eleventh Amendment is not available." *Id*. at 1191. In holding the *Young* remedy inapplicable, the Court explained:

> [u]nder the analysis required by *Seminole Tribe*, we find that the Tax Injunction Act, 28 U.S.C. § 1341 (1994), is the appropriate statute on which to base a comparison between the judge-made *Ex parte Young* doctrine and Congress' statutory scheme. In the Tax Injunction Act Congress expressly limited the power

> of federal courts to issue certain types of remedies pertaining to the assessment, levy or collection of state taxes. Furthermore, we find that the criteria for relief under the Tax Injunction Act are significantly narrower than the criteria under *Ex parte Young.* As a result, we conclude that the *Ex parte Young* doctrine may not be invoked for the pipelines' prospective claims that seek relief that is precluded by the Tax Injunction Act.
>
> * * *
>
> As a result, we cannot avoid the conclusion that when a state provides an adequate forum for a plaintiff's federal claims, the criteria for a remedy under *Ex parte Young* are broader than the criteria under the Tax Injunction Act. On the basis of that conclusion, the rule in *Seminole Tribe*—that federal courts may not imply the judge-made remedy of *Ex parte Young* when Congress has provided a more narrowly circumscribed remedy—controls this case. *See Seminole Tribe,* 116 S.Ct. at 1133. Thus, when a state provides an adequate forum to hear claims for injunctive relief against state taxes, there is no *Ex parte Young* mechanism available to avoid the Eleventh Amendment's prohibition of suits against unconsenting states.

Id. at 1191-92 (footnotes omitted). *See also Hill,* 478 F.3d at 1256 ("federal courts are not free to imply the wide-ranging, judge-made remedial doctrine of *Ex parte Young* when Congress has seen fit to craft a significantly narrower statutory remedy") (quoting *ANR Pipeline Co.*, 150 F.3d at 1189)). In cases where the Tax Injunction Act applies, Supreme Court precedent further supports the *Seminole Trib*e exception to invoking *Ex parte Young*.

In *Arkansas,* 520 U.S. at 826-27, for example, the Court explained that "[e]nactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government, a concern prominent after the Court's ruling in *Ex parte Young* . . . that the Eleventh Amendment is not in all cases a bar to federal court interference with individual state officers alleged to have acted in violation of federal law." The Court continued that "[g]iven the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Id*. at 827. *See also Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 521 n. 28 (1981) ("[t]he Tax Injunction Act was only one of

several statutes reflecting congressional hostility to federal injunctions issued against state officials in the aftermath of * * * *Ex parte Young*").

As *Arkansas* and other Supreme Court decisions confirm, the Tax Injunction Act is meant "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Arkansas*, 520 U.S. at 826 (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982)). This Court has recognized that judicial limitation. *See Burns*, 526 F. Supp. 2d at 240 (holding that "[a] federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost"). Where, as here, Congress has directed federal district courts to refrain from interfering with a State's collection of its revenue (unless a "plain, speedy and efficient" state remedy is unavailable), an *Ex parte Young* remedy may not be used to grant Plaintiffs the relief they seek and circumvent Rhode Island's Eleventh Amendment protection.

Even if Plaintiffs seek prospective relief only, such a prospective declaration may also have the effect of "adjudicating the liability issues in a damages action against the state even though a direct federal suit for damages would be barred by the Eleventh Amendment."[19] *ANR Pipeline*

[19]While Defendants submit that non-mutual offensive collateral estoppel may not be asserted against the State of Rhode Island in a subsequent action, this issue does not appear to have been authoritatively determined by either the Supreme Court or the First Circuit. Collateral estoppel may not be asserted against the federal government by an entity that was not a party to the original action, *see United States v. Mendoza*, 464 U.S. 154 (1984), and the Ninth and Eleventh Circuits have recognized that non-mutual offensive collateral estoppel may not be asserted against a state governmental entity. *See State of Idaho Potato Comm. v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005) ("*Mendoza's* rationale applies with equal force to G&T's attempt to assert nonmutual defensive collateral estoppel against IPC (a state agency"); *Hercules Carriers, Inc. v. Claimant State of Fla. Dep't of Transp.*, 768 F.2d 1558 (11th Cir. 1985) (extending *Mendoza* to state government). Because neither the Supreme Court nor the First Circuit appears to have examined extending *Mendoza* to state governments, the *possibility* that non-mutual offensive collateral estoppel could be asserted against the State of Rhode Island cannot be eliminated and

Co., 150 F.3d at 1189. Allowing such a circumvention of the Eleventh Amendment through a federal court declaration violates Rhode Island's sovereignty and principles of federalism. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) ("To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed . . . in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction."). Such interests are "not to be sacrificed to elementary mechanics of captions and pleading" but rather must "reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id*. *See also Nat'l Private Truck Council*, 515 U.S. at 592 ("When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983, however, state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy."). For this additional reason, this Court should decline to issue a declaration in this case.

III. CONCLUSION

The Tax Injunction Act establishes a broad jurisdictional bar prohibiting this Court from enjoining or restraining the collection of state taxes such as the tolls at issue here, which have been authorized by the General Assembly to raise revenue to maintain all bridges in structurally sound and good condition for the general benefit of the public. In addition, at a minimum, principles of federalism and comity, which permeate this case, require that the state matters at issue be adjudicated in state court and not in federal court. Lastly, the State's Eleventh Amendment

this consideration further weighs against this Court maintaining jurisdiction in circumvention of the State's Eleventh Amendment immunity.

immunity bars this lawsuit. Accordingly, this lawsuit should be dismissed without prejudice to "a plain, speedy and efficient remedy . . . in the courts of such State." 28 U.S.C. § 1341.

Respectfully submitted,

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

PETER F. KILMARTIN
ATTORNEY GENERAL

/s/Michael W. Field

Michael W. Field, (#5809)
Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400, Extension 2380
Fax: (401) 222-3016
mfield@riag.ri.gov

RHODE ISLAND TURNPIKE AND BRIDGE AUTHORITY
By its attorneys,

/s/ John A. Tarantino
John A. Tarantino (#2586)
jtarantino@apslaw.com
Patricia K. Rocha (#2793)
procha@aplslaw.com
R. Bart Totten (#5095)
btotten@apslaw.com
Nicole J. Benjamin (#7540)
nbenjamin@apslaw.com

ADLER POLLOCK & SHEEHAN PC
One Citizens Plaza, 8th Floor
Providence, Rhode Island 02903
(401) 274-7200
Fax (401) 351-4607

CERTIFICATION

I, the undersigned, hereby certify that I filed the within document via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF System to counsel of record on this 24th day of August, 2018.

/s/Michael W. Field