

No. 11-1758

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMODITIES EXPORT COMPANY,
Plaintiff-Appellee,

v.

DETROIT INTERNATIONAL BRIDGE CO.,
Defendant/Cross-Defendant-Appellant,

UNITED STATES OF AMERICA,
Defendant/Cross-Plaintiff-Appellee,

CITY OF DETROIT
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

**MOTION FOR LEAVE TO EXTEND FILING FOR AMICUS CURIAE
BRIEF OF MICHIGAN MUNICIPAL LEAGUE, SOUTHWEST DETROIT
BUSINESS ASSOCIATION, HUBBARD FARMS HISTORIC DISTRICT,
WEST GRAND BOULEVARD UNITED FOR PROGRESS, PEOPLE'S
COMMUNITY SERVICES', SOUTHWEST DETROIT ENVIRONMENTAL
VISION, MAURICE AND JANE SUGAR LAW CENTER FOR SOCIAL &
ECONOMIC JUSTICE, BRIDGEWATCH DETROIT, AND FRIENDS OF
RIVERSIDE PARK**

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NOW COME The Michigan Municipal League (MML), Southwest Detroit Business Association (SDBA), Hubbard Farms Historic District (HFHD), West Grand Boulevard United for Progress (WGBUP), People's Community Services' (PCS), Southwest Detroit Environmental Vision (SDEV), Maurice and Jane Sugar Law Center for Social & Economic Justice (Sugar Law Center), Bridgewatch Detroit (BWD), and Friends of Riverside Park (FRP) (collectively, "Amici"), by and through counsel, and for their Motion for Leave to File Late Motion for Leave, state as follows:

1. The Amici are comprised of government, business, community, and nonprofit groups with ongoing activities and interests in Southwest Detroit.
2. The disposition of this case will affect the Amici in numerous and measurable ways.
3. The question at issue is whether the Detroit International Bridge Company (DIBC) is a federal instrumentality.
4. Each of the Amici has been and will be affected by actions the DIBC has taken under the guise that they are a federal instrumentality and not subject to local regulations.

5. In addition, the Amici offer this honorable Court a unique important community perspective and relevant legal argument that will assist this Court in making a final determination on the questions presented.
6. The Amicus Curiae Brief will assist the Court by presenting ideas, arguments, theories, insight, facts and data that are not found in the parties' briefs.
7. Defendant/Cross-Plaintiff-Appellee United States and Defendant-Appellee City of Detroit have consented to amicus participation by MML, SDBA, HFHD, WGBUP, PCS, SDEV, Sugar Law Center, BWD, and FRP. Detroit International Bridge Company was contacted, but has not yet responded.
8. The accompanying brief has been written and reviewed on a pro bono basis.
9. The question presented, whether the DIBC is a federal instrumentality, is crucial to the community, its residents and businesses, located in and around the Ambassador Bridge and surrounding neighborhoods. For this reason and in the interest of justice, this Court is asked to exercise its discretion in favor of allowing petitioners to file their brief herein, although it is delayed.

10. This appeal was brought to the attention of the *amicus* petitioners late in the course of the proceedings and it took time to locate legal counsel to conduct due diligence, contact the parties and draft the accompanying motion and brief.

11. Federal Rules of Appellate Procedure, Rule 29(a) permits the filing of the accompanying brief by consent of the parties or leave of the court and Fed. R. App. Proc., Rule 29(e) grants this court discretion to permit late filings.

WHEREFORE, the proposed *amicus* petitioners respectfully request that this Honorable Court grant this Motion and issue an order permitting petitioners to file a late *amicus* brief, under Fed. R. App. Procedure, Rule 29(b) and 29(e).

Respectfully submitted,

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

These *amicus* petitioners represent an unusually broad range of government, business, community, and nonprofit interests. This case directly impacts the extent to which the citizens, through their elected representatives, can assert regulatory control over private entities so as to protect the health and welfare of a vibrant urban community. This has prompted an incredible diversity of *amici* to bring their views to the attention of the Court.

The **Michigan Municipal League (MML)** is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. The submission of this *amicus* brief is authorized by the Legal Defense Fund's Board of Directors, the membership of which includes: the President and Executive Director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Randall L. Brown, City Attorney, Portage; Lori Grigg Bluhm, City Attorney, Troy;

Stephen K. Postema, City Attorney, Ann Arbor; Eric D. Williams, City Attorney, Big Rapids; Clyde J. Robinson, City Attorney, Kalamazoo; James O. Branson, III, City Attorney, Midland; James J. Murray, City Attorney, City of Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee, John C. Schrier, City Attorney, Muskegon, Thomas R. Schultz, City Attorney, Farmington Hills; and William C. Mathewson, General Counsel, Michigan Municipal League.

The Southwest Detroit Business Association (SDBA) is a 55-year old community based, tax-exempt Michigan non-profit corporation engaged in, or representing, 130 businesses which are engaged in economic activity and economic development in Southwest Detroit. SDBA is active in land use and transportation planning, commercial development, business incubation, and cultural activities. In partnership with local businesses and property owners and the state of Michigan, it has completed commercial renovations and real estate development totaling \$31,000,000 with an additional \$12,000,000 in commercial retail development and greenway construction in financing stages in Southwest Detroit. DIBC's actions and inactions in Southwest Detroit, such as its failure to complete its portion of the Gateway Project, have severely negatively impacted SDBA and its clients, local businesses. Businesses, particularly restaurants and food stores lost an estimated 30% of their business. The result has been loss of jobs and a loss of tax revenue for the City of Detroit.

Several of the *amici* are faith or community based in Southwest Detroit. **Hubbard Farms Historic District (HFHD)** is a local unincorporated neighborhood association whose mission is to preserve and revitalize the historic Hubbard Farms community and promote education and safety to improve the quality of life. It builds community through events and technology. Formed in 1981, HFHD is designated by City of Detroit Historic District Commission and is filed with the Michigan State Historic Preservation Office. The densely populated blocks of historic renovated homes, duplexes, row-houses and apartment buildings have approximately 1200 residents with a strong sense of community. The residents are engaged and proactive in preserving and improving their quality of life. The eastern boundary of HFHD is West Grand Boulevard, approximately 300 feet from the DIBC's Bridge Plaza's. Its efforts at building this neighborhood and community have been undermined by DIBC's actions that have created excessive truck traffic travelling illegally to and from the Bridge through these neighborhoods. This excessive traffic has caused serious and widespread health problems due to the air pollution it has generated. As well, it has created safety concerns due to unsafe traffic patterns. Additionally, DIBC owns numerous vacant and blighted properties, which enable drug dealing, prostitution, arson and violent crime, all of which lower property values. Ultimately, HFHD sought historic

designation, partly as a mechanism to discourage the DIBC from acquiring homes for future demolition.

West Grand Boulevard United for Progress (WGBUP) is an association of approximately forty-five (45) residents and home owners who live on or near West Grand Boulevard in southwest Detroit. Formed in 2008, WGBUP was established to bring neighbors together to address problems that threaten community safety and the quality of life in their neighborhood. Many of the members' homes, schools, and churches are within 300 ft. of DIBC's properties. DIBC's activities in this area have caused serious problems in that neighborhood due to heavy industrial and semi-truck traffic on residential streets. This is unsafe for pedestrians, bicyclists and slower moving local auto traffic. Furthermore, a poorly designed network of road blocks and turns have caused unintended and undesired trips to Canada for neighborhood residents. Semi-truck traffic originating and ending at the DIBC trucking facility adds to the substantial amount of daily diesel truck traffic on the residential streets. Additionally, DIBC owns other blighted and unattended properties throughout the neighborhood. DIBC operations interfere with the enjoyment of the residents' homes and causes threats to their safety. The current presence and constant threat of further expansion by the DIBC in this neighborhood represents an environmental danger and diminishes livability and economic values of homes in the community.

For more than 50 years, **People's Community Services' (PCS)** has offered assistance to those in need in order to strengthen family life and develop better neighborhoods. PCS has rehabilitated homes and provided a wide variety of social services including day care, transportation and homecare assistance to senior citizens, substance abuse and crisis counseling, adult and youth education and after-school programs throughout Detroit. PCS serves approximately 200 youths per week in Southwest Detroit and 400 in the summer. PCS, like many neighborhood organizations has seen the adverse effect of DIBC's actions and inactions on its programs, its clients, and the community at large.

Southwest Detroit Environmental Vision (SDEV) is a 501c3 nonprofit organization that serves nearly 90,000 residents as well as businesses in their service area. SDEV's mission is to improve the environment and strengthen the economy of Southwest Detroit. Their work focuses on pollution prevention and reduction, including improving air quality and health through local industry partnerships to reduce diesel emissions, addressing transportation impacts and land use planning to improve quality of life, and other programs to address blight and other pollution burdens. SDEV and their clients, both residents and businesses, have been adversely affected by DIBC's activities. Over the course of the past four years pursuing pollution reduction strategies, their clients' top priority has been the reduction of mobile-source

air pollution from trucks, most of which come from the Ambassador Bridge. The zip code that includes DIBC's Ambassador Bridge within SDEV's service area has adult asthma hospitalization rates three times the rate for all of Michigan adults. The continuing excessive truck traffic resulting from DIBC's stalling of the Gateway Project significantly diminishes the work of SDEV.

The **Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center)** is a national nonprofit law center based in Detroit. The Sugar Law Center provides direct counseling, advocacy, and litigation to support of low-income communities. The Law Center is actively engaged in Southwest Detroit and to maximize community benefits during the course of public and private development projects. Community benefits seek to ensure economic and social justice for local residents during the course of development activities. The Sugar Law Center is deeply interested in this case, since its outcome directly affects the ability of Southwest Detroit residents to collectively advocate for fair treatment within the context of private development schemes. Sugar Law Center's work is based on the principle that residents and citizens can demand accountability and fair representation in matters affecting broad community interests.

Bridgwatch Detroit (BWD) is an unincorporated association formed by residents, community groups, businesses and churches located in southwest Detroit to improve the environment, public health and overall quality of life of families

and stakeholders living near the Ambassador Bridge. Formed in 2003, Bridgeward Detroit was created to respond DIBC's activities detrimental to the quality of life in the neighborhoods surrounding the Ambassador Bridge. Such activities include unacceptable bridge traffic, including truck traffic through local neighborhoods, increased asthma rates among residents, the expropriation of public property, increased blight of buildings and property owned by the DIBC and disregard of local state, and federal environmental and regulatory laws. Bridgeward Detroit formed the "We Have the Right to Breathe" campaign to increase accountability of corporations that don't follow local, state and federal laws and processes. Bridgeward Detroit helps increase awareness through media outreach and education forums. Bridgeward Detroit views the Detroit International Bridge Company's claim that it is a federal instrumentality to be a continuing negative force against the health and well being to the neighborhoods and communities surrounding the Ambassador Bridge.

Friends of Riverside Park is an unincorporated association founded in 2008 to protect historic Riverside Park, located at the base of the Ambassador Bridge. Friends of Riverside Park is a diverse group of concerned citizens, block clubs, sports groups, companies, and others committed to preserving and improving the park's footprint for Detroit's youth. The organization was formed in response to DIBC's actions adversely affecting Riverside Park, the City of Detroit,

and its residents. DIBC's actions in and around Riverside Park have been occurring for over ten (10) years since 2001. Friends of Riverside Park has been directly impacted by DIBC's unauthorized fencing off part of the Park, making it inaccessible for residents who were once able to use it. This action destroyed the softball diamond and basketball court. It intimidated residents through its private security force. Finally, it failed to maintain the Park. For example, it did not cut the grass. Despite these challenges, Friends of Riverside Park has partnered with other community organizations to use the Park as much as possible given the current restrictions and limitations. In February 2012, DIBC was ordered to vacate the Park but has not done so to date.

This diverse group is united in its view that a reversal of the District Court's decision will have a devastating effect on the ability of local governments to enact and enforce local regulatory ordinances, which will have an immediate, negative impact on southwest Detroit and will also have a long term negative impact on other neighborhoods and areas throughout the nation.

Authority to file the instant Amicus Curiae brief is provided in Fed. R. App. Proc. 29(a). *Amici* disclose that counsel for the parties to this case did not author, in whole or in part, any portion of this brief and that no party, no counsel for the parties and no other persons made a monetary contribution to fund the preparation

or submission of the brief. *Amicus Curiae's* counsel authored the instant brief on a pro bono basis.

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SUMMARY OF ARGUMENT

Summary judgment was properly granted to the United States on its cross-claim, which sought both a declaratory judgment that the Detroit International Bridge Company (DIBC) was *not* a federal instrumentality and which sought an injunction prohibiting DIBC from asserting itself to be a federal instrumentality.

DIBC's claim that it is a federal instrumentality is factually and legally incorrect. The federal government lacks the requisite control necessary for the DIBC to claim that it is a federal instrumentality. The U.S. government does not own any part of the DIBC, and does not have a financial stake in its gains or losses. The DIBC is a privately owned and operated company, which was not created by federal statute and it, in no way, represents the federal government when taking action, or failing to take action.

In *City of Detroit v. Ambassador Bridge Co.*, the Michigan State Supreme Court misapplied *Name.Space v. NSI*, 202 F.3d 573 (2d Cir. N.Y., 2000), a case it relied on by the DIBC to argue that it is a limited federal instrumentality. Unlike in *Name.Space*, the U.S. Government has no contract with the DIBC to perform any federal function. The Michigan Supreme Court's analysis was erroneous.

The DIBC performs no functions or operations of the federal government. Operating an international bridge is not in itself a federal function. DIBC does not perform activities such as customs and border patrol. These latter functions are performed by the U.S. Government at the site of the Ambassador Bridge. Courts across the country have held that construction and operation of interstate or international bridges does not imply that the entity doing so is a federal instrumentality.

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INTRODUCTION

By claiming to be a federal instrumentality, the Detroit International Bridge Company (hereafter “DIBC”) has caused continuing and recurring harm to the residents, business owners and community in Southwest Detroit, the City of Detroit, and beyond.

The DIBC has also used its purported federal instrumentality status not only as a shield from liability for its illegal actions, but also as a sword to increase its profits. DIBC’s actions have resulted in a reduction of the quality of life for the residents of the surrounding neighborhoods. For example, it has fenced off Riverside Park, isolated businesses from their customer base, enabled fatal interstate traffic backups, encouraged fleets of commercial trucks to drive through residential neighborhoods, and closed down a part of Fort Street, a major thoroughfare.

DIBC’s actions have thus significantly damaged the community over the past ten (10) years. Many of its actions are premised on DIBC’s false claim that it is a federal instrumentality that is not subject to land use restrictions, permitting requirements, and other state and local regulation.

ARGUMENT

A. THE LACK OF FEDERAL GOVERNMENT CONTROL OVER THE DIBC CONFIRMS THAT THE DIBC IS NOT A FEDERAL INSTRUMENTALITY.

The District Court correctly held that the Detroit International Bridge Company (hereafter “DIBC”) is not a federal instrumentality. DIBC is a private company whose purpose is to generate profit for its owners¹. DIBC attempts to cloak its profit-seeking activities in the robe of serving the government’s interest of facilitating interstate commerce. This Court should see that claim for what it is: an improper attempt by a private entity to unilaterally arrogate to itself the authority, rights and privileges of the federal government.

The Sixth Circuit has promulgated a three-part test in considering whether a private entity constitutes a federal instrumentality. The test examines: (1) the function for which the private entity was established; (2) whether the private entity

¹ The DIBC’s articles of incorporation disclose that the corporation is organized under Michigan Act 284, Public Acts of 1972 and that:

the purpose or purposes for which the corporation is organized is to engage in *any activity* within the purposes for which a corporation may be organized under the business corporation Act of Michigan.

(See Articles of Incorporation, attached as Exhibit 1 to Defendant United States’ Motion for Summary Judgment on “Federal Instrumentality” Status of DIBC (RE #55) (emphasis added).

continues to serve that function, and (3) the extent of the federal control exerted on, and the federal involvement with, the private actor. *United States v. Michigan*, 851 F.2d 803, 806 (6th Cir. Mich., 1988). The third prong of this test is the focus of this section. Due to the federal government's total lack of control over the daily operations of DIBC, this third and crucial prong is not satisfied. DIBC was not created by a federal statute and does not owe its existence to Congress.² Its corporate officers are not appointed by the President of the United States or by any other federal officials. Likewise, government officials do not dictate or control the company's operations. Nor is the company perceived by President, Congress, or any federal agency, to be an extension of the United States government.

In *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. N.Y., 2000) (discussed *supra*), a private entity had a contract with the federal government. The contract required the entity to take certain actions and described the federal control over the private actor:

NSF [the federal agency] has the responsibility for registration services support, support planning, ***oversight, monitoring and evaluation***. NSF will make approvals required under the General Conditions and, where necessary and appropriate, NSF will contact and negotiate with Federal agencies and other national and

² The Ambassador Bridge itself was created in 1921 by the Ambassador Bridge Authorization Act, but does not provide for federal government control or oversight over the entity operating the Ambassador Bridge.

International members of the Internet community to further the efforts of this project.

Pgmedia, Inc. v. Network Solutions, 51 F.Supp.2d 389, 393 (S.D.N.Y. 1999) (citing Id. Art.'s 6(A), 6(B)(1))(emphasis added).

In the present case, there is a total lack of control articulated and relied upon in *Name.Space*, which would establish federal control over DIBC. There is no contractual oversight, monitoring, and evaluation of DIBC activities by the federal government. This rationale in *Name.Space* is consistent with the holding of the District Court herein, in that the third prong of the test, that of control, was not established and thus the federal government lacks sufficient control over DIBC for it to constitute a federal instrumentality.

The United States Supreme Court has rejected arguments that a state government cannot regulate a private corporation's international bridge between the United States and Canada. In *International Bridge Co. vs. New York*, the state required the bridge to include a pathway for vehicles and pedestrians. The Court explained that simply because Congress authorized the construction of the private company's bridge, it did not mean that the state regulatory control over it was precluded, *International Bridge Co. v. New York*, 254 U.S. 126; 41 S. Ct. 56; 65 L.

Ed. 176 (1920). Although this case did not directly address the issue of federal instrumentality, the Court's conclusion that a federally-authorized privately-owned bridge was subject to state and local regulation and taxation presumes that the bridge is not a federal instrumentality and is relevant to the issue of control.

DIBC has argued that its participation in a 2005 federal challenge to reduce border crossing times in Detroit and in Port Huron Michigan by 25% demonstrates that it is a federal instrumentality. However, numerous private and public entities participated in that challenge. Participation alone does not in any way show that DIBC's operations are controlled by the federal government in the ways the Supreme Court has found necessary to constitute a federal instrumentality.

Moreover, the adversarial nature of DIBC's relationship with the federal government shows an overall lack of federal control over DIBC. The nature of DIBC's adversarial relationship with the federal government is illustrated by affidavits of Hala Elgaaly, Administrator of the United States Coast Guard Bridge Program, Donald Melcher, Project Manager with the General Services Administration's Land Ports of Entry Service Center, James Steele, then Administrator of the Michigan Division of the Federal Highway Administration, and Gary Sheaffer, then Acting Director of the Office of Canadian Affairs in the

State Department's Western Hemisphere Bureau. Administrator Elgaaly has sworn that she is unaware of any instance when either she or her staff "stated, implied or suggested" that DIBC holds any federal powers, and that neither she nor her staff ever "delegated or directed DIBC" to act on behalf of the Coast Guard. Elgaaly Aff. ¶ 2. Her affidavit further confirms that the Coast Guard's treatment of DIBC is as a "private entity." *Id.* at ¶ 3.

Mr. Melcher's affidavit similarly outlines the longstanding antagonistic relationship between DIBC and the General Services Administration ("GSA"). He confirmed that DIBC does not represent the interests of GSA and that DIBC has not been delegated and does not exercise federal powers by the Federal Highway Administration. Melcher Aff. ¶ 2. He further affirmed that DIBC and the federal government have adverse interests. Mr. Melcher's affidavit also confirmed that the State Department considers DIBC a private company that has not been delegate any federal authority and which is not an arm of the federal government. *Id.* These affidavits demonstrate that the United States does not consider DIBC to be any sort of appendage of the federal government. DIBC has not cited and no case law has been found where a federal court has ruled that an entity is a federal instrumentality over the objection of the United States government.

B. COURTS HAVE ROUTINELY REJECTED DEFENDANTS' ARGUMENT THAT BRIDGES ARE FEDERAL INSTRUMENTALITIES MERELY BECAUSE THEY ARE AUTHORIZED BY CONGRESS

Interstate and International bridges are authorized the same way through Congress. Congress has the authority to regulate all bridges over navigable waters, regardless of whether the bridge is interstate or international. “The Bridge Act of 1906 sets out, in detail, the conditions and procedure for construction of any bridges that Congress might authorize after March 23, 1906.” *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 48 (5th Cir. Tex, 1966). This power applies “to *all* bridges over navigable waters, and not merely to interstate bridges”. *Automobile Club of New York, Inc. v. Cox*, 592 F.2d 658 (2nd Cir. N.Y. 1979) (emphasis added).

Courts across the country have rejected the argument that interstate bridges are a federal instrumentality merely because they are authorized by the federal government. There are relatively few cases involving the regulation of companies owning or operating international bridges. However, cases involving *interstate* bridges raise identical issues. Such cases should be found dispositive in showing that entities owning interstate and international bridges are not engaged in

interstate commerce and are not federal instrumentalities. Courts have consistently concluded that entities owning or operating bridges crossing different states were not engaged in interstate commerce, as was concluded in *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 294 U.S. 83; 55 S. Ct. 332; 79 L. Ed. 777 (1935). Also see, e.g., *Henderson Bridge Company v. Kentucky*, 166 U.S. 150, 154, 17 S.Ct. 532, 41 L.Ed. 953 (1896) (finding no interference with "interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. **That DIBC is not engaged in interstate commerce further demonstrates that it is not a federal instrumentality. The fact that** business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."); *In re Vicksburg Bridge & Terminal Co.*, 24 F. Supp. 123, 127 (S.D. Miss 1938) ("Operation of the bridge and collection of tolls for the passage of persons and property thereover, is not interstate commerce."); *Arkansas & Memphis R. Bridge & Terminal Co. v. State*, 174 Ark. 420, 425; 295 S. W. 378 (Ark. 1927).

The Ambassador Bridge is hardly unique in being authorized by Congress. In the past century, Congress has also passed Acts authorizing the construction of hundreds of bridges spanning state boundaries. As noted above, courts have held

that entities owning or operating these bridges are not engaged in interstate commerce, such that they are regulated exclusively by the federal government. Therefore, the argument that such entities are federal instrumentalities are even more tenuous. Numerous courts have confirmed that, despite such explicit Congressional authorization, the entities owning or operating these bridges are not federal instrumentalities.

That DIBC is subject to taxation further supports the point that it is not a federal instrumentality. In *Miller v. City of Greenville, Miss.*, 138 F.2d 712 (8th Cir. Ark. 1943), the City of Greenville Mississippi owned a bridge that spanned the Mississippi River and linked Greenville, Mississippi with Chicot, Arkansas. The City of Greenville and other parties brought suit seeking declaratory judgment that it was exempt from state taxation in Arkansas. In that case, Congress had authorized the City of Greenville to construct, maintain and operate a bridge across the Mississippi River. The City was also authorized to set toll charges. The lands for the bridge were acquired under the authority of an act of Congress. Chicot city officials intended to assess taxes on the portion of the bridge which they claimed were within the State of Arkansas.

The plaintiffs argued that the bridge was not subject to taxation on the ground that it was a federal instrumentality. The plaintiffs reasoned that “the city under the Act of Congress had been designated as an agency of the United States and was acting as such in owning and operating the bridge.” *Id.* at 715.

The original version of the Congressional act which authorized the construction of the bridge would have expressly designated it a federal instrumentality. President Franklin D. Roosevelt vetoed the original version, explaining: “I cannot give my approval to this bill, first because I can find no compelling reason for making publicly-owned interstate highway bridges Federal instrumentalities . . .” *Id.* at 717.

The court then found that: “*it does not follow from the mere fact that Congress constitutionally authorized the erection and maintenance of the bridge that Congress created a federal instrumentality not subject to taxation.*” *Id.* at 718 (emphasis added) (citing *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 19 S.Ct. 553, 43 L.Ed. 823 (1899); *City of Louisville v. Babb*, 75 F.2d 162, (7th Cir. Ind. 1935) *cert. denied* 295 U.S. 738; 55 S.Ct. 650; 79 L.Ed. 1686 (1935); *People v. City of St. Louis*, 291 Ill. 600, 126 N.E. 529 (Ill.1920); *Appeal of City of Dubuque Bridge Comm.*, 232 Iowa 112; 5 N.W.2d 334 (1942), *cert. denied*; *City of*

Dubuque Bridge Comm. v. Board of Review for City of Dubuque, 317 U.S. 686, 63 S.Ct. 259, 87 L. Ed.(1942).

The court went on to explain that, “the bridge is not a structure owned or controlled by the government, nor do those in charge of it use or exercise the authority of the United States government in their activities in connection with the bridge in such a way that they could be said to be acting for the government. . . . Moreover from the history of the contemporaneous legislation surrounding the authorization of such bridges, it is clear that Congress did not intend that the bridge should be deemed a federal instrumentality.” *Id.* at 718.

Other courts addressing this issue have come to similar conclusions. One such court issued a similar decision in *Appeal of Dubuque Bridge Commission*, 232 Iowa 112, 5 NW2d 334 (1942). There, Congress had passed an Act in 1939 creating the City of Dubuque Bridge Commission, and authorized it to construct an interstate bridge from Iowa to Illinois. The commission argued that it was a federal instrumentality. The court rejected this argument, stating:

Appellant argues as to the constitutionality of the act creating the City of Dubuque Bridge Commission as a constitutional exercise of congressional power. We have no doubt that this was a constitutional exercise of a power of Congress, but the conclusion drawn by appellant that Congress, having constitutionally created the corporation such as the one in question, has created a federal instrumentality not subject to

state tax, does not necessarily follow.

Appeal of Dubuque Bridge Commission, supra, at 118. The court wrote further, “the Dubuque Bridge Commission is not a corporation which the United States owns and controls. The bridge is not a government-owned structure.” *Id.* at 120.

Another court reached the same conclusion in *Columbia River Bridge Co. v. State*, 46 Wn.2d 385, 282 P.2d 283 (Wash. 1955). In that case, the plaintiff was a private corporation that had received approval through an Act of Congress to build an interstate bridge between Washington and Oregon. The company asserted that this authorization transformed it into a federal instrumentality. The court disagreed, stating:

The reason why authority of Congress to build the bridge is not a Federal franchise, which grants immunity from state taxation, is because it does not make the respondent an agent of the Federal government, nor convert the bridge into a Federal instrumentality for the accomplishment of a governmental function.

Id. at 390.

In *Miller*, *Dubuque*, and *Columbia River Bridge*, there was a finding of no federal instrumentality. Courts have only found a federal instrumentality *where Congress has expressly provided* that a bridge company will be a federal

instrumentality. This was the case in *State ex rel. Cairo Bridge Com'n v. Mitchell*, 352 Mo. 1136; 181 S.W.2d 496 (Mo. 1944). In *Cairo*, the relevant act of Congress created the Cairo Bridge Commission (the "Commission") "to construct, maintain and operate a bridge and approaches across the Ohio River at or near the City of Cairo, Illinois; and to purchase, maintain and operate ferries across the Ohio and/or Mississippi Rivers within ten miles of the location selected for the bridge." *Id.* at 1139. The Act further provided that,

The bridge constructed under the authority of this Act *shall be deemed to be an instrumentality for interstate commerce, the Postal Service, and military and other purposes authorized by the Government of the United States*, and said bridge and ferry or ferries and the bonds issued in connection therewith and the income derived therefrom shall be exempt from all Federal, State, municipal and location taxation.

Id. at 1140 (emphasis added). The parties agreed that this express designation of a federal instrumentality created a federal instrumentality. The *Cairo* court contrasted this case from *Miller*, explaining that in *Miller*, the "Federal government did not finance, build, own and operate the Greenville bridge through an agency such as the realtor Bridge Commission. The Act [providing authorization to build a bridge in *Miller*] was a short, one page statute, which merely *authorized* the City of

Greenville to construct it . . . It did not say the bridge should be a federal instrumentality.” *Id.* at 1146 (emphasis in original).

The case at bar is analogous to the *Miller* case and is distinguishable from *Cairo*. In *Cairo*, Congress expressly stated that the Commission would be a federal instrumentality, while in *Miller*, Congress did no more than authorize its construction, operation, and maintenance. In *Miller*, the court found that Congressional authorization for the erection and maintenance of a bridge did not create a federal instrumentality, especially when supported by evidence that the federal government did not wish to create a federal instrumentality. Because Bridge Act does not distinguish between the scope of Congress’ power to regulate interstate bridges over navigable waters from its authority to regulate international bridges over navigable waters, and courts have rejected the argument that interstate bridges are federal instrumentalities simply because they are authorized by the federal government, it follows that international bridges over navigable waters are likewise not federal instrumentalities merely because they are authorized by the federal government.

Based upon the foregoing analysis, because Congress did not expressly declare DIBC to be a federal instrumentality, it cannot be deemed a federal

instrumentality and DIBC cannot unilaterally claim federal instrumentality status simply because the construction of the bridge (but not the creation of DIBC) was authorized by Congress.

C. THE MICHIGAN SUPREME COURT, IN *CITY OF DETROIT V. AMBASSADOR BRIDGE CO.*, MISAPPLIED *NAME.SPACE, INC. AS TO DIBC*, IN HOLDING THAT DIBC IS A LIMITED FEDERAL INSTRUMENTALITY.

In 2008, the Michigan Supreme Court erroneously held that DIBC was a limited federal instrumentality largely based on a case titled *Name.Space, Inc. v. Network Solutions, Inc.* The Court, interpreting federal law, misapplied this case to the facts related to the level of control the federal government has over DIBC's activities. **While state supreme courts are the expert tribunals on questions of state law, it is federal courts that are the expert tribunals on questions of federal law.**

1. Summary of *Name.Space*

In *Name.Space*, Network Solutions Inc. (NSI) had previously entered into an agreement (the "Cooperative Agreement") with the Commerce Department, which required NSI to request written direction from an authorized Commerce Department official before making any changes to a root zone file. The Cooperative Agreement provided, in part, that NSI:

has primary responsibility for ensuring the quality, timeliness and effective management of the registration services provided under this agreement. To the extent that NSF does not reserve specific responsibility for accomplishing the purposes of this Agreement, by either special condition or general condition of the Agreement, all such responsibilities will remain with [NSI].

Pgmedia, Inc. 51 F.Supp 2d at 393 (citing *Id.* Art.'s 6(A)).

Name.Space, Inc. subsequently sought to have NSI amend a master root zone, which would enable it to register universally accepted domain names. NSI argued that it lacked authority to grant the request. Name.Space then filed a federal antitrust action against NSI alleging that NSI had abused its monopoly power over the domain name registration system to maintain control of the root zone file. The district court held that based upon the federal instrumentality doctrine, “NSI is entitled to antitrust immunity for its actions taken pursuant to the Cooperative Agreement.” *Pgmedia, Inc.*, 51 F.Supp.2d at 406.

The court further found that under the federal instrumentality doctrine, “the scope of the immunity conferred as a result of being a federal instrumentality is ... equivalent to that enjoyed by the United States itself.” *Id.* The 6th Circuit Court of Appeals declined to apply broad immunity solely based on a private entity’s status as a federal instrumentality. The court reasoned that “NSI’s mere status as a government contractor does not entitle it to be implied antitrust immunity for all its

conduct. Instead, looking to “the nature of the activity challenged, rather than the identity of the defendant,” the court applied a conduct-based test. *Id.* (citing *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 58-59; 105 S. Ct. 1721; 85 L. Ed. 2d 36 (1985)). The court then found that NSI was entitled to immunity for refusing to amend the master root zone. *Name.Space*, 202 F.3d at 582. In that case, antitrust immunity was appropriate since it “was compelled by the explicit terms of NSI’s agreement with a government agency.” *Id.* The court made clear that it declined “to take any position with respect to NSI’s immunity for any other past, present or future conduct.” *Id.* at 582 n 8.

The court in *Name.Space*, in citing *Southern Motor Carriers* (a state action immunity case) in support of its focus on the type of activity challenged rather than the identity of the defendant, was careful to distinguish *Southern Motor Carriers* from *Name.Space* on the basis of “(i) considerations of federalism are not implicated where the federal government is involved; and (ii) *this case does not involve the state regulation of a private entity, but rather a contractual relationship with the federal government in furtherance of a governmental policy.*” *Id.* at 582 n 7 (emphasis added).

2. The Michigan Supreme Court’s Analysis and Holding

The Michigan Supreme Court, in *City of Detroit v. Ambassador Bridge Co.*, applied the conduct-based test in *Name.Space* without considering the nature and scope of the contractual relationship between the private entity and the federal government. The Michigan Supreme Court failed to recognize that, unlike in *Name.Space*, DIBC has no contractual relationship with the federal government in furtherance of a governmental policy.

The Michigan Supreme Court dealt with this issue by merely concluding that “[w]e acknowledge that the court in *Name.Space* was dealing with the slightly different issue of governmental immunity from antitrust suits.” *City of Detroit v. Ambassador Bridge Co.*, 481 Mich. 29, 40; 748 NW2d 221 (Mich. 2008). This fails to address the fact that the Court applied a test articulated for analysis of contractual relationships with the federal to a case involving state regulation of a private entity, a difference the court in *Name.Space* expressly distinguished.

Moreover, the Michigan Supreme Court, in holding that “like the instrumentality in *Name.Space*, the DIBC has conduct-based immunity which applies only to its conduct that furthers its federal purpose . . . the DIBC has immunity for its conduct in the operation and maintenance of the Ambassador Bridge” (*City of Detroit*, 481 Mich. at 47) expands the *Name.Space* holding. The

court in *Name.Space* was careful to limit the scope of NSI's federal instrumentality immunity to the specific conduct compelled by the express terms of the contract and declined take a position as to NSI's immunity for any other past, present or future conduct. *Id.* at 582 n 8. Other courts that have addressed the issue of the scope of a limited federal instrumentality have also found that the characterization of an entity as a federal instrumentality in one context does not characterize the entity as a federal instrumentality in other contexts. *See United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 1385 (1982) ("If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs.").

The Michigan Supreme Court, however, extended DIBC's federal instrumentality immunity to any conduct "in the operation and maintenance of the Ambassador Bridge," (*City of Detroit*, 481 Mich at 47), which goes beyond the specific conduct complained of in the case and potentially includes present and future conduct. The Michigan Supreme Court, in failing to limit the federal instrumentality status to the specific conduct compelled by the express terms of the

Congressional authorization, drastically eviscerated the concept of a *limited* federal instrumentality.

Unlike the instrumentality in *Name.Space*, which had express direction from the federal government to perform the challenged functions, DIBC has been no such express direction. Instead of an executed contract articulating the express conduct to be performed by DIBC, DIBC may look only to a Congressional *authorization* to construct, maintain and operate the Ambassador Bridge and its approaches. Ambassador Bridge Authorization Act, PL 66-395, 41 Stat 1439. The *Name.Space* case is irrelevant to the issue of whether DIBC is a federal instrumentality for the purposes of preemption of local regulation, as it involved an antitrust challenge and questions of immunity for a federal instrumentality acting under contract with the federal agency. The Michigan Supreme Court misapplied *Name.Space* by extending its holding to a preemption case, despite the fact that the court in *Name.Space* clearly distinguished such cases. (*See, eg. Name.Space, Inc.* 202 F.3d at 582 n7). Accordingly, it is clear that the Michigan Supreme Court misread *Name.Space*, and its reliance on said case was clear error.

CONCLUSION

These amici are concerned that the decision below, if reversed, will be a damaging precedent harmful to the State and its residents. The community-based amici are concerned about the immediate adverse impact that a court decision stripping the State and its municipalities of their police power would have on residents' daily lives. The Court cannot take away well-established police powers, such as zoning, building code enforcement and urban traffic management, without leaving the community open to oppression and abuse, and allowing the private business entity running the bridge to profit from displacing and externalizing costs of its business on to the public.

What is more, the adverse affects such a decision would have would ultimately not be restricted solely to Southwest Detroit. There are two other cities in Michigan that could be negatively impacted. The bridges that provide international border crossings at Port Huron and Sault Ste. Marie would leave those cities subject to unfettered bridge owners to do as they like, should those bridges be turned over to private hands.

Additionally, if the possibility of a private bridge in Wayne County goes ahead, the affects of a decision reversing the District Court would blunt exercise of

the police power there too. Because all bridges could share the claim to interstate commerce, if all that need be involved is "managing and facilitating the timely and efficient flow of vehicular traffic" (App. 483a), their operators would all be freed from state regulation. This is the pressing state-wide concern of the Michigan Municipal League. This was never the intended reach of federal immunization where there is not the barest whisper by Congress that this is its intent.

REQUEST FOR RELIEF

For all these reasons, as well as those stated in the United States' brief, the District Court's decision should be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing Amicus Curiae brief is:

Proportionally spaced, has a typeface of 14 points or more and contains words.

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