

In the State of Michigan  
Michigan Supreme Court

Appeal from the Court of Appeals  
Hoekstra, Wilder, and Zahra

CITY OF DETROIT, A MUNICIPAL CORPORATION,	)	Supreme Court No. 132329
Plaintiff-Appellee,	)	Court of Appeals No. 257415
	)	Circuit Court No. 01-106546
v.	)	
	)	
AMBASSADOR BRIDGE COMPANY	)	
A/K/A, DETROIT INTERNATIONAL	)	
BRIDGE COMPANY, <i>ET AL.</i> ,	)	
Defendants-Appellants.	)	

**BRIEF FOR APPELLANT  
AMBASSADOR BRIDGE COMPANY**

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF JURISDICTION**

On March 30, 2007, this Court granted Appellant Detroit International Bridge Company's (DIBC's) application for leave to appeal the September 14, 2006 judgment of the Court of Appeals. Jurisdiction is conferred pursuant to MCR 7.301(A)(2).

On June 1, 2007, the City of Detroit moved to dismiss the appeal as moot. On June 8, 2007, DIBC filed a written opposition. That motion remains pending.

## STATEMENT OF ISSUES INVOLVED

1. Whether the City of Detroit is preempted from issuing and enforcing zoning ordinances that interfere with the flow of commerce over an international bridge?

The trial court answered: “Yes”

The Court of Appeals answered: “No”

Appellant answers: “Yes”

2. Whether the trial court reasonably found that the owner of an international bridge is a federal instrumentality to the extent that it is involved in managing and facilitating the timely and efficient flow of vehicle traffic in and out of the bridge complex?

The trial court answered: “Yes”

The Court of Appeals answered: “No”

Appellant answers: “Yes”

## PRELIMINARY STATEMENT

This case concerns the City of Detroit's attempt to veto a federally-approved project designed to facilitate the flow of commerce over an international bridge. In 2000, Appellant Detroit International Bridge Company ("DIBC") sought approval from federal customs authorities to make infrastructure changes within the federal compound adjacent to the Ambassador Bridge. This compound is exhaustively regulated by federal authorities for border enforcement and immigration purposes. The purpose of DIBC's project was to reduce traffic delays flowing over the bridge from Canada and to secure border infrastructure. Federal authorities approved the project.

The City of Detroit ("City") objected. It sought to impose an additional regulatory layer upon this federally-approved project, with a potential 2-year application process. The City's objection was driven by concerns of some local residents that the change in traffic flow from the project would threaten their neighborhood with noise and pollution. The City never conducted a study to verify these concerns, nor did the residents. In refusing a zoning permit, the City sought to promote the parochial interests of a few local residents to the detriment of foreign commerce, including U.S. businesses dependant on trade with Canada.

The City brought this action to enjoin the project. Following a four-week bench trial, the Circuit Court ruled that DIBC was immune from the City's zoning

regulation “[o]n the unique facts of this case.” (App. 483a). The court emphasized the Ambassador Bridge “was created for the purpose of facilitating the flow of both interstate and international commerce,” (App. 477a), and that the City’s actions here “interfere[d]” with that objective. (App. 484a). The Court of Appeals reversed. It found that federal law did not preempt the City’s actions and that DIBC was not a federal instrumentality immune from local regulation. It did not address the interstate or foreign commerce burdens. This Court subsequently granted DIBC’s request for leave to appeal.

## **STATEMENT OF FACTS**

### **A. The Ambassador Bridge and Plaza**

The Ambassador Bridge connects the United States with Canada. It was built in 1929, and today is the busiest international border crossing in North America for trade purposes. The Ambassador Bridge has been essential to the international trading relationship between the United States and Canada.

The Bridge has a dual public and private character that makes it unlike any other. The Ambassador Bridge is privately owned and operated by DIBC, but its purpose is “inherently public.” *Detroit Int’l Bridge Co v American Seed Co*, 249 Mich 289, 299; 228 NW 791, 795 (1930). Congress granted consent to “construct, maintain, and operate” the “bridge and approaches thereto,” pursuant to its powers under the Commerce Clause (US Const Art I, §8, cl 3). Ambassador Bridge

Authorization Act, Ch 167, 41 Stat. 1439 (1921). The federal purpose was to facilitate international commerce. (Trial Court Opinion, App. 471; Court of Appeals Opinion, App. 494a). No modification of the Bridge itself or accessory works is permitted, without prior approval from the Secretary of Homeland Security, acting through the U.S. Coast Guard. *See* 33 USC 491.

All vehicles traveling from Canada arrive at the port of entry's inspection compound, which is an enclosed area. The land within the inspection compound at the foot of the bridge, through which the approaches to the Bridge run, is functionally part of the Bridge. "The bridge and its approaches form one structure" and combined constitute "one uninterrupted public road." *Detroit Int'l Bridge*, 249 Mich at 295; 228 NW at 793. An aerial photo of the inspection compound is included in the Appendix at 10a.

Federal authorities operate in the inspection compound. Those agencies include U.S. Customs and Border Protection ("Customs"), the General Services Administration ("GSA"), the Immigration Customs and Enforcement ("ICE"), and the U.S. Department of Agriculture. (App. 474a). They are present to enforce a variety of federal laws and regulations relating to border control and security. (App. 477a-478a). Customs inspects all vehicles and persons wishing to enter the United States. 19 CFR § 123.1. GSA representative Donald Melcher stated that

the inspection compound can be considered “in a broad sense” to be an instrument of federal policy and regulation. (App. 160a).

Certain parcels of the land in the inspection compound are owned by the U.S. Government and other parcels by DIBC, and some buildings are located on both Government and DIBC-owned property. The Circuit Court thus found as follows:

The federal officials occupy facilities in some instances owned outright by the Federal government, and in some instances, leased from DIBC. The cargo inspection facility (CIF) is located on property owned by both the federal government and the DIBC. Some buildings even straddle federally owned and DIBC owned property. For example, the building at the CIF, which houses Customs, INS, FDA, Department of Agriculture and other federal officials along with private customs brokers, is located on parcels owned by both the federal government and the DIBC. Not only has the federal government built on DIBC property, but DIBC has, with license approval from the General Services Administration, constructed certain facilities on GSA-owned land.

(App. 476a-477a).

As with any port of entry, the federal government exercises exhaustive control within the inspection compound. (App. 474a; Melcher Testimony, App. 144a). The compound is designed to provide for a controlled entry into the United States. It is maintained as a sterile area separated from adjacent property by barbed wire-topped fencing, masonry walls, or both. (App. 145a). From the time a vehicle enters the compound until its departure, it is subject to supervision and control by federal authorities. Uniformed, armed federal officers patrol the

compound in order to maintain its security. (App. 31a; 475a). The federal government exercises this control because of its obligation to manage and safeguard the U.S. border and Customs operations. As the trial court found, “[a]ccess to this entire area is clearly restricted for the primary purpose of protecting and maintaining the integrity and security of border crossing.” (App. 474a).

DIBC operates within the inspection compound (e.g., collecting tolls), but it too is subject to directives from federal authorities. (App. 475a-476a). DIBC employees are required to account for their presence at all times, and must check out with Customs when leaving the compound. (App. 475a). DIBC must arrange the facilities within the compound to accommodate the sequence of inspection for each vehicle required by Customs. (App. 475a). DIBC also seeks federal approval for construction or improvements on its own property. Any such changes must assure that federal policies and security concerns are satisfied.

One example of federal control is the “return lane” project. In the early 1990s, Customs had requested that DIBC construct a “return lane” so that vehicles denied entry into the United States could go back to Canada without leaving the compound. In order to comply, DIBC had to build part of the road on its land. (Stamper Testimony, App. 203a-204a). Although it was improving its own property at the federal government’s behest, DIBC still had to get approval from

Customs for the construction itself and get a license from GSA to build on government land. (App. 206a). The federal government did not require DIBC to apply for zoning permit from the City, and the City did not enforce its zoning laws to this project. (*Id.*) Thus, the Circuit Court observed that DIBC is “to a large extent under the control of the various federal agencies that are also present in the complex.” (App. 472a).

### **B. Traffic Delays and Congestion on the Bridge**

DIBC is responsible for facilitating the efficient and timely flow of traffic using the Bridge. (App. 478a). The volume of such traffic is extraordinary. The Bridge operates 24 hours a day, seven days a week. It carries about 9,000 trucks and 24,000 cars each day. (*See* App. 92a-93a). The Bridge is the main trade artery for Canada and the United States, carrying more than 25 percent of the trade between the two countries. (App. 62a). Every day, trucks carrying \$300 million worth of goods cross its span. (App. 58a; 87a). Canadian prime ministers and American presidents have acknowledged the Bridge’s importance to bilateral trade and mutual understanding. (App. 60a-61a).

In recent years, the Ambassador Bridge has been plagued by serious traffic delays that adversely impact the economies on both sides of the Bridge. (App. 479a). By October 2000, traffic back-ups occurred almost every day and the queue of vehicles extended for up to four miles from the U.S. inspection facility.

(Stamper Affidavit, App. 111a). The back-ups were caused by a variety of factors. These include increased traffic due to NAFTA, which loosened regulatory barriers to U.S./Canada trade; insufficient number of Customs inspection points; insufficient number of toll booths; cars and trucks using the same toll booths; trucks required to use a single lane; and vehicular problems. (Melcher Testimony, App. 122a; 126a).

Businesses on both sides of the Bridge also suffered. For instance, border congestion was driving up costs for Michigan car manufacturers. If a truck gets stuck on the Bridge and is late with a delivery of parts to a General Motors plant, the company has to pay for idle workers who wait for the shipment and then overtime to make sure that someone is available to unload the last shipment in the backlog. (App. 227a-228a; 230a-231a; 239a). If a truck is more than 60 minutes late with a critical part, such as seats for the cars being manufactured, it can cost the company between \$500 and \$1500 for every minute the assembly line has to be shut down. (App. 236a). The trial court concluded it was reasonable to assume that other businesses would face similar losses. (App. 480a). Delays became so bad that GM's production control and logistics center started sending voice mails to all GM assembly plants throughout the United States and Canada warning them about the Ambassador Bridge and telling them to take necessary precautions. (App. 235a-236a).

**C. DIBC Proposes to Relocate Toll Booths and Duty Free Store to Free Up Necessary Space In the Plaza**

To address the border congestion problems, in 1999, DIBC proposed making infrastructure improvements pertaining to internal operations in the inspection compound. The planned improvements included constructing new toll booths for cars and trucks, and reconfiguring the compound's gas station in order to improve traffic flow through the compound. (Stamper Affidavit, App. 111a, App. 314a). The objective was to relocate the toll booths to free up necessary plaza space and eliminate the backup of commercial trucks onto the plaza and connecting roadway.

Federal authorities exerted preemptive control over the project. At GSA's request, DIBC sought approval from federal authorities because this project dealt with border infrastructure. When DIBC relayed its intentions to position the toll booths in the primary inspection area, Customs sent DIBC a letter warning that it "cannot authorize the relocation of these toll booths until we have had the opportunity to thoroughly review your detailed proposal and related site plans." (Melcher, June 2, 2000 letter, App. 35a). Customs also advised DIBC that it "will need other affected Federal agencies to review your toll both relocation proposal for potential impact on their operations at the Ambassador Bridge." (*Id.*).

When DIBC clarified that the toll booths would be on DIBC-owned land, Customs still refused to relinquish control over the project. According to Customs, "[t]he Government asserts that it has an interest in this property because of its

obligation to safeguard U.S. Customs operations . . . .” (Malkin, July 11, 2000 Letter, App. 45a). Thus, Customs advised DIBC that it would “take whatever actions that we had to . . . to prevent those booths from going up” unless it had full access to the plans and was included in “thorough” discussions about implementation. (*Id.*).

After months of negotiations, DIBC deferred to Customs’ opinion that the proposed relocation of the toll booths would interfere with its mission. DIBC and GSA agreed that the toll booths would be built “at a point after trucks pass through U.S. Customs.” (Stamper-Whitlock January 17, 2001 Letter, App. 96a).

#### **D. The City Denies Permission To Relocate the Toll Booths**

As early as August 2000, DIBC consulted with the City on this project. (Stamper Affidavit, App. 110a). On February 14, 2001, the City denied permission to construct the toll booths because they were deemed to be a violation of the Detroit zoning ordinances. (App. 294a-308a). The Board of Zoning Appeals (“BZA”) denied DIBC’s request for a variance on June 4, 2001 because it determined that increased noise and pollution would be detrimental to the neighboring community. (App. 298a; 300a-301a; 303a-304a). The BZA apparently did not take into account the interests of U.S. foreign commerce using the Bridge. The City therefore purported to undo the arrangements that DIBC had carefully worked out with the federal government to meet the latter’s requirements.

In January 2001, DIBC applied for building permits for three projects at issue in this litigation: 1) construction of additional toll booths for cars; 2) expansion of the duty-free gas station on the compound; and 3) construction of additional toll booths for trucks and a truck weigh station. (Carter, Trial Testimony App. 290a; App. 445a.) Three weeks later, on January 25, 2001, DIBC began construction. The parties agree that DIBC started construction without building permits from the City, although the reasons and justifications for DIBC's action remain hotly contested. The day after DIBC began construction, a city building inspector, David Shockley, visited the site. (App. 101a). He issued tickets for non-compliance with permitting regulations and stop work orders. (App. 101a-102a).

On or about August 2001, DIBC completed its work on the project. The various construction projects have provided for much improved traffic conditions on the Bridge, particularly with respect to traffic entering the United States. As a result, traffic backups have been reduced.

#### **E. The City's Complaint**

On February 26, 2001, the City filed a verified complaint for a Preliminary and Permanent Injunction, alleging that DIBC was building without the requisite permits and violating Detroit's zoning laws. (App. 100a-108a). The City insisted that it had zoning authority because the project was on "privately-owned property"

within the inspection compound. (Trial Court Opinion, App. 483a). The parties filed cross motions for summary disposition, but the Circuit Court denied them on the ground that “there were disputed factual issues which required trial.” (App. 469a). The Circuit Court proceeded to hold a bench trial that lasted four weeks, from May 7, 2001 through June 5, 2001.

During the multiple days of hearings, the court heard extensive testimony on the international nature of the Ambassador Bridge and the problems caused by the traffic backups. The testimony also covered the degree of federal control over DIBC’s activities in the inspection compound and DIBC’s efforts to relieve traffic congestion on the Bridge.

#### **F. The Rulings Below**

On July 12, 2001, the Circuit Court ruled from the bench that DIBC was acting as a federal instrumentality for purposes of managing and facilitating the flow of vehicle traffic in the sterile zone, and therefore was immune from the City’s regulation. (Bench Opinion, App. 447a-467a). The Court informed the parties that it would prepare a written decision. Following the tragic events of 9/11, the Circuit Court held a status hearing to inquire whether the increased security concerns might impact the parties’ respective positions. (App. 470a). At the Court’s suggestion, the parties engaged in lengthy settlement negotiations but could not resolve their differences. (App. 3a; 470a).

On July 24, 2004, the Circuit Court issued a 20-page written decision awarding judgment for DIBC and against the City. “On the unique facts of this case, . . . DIBC must be considered a federal instrumentality to the extent that it is involved in managing and facilitating the timely and efficient flow of vehicular traffic in and out of the bridge complex.” (App. 483a). The Court also held that the City’s application of its zoning code was preempted by federal law. (App. 485a).

The Circuit Court’s decision contained numerous findings of fact. As most relevant, the Court found:

(1) the Bridge was created for the purpose of facilitating the flow of both interstate and international commerce (App. 477a);

(2) federal authorities exercise “a strong and substantial control . . . within the Bridge complex” (App. 474a);

(3) traffic backups had a “significant role . . . in the flow of international commerce” and cost U.S. and Canadian businesses money (App. 479a-480a);

(4) “DIBC’s proposed construction will have a positive impact on traffic flow and reduce delays for traffic at the bridge” (App. 481a); and

(5) the City’s actions in refusing zoning approval for this project “interfer[ed] with international and interstate commerce.” (App. 484a).

The Court of Appeals reversed. *Detroit Int'l Bridge Co v. Detroit*, \_\_\_ Mich App \_\_\_; \_\_\_ NW 2d \_\_\_; 2006 WL 2639520 (App. 487a-501a). The Court disagreed that DIBC's operations were so imbedded with the federal government's mission that it was a federal instrumentality. (App. 494a-495a). The Court further held that federal law did not preempt the field of the City's zoning regulations. (App. 496a). The Court remanded the case to consider the zoning issues raised by the City as they were no longer moot. (App. 500a-501a). In its opinion, the Court never addressed the burdens imposed on foreign commerce by the application of local zoning or other laws.

On March 30, 2007, this Court granted DIBC's application for leave to appeal. (App. 8a). The Court directed that "the parties shall include among the issues to be briefed whether [DIBC] is a federal instrumentality and whether federal law preempts application of the City of Detroit's zoning ordinances to construction projects within the 'sterile zone' enclosure of the bridge complex."

### **STANDARD OF REVIEW**

This Court applies the same standard as the Court of Appeals in reviewing a Circuit Court's grant of injunctive relief. The Circuit Court's legal conclusions are reviewed *de novo*. See *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553, 559 (2006). Its findings of fact are reviewed for clear error. See MCR 2.613(C); see also *Maine v Taylor*, 477 US 131, 145 & n.17; 106 S Ct

2440, 2451; 91 L Ed 2d 110, 125 (1986) (“[N]o broader review [of factual findings] is authorized here simply because this is a constitutional case . . .”). A finding is clearly erroneous only if “the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made.” *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

### **SUMMARY OF ARGUMENT**

DIBC’s conduct in this proceeding was directed to constructing facilities, with federal agency oversight and approval, designed to enhance the efficient flow of the huge volume of U.S.-Canada trade that daily crosses the Ambassador Bridge and traverses through the secure inspection compound at the base of the Bridge. The City’s application of its zoning ordinance, by contrast, would have caused much of that foreign commerce to be impeded since it would have prevented DIBC from taking essential steps to relieve the significant delays experienced by traffic crossing the Bridge from Canada to the United States.

This Court should find that the City has no authority to so interfere with foreign commerce in the setting of this case. First, the City’s application of its zoning ordinance is preempted by the federal government’s exclusive role in managing and securing the borders of the nation and in controlling activities within the federal inspection compound at the base of the Bridge. Customs, working with GSA, reviewed and approved DIBC’s plans for constructing facilities that were

designed to improve traffic flow. In asserting the ability to apply its zoning laws to effectively countermand what federal agencies had approved, the City purported to exercise powers that the Circuit Court found were preempted. This Court should affirm that determination.

Second, the City's actions intrude on foreign commerce and are thus preempted by the Foreign Commerce Clause, which constrains local authority to impair U.S.-Canada traffic. If the City could use its zoning power to prevent DIBC from constructing facilities intended to improve and facilitate traffic flow from Canada, then what is to stop it from asserting authority to stop that traffic from moving through the inspection plaza altogether? What would stop it from making the Bridge so inefficient that traffic would effectively be diverted to other crossings? This is not authority that the City could rightfully exercise under the Commerce Clause. Indeed, the City's actions, if upheld, could have interfered not only with foreign commerce, but also with our nation's relations with Canada, a major trading partner with the United States, and with the economy of the State of Michigan and other states dependent on the cargo that crosses the Ambassador Bridge.

Finally, the Court of Appeals erred in holding that DIBC was not a federal instrumentality. The Court should have applied a conduct-based test to uphold the Circuit Court's determination that the DIBC fulfills a federal role in connection

with its activities within the federal inspection compound. As such, DIBC is clearly an instrumentality for the purposes relevant to this case: facilitating the foreign commerce that crosses the Bridge and traverses through the inspection compound. DIBC coordinates its activities closely with federal inspection and other agencies that operate at the inspection compound and in doing so acts as an instrumentality of foreign commerce, a status which the Circuit Court properly found exempts it from the local zoning ordinance.

## ARGUMENT

### I. The City's Actions Violate the Supremacy Clause and Commerce Clause

#### A. The City's Actions Are Preempted by Federal Law

##### 1. The Criteria for Conflict Preemption

Under the Supremacy Clause (US Const, art VI cl 2), Congress has the power to preempt state law. The U.S. Supreme Court has delineated three categories for federal preemption – express preemption and two forms of implied preemption – field and conflict preemption. Such categories are only “terminology” and are not “rigidly distinct.” *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 373 n.6; 120 S Ct 2288, 2294 n.6; 147 L Ed 2d 352, 361 n.6 (2000) (citation omitted); *Geier v American Honda Motor Co*, 529 US 861, 873-74; 120 S Ct 1913, 1921; 146 L Ed 2d 914 (2000). Municipal ordinances are analyzed in the same way as state laws. *Hillsborough Co v Automated Medical Laboratories, Inc*, 471 US 707, 712-13 & n.1; 105 S Ct 2371, 2375; 85 L Ed 2d 714 (1985).

Under conflict preemption principles, state law is preempted to the extent of any actual conflict with federal law. *Crosby*, 530 US at 372; 120 S Ct at 2294; 147 L Ed 2d at 361. Such a conflict may be found in either of two situations: when it is impossible to comply with both state and federal law, or where the state law

stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Geier*, 529 US at 873-74; 120 S Ct 1913 at 1921; 146 L Ed 2d 913.

“[C]onflict pre-emption . . . turns on the identification of ‘actual conflict,’ and not on an express statement of pre-emptive intent.” *Id.* at 884; 120 S Ct at 1927; 146 L Ed 2d at 934. Thus, conflict preemption may arise from interference with a federal program, even where there is no formal statutory or administrative statement to that effect. *See id.* at 884-85; 120 S Ct at 1927; 146 L Ed 2d at 934. (“[O]ne can assume that Congress or an agency ordinarily would not intend to permit a significant conflict.”).

## **2. The City’s Actions Conflict with the Federal Regulatory Goals of Facilitating Interstate and International Commerce**

This case merits a finding of conflict preemption because of its unique facts. Each of these facts were found by the Circuit Court. Each finding is supported by the record.

First, Congress authorized the construction, operation and maintenance of the Ambassador Bridge for the purpose of facilitating the flow of international commerce.<sup>1</sup> The Circuit Court made numerous findings in this respect. “There

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<sup>1</sup> The Act of March 4, 1921 provides: “The consent of Congress is hereby granted to American Transit Company, its successors and assigns to construct maintain and operate a bridge and approaches thereto across the Detroit River . . . .” 66 Cong Ch 167, 41 Stat 1439 (Mar. 4, 1921). The permission was made subject to the Federal Bridge Act of March 23, 1906. 33 USC 491-498. The

can be little dispute and the Court concludes that the bridge was constructed for the purpose of facilitating interstate and international commerce.” (App. 471a).

“There are numerous federal purposes and objectives achieved by operation of the bridge. It seems obvious that the bridge was created for the purpose of facilitating the flow of interstate and international commerce; that is to allow people and goods to travel across it.” (App. 477a). The City did not challenge any of these findings in its appeal. Indeed, the Court of Appeals adopted this aspect of the Circuit Court’s ruling: “we agree with the circuit court that the *Bridge* was constructed to facilitate interstate and international commerce . . . .” (App. 494a).

Second, the City’s actions here create an obstacle to the federal objective. As the Circuit Court found, the State’s actions “interfere with international and interstate commerce.” (App. 484a). The Circuit Court made other findings on this point too: “Application or enforcement of the City of Detroit’s zoning ordinance to property within the enclosed bridge complex . . . conflicts with and has the effect of interfering with the performance by DIBC of its Federal function to facilitate and manage the flow of traffic in interstate and international commerce.” (App. 470a-471a). “[A]pplication of such requirements would conflict with the

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Act in turn prohibited any subsequent modifications to the bridge or approaches without prior approval from the Secretary of Transportation (subsequently amended to transfer this authority to the Secretary of Homeland Security), whose authority is delegated to the U.S. Coast Guard *See* 33 USC 491. In 1933, DIBC succeeded the American Transit Company as the owner of the Ambassador Bridge.

exercise of the important federal purpose of facilitating the flow of international/interstate commerce.” (App. 483a).

There is record evidence supporting these findings. DIBC presented video tape evidence and testimony showing that truck backups were causing acute problems with the flow of traffic from Canada. (Stamper Testimony, App. 328a-330a). Indeed, truck lines at the Ambassador Bridge stretched for miles. DIBC’s witnesses explained in detail why DIBC’s proposed relocation of the toll booths would have a positive impact on traffic flow and reduce delays for traffic at the Bridge. (Trial Court Opinion, App. 481a; Stamper, 339a-351a).<sup>2</sup> DIBC’s witnesses testified that the City’s application process ordinarily takes up to two years to complete. (App. 288a). The City’s zoning review does not take into account the interests of foreign commerce or U.S. business. By seeking to promote parochial interests without regard to the foreign commerce consequences, the City’s actions constituted an unreasonable impediment to the expeditious implementation of federally-approved improvements to the inspection plaza.

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<sup>2</sup> The Circuit Court explained, “[w]hile the impact may not be as great as other measures, the Court is satisfied that these projects will contribute in a positive way to reduce traffic delays at the bridge.” (App. 481a-482a).

Because there is evidence supporting the Circuit Court’s findings, those findings should not be disturbed.<sup>3</sup>

Third, federal regulatory interests concerning control of the border are at stake here because the DIBC project at issue concerned infrastructure changes to the internal operations of the federally-controlled sterile inspection compound. The federal government’s role in protecting and controlling the nation’s borders at such facilities is well established and dates from the earliest days of the nation. *See* Customs Act of 1789 § 5 (placing ports under the authority of a Customs collector and naval officer); 19 USC 69 (authorizing Customs to expend funds to create barriers crossing the Canadian and Mexican borders and to build “such fences in the immediate vicinity of such highways and roads as may be necessary to prevent unlawful entry or smuggling”); 19 CFR 101.2(a) (describing the “[s]upremacy of delegated authority” to Customs officers). DIBC’s project to

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<sup>3</sup> In its brief to the Court of Appeals, the City cited testimony from the GSA’s project manager that, in his view, proposed relocation would not ease traffic congestion problems. (City Br. at 37, 43). The Circuit Court considered this testimony but found it insufficient to overcome the other evidence showing that these projects would facilitate the flow of traffic on the bridge. (App. 482a). This conclusion, reached after four weeks of trial, was not clearly erroneous. GSA’s project manager was only familiar with one of the projects involved. (App. 117a). He was also emphatic that his agency’s mission related to the enforcement of federal law relative to people and goods, not to the flow of international commerce. (Melcher, App. 160a-161a; Weeks, App. 397a-399a). Thus, DIBC was in a better position than GSA to present knowledgeable testimony on the traffic flow point. (Trial Court Opinion, App. 477a-478a).

change the traffic flow through the inspection compound at the international border clearly implicates the interests of Customs in its role at the border.

Moreover, the federal government in fact exerted preemptive control over the DIBC project. U.S. Government officials repeatedly insisted that any construction had to be pre-approved by Customs and other affected federal agencies. (App. 41a). Customs also rejected DIBC's initial proposal on the ground that such proposal did not satisfy its mission, safety, and health concerns. (App. 43a). The Circuit Court found that at least two of those agencies (Customs and GSA) approved the relocation project after negotiations between them and DIBC. (App. 482a).

The City asserts the right to second-guess this decision and impose an additional layer of regulatory review. The central problem with this is that the City's intrusion into this matter was in direct conflict with the federal approval for its project that DIBC had received. That federal approval was based on the federal government's assessment in light of its border security and control objectives. By contrast, the City's more parochial interests, which naturally affected the outcome of its own regulatory review, almost inevitably led to the conflict with the very different set of national objectives that underpinned federal review of DIBC's plans.

The City’s review was aimed at responding to certain “residential complaints” on the U.S. side about potential health and safety concerns flowing from the project. (Verified Complaint, App. 102a). The City never conducted a study to verify these concerns, however. At best, the City’s unsubstantiated “health and safety” concerns are of insufficient weight to effectively override federal interests in the operation and design of the inspection compound.

### **3. The Court of Appeals Misunderstood Conflict Preemption**

The City challenged the Circuit Court’s ruling in the Court of Appeals. The City explained that the Circuit Court relied upon conflict preemption as the basis for its ruling, even though it used the label “federal instrumentality.” The City said: “The trial court clearly found that conflict preemption existed as evidenced by his statement that the zoning ordinance ‘conflicts with and has the effect of interfering with the performance by DIBC of its federal function to facilitate and manage the flow of traffic in interstate and international commerce.’” (City Br. at 36).

The Court of Appeals reversed the conflict preemption ruling, but its analysis ultimately reveals a misunderstanding of this preemption doctrine. The Court of Appeals reasoned that “neither the Authorization Act or the Bridge Act of 1906 indicates that Detroit’s zoning ordinances cannot be applied to [lands] immediately surrounding the Bridge.” (App. 500a). This is mixing apples and

oranges, however. When an express preemption provision is at issue, Congress's intent in enacting the provision of course is a critical focus. But this case involves conflict preemption, which is a form of implied preemption. "[C]onflict preemption is different [than express preemption] in that it turns on the identification of 'actual conflict' and not on an express statement of pre-emptive intent." *Geier*, 529 US at 884; 120 S Ct at 1927; 146 L Ed 2d 934.<sup>4</sup> Thus, the lack of direct evidence of Congress' preemptive intent in the statutes noted by the Court of Appeals is neither surprising nor significant.

To the extent the Court of Appeals was suggesting the City's actions did not interfere with federal objectives, the Court erred. As explained above, the Circuit Court made extensive factual findings that the City's actions did interfere with federal objectives "[o]n the unique facts of this case." (App. 483a). Moreover, by asserting that DIBC could comply with both federal and local requirements, the Court of Appeals overlooked the fact that Customs and GSA had reviewed DIBC's plans, required alterations and ultimately approved those plans – directly contrary to the outcome under the City's application of its zoning ordinance. The Court of Appeals likewise overlooked the federal law and policy that underpins Customs'

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<sup>4</sup> See also Laurence H. Tribe, *American Constitutional Law*, § 6-25, at 481 n.14 (2d ed. 1988) (conflict preemption exists even "where *Congress did not necessarily intend preemption* . . . [if] the particular state law conflicts directly with federal law, or stands as an obstacle to the accomplishment of federal objectives") (emphasis added).

critical role as the guardian of the nation's borders and its role here in reviewing – with GSA involvement – DIBC's plans for improving the operation of the Bridge and inspection compound.

To the extent the Court of Appeals was suggesting that federal policy is limited to the Bridge itself and does not extend to adjacent inspection area, the Court was mistaken. *Detroit International Bridge Company v. American Seed*, cited by the Court of Appeals, supports DIBC's position in this regard. There, this Court recognized that the "bridge and its approaches form one structure." *American Seed*, 249 Mich at 295, 228 NW at 793. "As such, it constitutes a union of highways of Michigan and of Ontario and converts them into one uninterrupted public road." *Id.* The Bridge and the inspection compound operate, and should be regarded as, a single unit. If federal policy to promote foreign commerce applies to the Bridge, that policy must also be applied to the inspection compound through which all Bridge traffic flows and at which such traffic is controlled and monitored by federal officials.

#### **4. A Zoning Ordinance Is Not Immunized from Preemption**

Contrary to the City's suggestion below, a zoning ordinance is not immunized from preemption if the ordinance conflicts with federal policy or the federal scheme of regulation. Such zoning ordinances in fact have been found to be preempted by federal law on several occasions analogous to this case. For

example, the Tenth Circuit has held that a zoning ordinance which prevented an individual from complying with an order issued by the Environmental Protection Agency was preempted. *See United States v Denver*, 100 F.3d 1509, 1512-13 (CA 10 1996). A Bellevue, Washington zoning ordinance that regulated where group facilities may be located was held to be preempted by the Fair Housing Act. *See Children's Alliance v Bellevue*, 950 F Supp 1491, 1501 (WD Wash 1997). Similarly, a Michigan statute which limited where homes for disabled persons could be located was also invalidated under the Fair Housing Act. *Larkin v Michigan Dep't of Social Services*, 89 F3d 285 (CA 6 Cir. 1996). The Eighth Circuit has even held that a regulation promulgated by the Federal Communications Commission ("FCC") preempts zoning ordinances that determine where radio antennas may be located. *Pentel v Mendota Heights*, 13 F3d 1261 (CA 8 1993). In each of these cases, the Court found, as this Court should find, that the local ordinance stood as an obstacle to the fulfillment of the federal law or policy at issue.

Although a state possesses police powers to adopt laws to secure generally the comfort, safety, health and prosperity of its citizens, the U.S. Constitution restricts such powers, including the power to regulate environmental or safety concerns, to those that do not interfere with Congress' exclusive authority to regulate interstate and foreign commerce under the Commerce Clause. *E.g.*,

*Raymond Motor Transp, Inc v Rice*, 434 US 429; 98 S Ct 787; 54 L Ed 2d 664 (1978) (State law banning from state highways trucks longer than 55 feet unconstitutional); *Southern Pacific Co v Arizona*, 325 US 761; 65 S Ct 1515; 89 L Ed 1915 (1945) (State law prohibiting trains more than 14 passenger cars or 70 freight cars in length from operating in Arizona unconstitutional).

In short, the City may not use its zoning power to hamper international commerce flowing over the Bridge and through the inspection compound. The City's power has been preempted by federal law.

**B. The City's Actions Are Preempted By the Foreign Commerce and Interstate Commerce Clauses of the U.S. Constitution**

The City's attempt to exercise zoning regulation on these specific facts interferes with the flow of commerce over the international bridge and, as such, is preempted by the Commerce Clause of the U.S. Constitution.

**1. The Applicable Standards**

The U. S. Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ." U.S. Const art I, §8, cl 3. Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce. *South-Central Timber Dev, Inc v Wunnicke*, 467 US 82, 87; 104 S Ct 2237, 2240; 81 L Ed 2d 71

(1984). Municipal ordinances are subject to the same scrutiny as state laws under the Commerce Clause. *See Dean Milk Co v Madison*, 340 US 349, 353; 71 S Ct 295; 95 L Ed 329 (1951).

The Court's seminal modern decision restricting state action under the Foreign Commerce Clause is *Japan Line, Ltd v County of Los Angeles*, 441 US 434; 99 S Ct 1813; 60 L Ed 2d 336 (1979). There, the Court emphasized, "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* at 448; 99 S Ct at 1822; 60 L Ed 2d at 347 (citation omitted). The Court will make a more extensive constitutional analysis when foreign rather than domestic commerce is involved, and in doing so the Constitution requires that the Court examine the national interest rather than that of any individual state. *See id.* "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v Pink*, 315 US 203, 233; 62 S Ct 552, 567; 86 L Ed 796, 819 (1942).<sup>5</sup>

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<sup>5</sup> *See also California Bankers Ass'n v Shultz*, 416 US 21; 94 S Ct 1494; 39 L Ed 2d 812 (1974) (stating that Congress' plenary authority over foreign commerce "is not open to dispute"); *Zschernig v Miller*, 389 US 429, 436; 88 S Ct 664, 668; 19 L Ed 2d 683 (1968); *Buttfield v Stranahan*, 192 US 470, 493; 24 S Ct 349, 354; 48 L Ed 525 (1904) (describing the "complete power of Congress over foreign commerce"); *Chy Lung v Freeman*, 92 US 275, 279-81; 23 L Ed 550 (1876).

Interstate commerce is also implicated here because the severe traffic congestion had a rippling effect, harmful to U.S. businesses.<sup>6</sup> As to interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137; 90 S Ct 844; 25 L Ed 2d 174 (1970), outlines the relevant factors to be considered here: (1) the nature of the putative local benefits advanced by the Ordinance; (2) the burden the Ordinance imposes on interstate commerce; (3) whether the burden is “clearly excessive in relation to” the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce. *Id.* at 142; 90 S Ct at 848; 25 L Ed 2d at 174.

A key inquiry under the *Pike* analysis is the extent of the burden on interstate commerce. *Raymond Motor Transp*, 434 US at 445-46; 98 S Ct 787; 54 L Ed 2d 664. “Although states and local governments may regulate matters of local concern that incidentally affect interstate commerce without violating the Commerce Clause, . . . they are prohibited from passing legislation which substantially affects the free flow of such commerce.” *Southern Pacific Transp Co*

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<sup>6</sup> The Commerce Clause has been understood “to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Oregon Waste Sys v Dep’t of Environmental Quality*, 511 US 93, 98; 114 S Ct 1345, 1349; 128 L Ed 2d 13, 20 (citation omitted) (1994). This “negative” interpretation of the Commerce Clause is known as the dormant Commerce Clause.

*v St. Charles Parish Police Jury*, 569 F Supp 1174, 1179 (ED La 1983) (citation omitted).

## **2. The City's Actions Interfere with the Flow of Foreign Commerce**

This case illustrates why the Framers of the U.S. Constitution vested the federal government with exclusive authority over foreign commerce. The City has sought to serve local interests by refusing the zoning permit, without regard to the impact on foreign commerce or U.S. businesses. Only the federal government can undertake the global and comprehensive review that transcends these local concerns.

The Ambassador Bridge is vital to the interests of both the United States and Canada. The Ambassador Bridge is the most heavily traveled trade link in the world. *See* Carl Ek, Congressional Research Service Report, *Canada-U.S. Relations* at 24 (May 1, 2006). Congress has spoken with a loud voice on the importance of trade with Canada by ratifying the North American Free Trade Agreement (NAFTA) and its precursor, the U.S.-Canadian Free Trade Agreement. NAFTA created the biggest integrated market in the world in keeping with its purpose stated in Article 102 to “eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties . . . .” NAFTA, Can-US-Mex, Dec. 17, 1992, 32 ILM 289. With the help of the NAFTA framework, Canada is the U.S.’s largest trading partner.

NAFTA also underscores the Ambassador Bridge's role as a key link in the global economy. The value of goods crossing the Ambassador Bridge exceeds that of all U.S. exports to Japan. (App. 87a). The Bridge accommodates over a quarter of the annual trade between the United States and Canada, or approximately \$120 billion dollars annually. Ek, *Canada-U.S. Relations, supra*, at 24. The American automobile industry is completely integrated with Canadian suppliers, which has led to "just in time" parts procurement that relies on an open border. (App. 88a; 91a; Weeks Testimony, App. 381a).

Detroit's attempt to impose its zoning laws on the Bridge compound must fail in light of the unassailable principle that the national government has control over foreign commerce, including U.S. trade policy. The parochial interests of one neighborhood or one City in restricting traffic flow must yield to Congress's power to regulate foreign commerce for the good of the entire nation. *Japan Line Ltd*, 441 US at 449-50; 99 S Ct at 1822; 60 L Ed 2d at 348. "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v Davidowitz*, 312 US 52, 63; 61 S Ct 399, 402; 85 L Ed 581, 585 (1941). The City's actions here impermissibly interfere with the federal government's authority, and are thus preempted on that basis.

Further, the City's interference with foreign commerce could potentially have a direct and adverse impact on the federal government's conduct of foreign affairs. "[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Hines*, 312 US at 63; 61 S Ct at 402; 85 L Ed at 585 (citation omitted). A state regulation impinges on this prerogative merely if it has "great potential for disruption or embarrassment." *Zschernig, v Miller*, 389 U.S. 429, 435; 88 S Ct 552, 667; 19 L Ed 2d 683, 689 (1968). (See Windsor Police Letter, App. 94a-95a).

Here, Canadian officials engaged both DIBC and U.S. Government officials to find solutions to ameliorate the problem of delays entering the United States. (App. 94a-95a). Further, Customs was concerned about the potential for an increased media campaign that would blame the U.S. Government for traffic accidents and other hazards. (App. 380a). A U.S. Customs official testified that the agency was concerned about the potential for accidents that could be "an international nightmare to try to remedy."<sup>7</sup> The City's interference with bi-national efforts to reduce traffic congestion on the Bridge, which included DIBC's plans to reconfigure and expand the toll plazas, was very much at odds with the interests of foreign commerce.

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<sup>7</sup> Weeks Testimony, App. 380a. See also App. 412a-414a, 419a, 379a-381a; Carter Testimony, App 194a.

The effects of the City's actions would have been felt in Canada and would have interfered with the bi-national policy of promoting trade. Mr. Weeks, who testified for Customs, recognized the importance of keeping traffic moving and avoiding back-ups to the U.S.-Canadian bilateral relationship. Weeks, App. 380a (stating that Customs wanted good relations "with our neighbor to the south").<sup>8</sup> This commitment to facilitating and increasing trade has been articulated at the highest levels of government. (App. 60a-63a). The City cannot undermine that spirit of cooperation by exercising its zoning power to impair foreign trade. *Cf. American Ins Ass'n v Garamendi*, 539 US 396; 123 S Ct 2374; 156 L Ed 2d 376 (2003).

### **3. The City's Actions Burden Interstate Commerce and Michigan's Economy in Particular**

The substantial adverse effect of the City's application of its zoning ordinance on Michigan's economy was clear to the Circuit Court. (App. 479a-480a). Likewise, Judge MacDonald on remand held that the City's denials of the zoning variances were "not supported by competent, material and substantial evidence on the record." (Order on remand, App 503a). In the face of these findings, this Court should find that the City's actions resulted in an impermissible interference with interstate commerce under the *Pike* test, described above.

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<sup>8</sup> It is a quirk of geography that Windsor Canada is south of Detroit.

The local residents who supported the City's zoning actions had expressed concerns that DIBC's proposed relocation of the truck toll booths would increase noise and air pollution. However, they were not able to provide any evidence to sustain that contention. In short, this is not a case where some demonstrated local safety or health benefit outbalances a clear national interest. Indeed, there is nothing in the record to demonstrate that the City's action would have resulted in any benefit of any kind.

In contrast, the harm to the State of Michigan is unmistakable. Michigan leads all 50 states in trade with Canada (App. 88a). The record in the trial court demonstrated that traffic back-ups on the Bridge were in fact harming U.S. companies, especially the Michigan auto industry.

The testimony of Dan Larabell, the material department director for General Motor's Detroit-Hamtramck assembly plant, provides a compelling portrait of the dependence of Michigan industry on the Ambassador Bridge. Mr. Larabell is responsible for "providing the assembly plant with all the materials that it takes to build a car." (App. 221a). Mr. Larabell explained that GM car seats are manufactured in Windsor, Canada, with only a five-hour buffer between the time they come off the assembly line and the time they are installed in a car under production at the Hamtramck plant. (App. 229a). If the delivery truck gets stuck on the bridge, then the GM assembly line has to be shut down. (App. 226a-228a).

This costs the company \$500-\$1500 per minute. (App. 239a). Less dramatic, but also a serious financial drain, are the labor costs associated with paying idle workers who are waiting for a shipment and then paying them overtime when the delays prevent them from completing their tasks during their allotted shift. (App. 227a-228a; 230a-231a; 239a).

The Hamtramck plant is not alone in being dependent on the Ambassador Bridge. Back-ups on the Bridge can have a ripple effect on “just in time” delivery throughout the country. Mr. Larabell testified that the company’s command and logistics center sends a mass voice mail to all GM assembly plants in the United States and Canada warning them of traffic problems and advising that the managers take “special precautions” because of the delays. (App. 235a-236a). There is no doubt that traffic on the Bridge has a profound impact on interstate commerce. (App. 243a).

In short, the City’s actions here cannot withstand analysis under *Pike* as the burden on interstate commerce was “clearly excessive” in relation to the putative, and unsubstantiated, local benefits of the City’s actions. *Pike* at 142; 90 S Ct at 848; 25 L Ed 2d at 174.

## **II. DIBC Is a Federal Instrumentality for the Purpose of Facilitating Interstate and Foreign Commerce**

The federal instrumentality doctrine shields DIBC’s alleged failure to comply with local zoning rules from liability. There are two types of federal

instrumentality doctrines recognized in the case law: conduct-based and status-based. Here, the Circuit Court found that DIBC acted with the consent of the federal government when it made bridge-related changes for the purpose of facilitating interstate commerce. That ruling is consistent with other precedent and should be affirmed.

**A. The Circuit Court Correctly Ruled DIBC Is a Federal Instrumentality for Certain Purposes**

An entity may be a federal instrumentality because of its inherent status or because of its conduct. “Status-based” immunity turns on the extent to which the federal government or its agencies directly own and/or exercise plenary control over the entity in question. A second type of immunity – “conduct-based” immunity – can apply when an entity may not enjoy status-based immunity, but acts at the direction and consent of a federal sovereign. *E.g., Name.Space, Inc v Network Solutions, Inc*, 202 F3d 573, 581-82 (CA 2 2000) (stating in connection with an implied antitrust immunity that a court should look “to the ‘nature of the activity challenged, rather than the identity of the defendant’”) (citation omitted). Private parties are shielded from liability “to the extent they are acting at the direction or with the consent of federal agencies.” *Id.* at 583.<sup>9</sup>

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<sup>9</sup> The entity is shielded from immunity only to the extent that it acts pursuant to a statutory or regulatory mandate. However, if the entity acts outside the zone of the conduct permitted by Congress, it does so without the benefit of such immunity.

It is undisputed that the Bridge itself is an instrumentality of interstate commerce. *See Overstreet v North Shore Corp*, 318 US 125, 129-30; 63 S Ct 494, 497; 87 L Ed. 656, 661 (1943) (“bridges . . . are instrumentalities of interstate commerce”). The Circuit Court concluded here that DIBC is also a federal instrumentality “to the extent that it is involved in managing and facilitating the timely and efficient flow of vehicular traffic in and out of the bridge complex.” (App. 483a). The Court’s conclusion was only logical as the Bridge could not operate as a federal instrumentality without DIBC’s performance of its duties in furtherance of providing for the efficient operation of the Bridge and its attendant inspection plaza.

By legislative grant, DIBC is vested with authority to “construct, maintain, and *operate a bridge and approaches thereto . . .*” Authorizing Act, 41 Stat. 1439 (1921) (emphasis added). DIBC’s operational and maintenance activities are vital to the proper function of the bridge’s structure as an instrumentality in interstate commerce. The federal government has deferred to DIBC’s role as the party most responsible for facilitating the flow of traffic across the Bridge.<sup>10</sup> Thus, the work of DIBC is so intimately related to the Bridge’s foreign commerce role as to be

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<sup>10</sup> Trial Opinion, App. 477a-478a (“The evidence established that DIBC is the entity responsible for facilitating the efficient and timely flow of traffic.”); Weeks Testimony, App. 398a-399a; 423a; 378a; 387a (“They [DIBC] take responsibility”); Melcher Testimony, App. 160a-161a (agreeing that DIBC’s role is “pretty much limited to traffic control in this area”).

part of it. *See Overstreet*, 318 US at 130; 63 S Ct at 497; 87 L Ed at 661 (“Those persons who are engaged in maintaining and repairing such facilities should be considered as ‘engaged in commerce’ . . . because without their services these instrumentalities would not be open to the passage of goods and persons across state lines.”).

DIBC’s status as a private corporation does not disqualify it from immunity, contrary to the Court of Appeals holding. *See Dep’t of Employment v United States*, 385 US 355, 358-59; 87 S Ct 464, 467; 17 L Ed 2d 414, 418 (1966) (holding that American Red Cross, a non-governmental entity, is a federal instrumentality). Instead, the U.S. Supreme Court focuses on the “‘nature of the activity challenged, rather than on the identity of the defendant . . . .’” *Name.Space*, 202 F3d at 581-82 (quoting *Southern Motor Carriers Rate Conference, Inc v United States*, 471 US 48, 58-59; 102 S Ct 1721; 85 L Ed 2d 36 (1985)). Moreover, this Court’s holding that DIBC does not enjoy immunity from state law for tax purposes does not prevent DIBC from enjoying conduct-based immunity as a federal instrumentality to the extent that it undertakes operations in furtherance of foreign commerce and under direct federal supervision. *See Paslowski v Standard Mortgage Corp*, 129 F Supp 2d 793, 802 n.12 (WD Pa 2000) (“[A]n entity simultaneously can be a federal instrumentality for some purposes but not a federal agency or entity for others.”). The logic of the distinction is

apparent. The fact that this Court has held that taxation of the Bridge does not create an undue burden on commerce does not contradict the finding of the trial court that zoning control by the City over the inspection compound does. Thus, DIBC is entitled to federal instrumentality status for this aspect of its operations.

**B. The Court of Appeals Misread the Case Law**

In reaching a different result, the Court of Appeals relied largely upon *Detroit International Bridge v. American Seed*, and *Mount Olivet Cemetery Ass'n v Salt Lake City*, 164 F3d 480 (CA 10 1998). The Court misread both cases.

*American Seed* was an eminent domain case. There, the Court upheld the DIBC's authority to condemn land for the Bridge under state law. In reaching its ruling, the Court made several findings that support DIBC's position, including that (1) "[t]he bridge and its approaches form one structure," (2) the "purpose of the bridge [is] inherently public," and (3) DIBC must use the bridge and its approaches for a public purpose. 249 Mich at 295-300; 228 NW at 793-95. The Court also rejected the land owner's argument that the federal interest in the bridge was exclusive, leaving no room for the state. The Court held that the state's interest in the bridge was sufficient that it could grant the right of eminent domain to DIBC. *Id.* at 298; 228 NW at 794.

*American Seed* says nothing, however, about any state or local interest in the federal inspection compound<sup>11</sup> — an area in which federal interests are plainly paramount given the federal government’s exclusive control of the nation’s borders. Nor does it address whether a state or local law conflicting with federal commerce could survive. In other words, the fact that the State might have some rights relevant to other elements of Bridge activities simply does not speak to the different questions posed here. This Court should find here that DIBC is a federal instrumentality with respect to its conduct as facilitator of foreign commerce in this proceeding.

*Mount Olivet Cemetery Ass’n v Salt Lake City* addresses the issue of federal instrumentality status, but in a very different context. There, the Tenth Circuit held that the operator of a cemetery was not a federal instrumentality and ultimately that it was subject to local zoning laws. The operator ran the cemetery as a private enterprise with “unfettered discretion” to conduct its affairs. *Mt. Olivet*, 164 F3d. at 487. DIBC’s situation is very different. By regulating traffic flow on an international bridge and through a federal inspection plaza, DIBC does “perform a significant or indispensable governmental function,” the hallmark of a federal instrumentality. *Id.* Moreover, in fulfilling its duties within the inspection

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<sup>11</sup> Nor could it have, as the Bridge was not likely operational at the time the record was being created in the *American Seed* case.

compound, DIBC is subject to federal government scrutiny and approval of its conduct, a factor lacking in *Mt. Olivet*. The Circuit Court detailed the extent of federal control in its opinion and noted too the interleaving of federally owned and DIBC owned property.<sup>12</sup> *Mt. Olivet* bears no resemblance to this fact situation.

Further, an analysis of the suggested factors for instrumentality status in *Mt. Olivet* shows that at least two of them weigh in favor of DIBC. Thus, DIBC (1) performs an important governmental function and (2) is subject to control by the government with respect to its conduct within the inspection compound such it “could properly be called a ‘servant’ of the United States in agency terms.” *Id.* at 486 (citing cases). There is no comparison here to *Mt. Olivet*.

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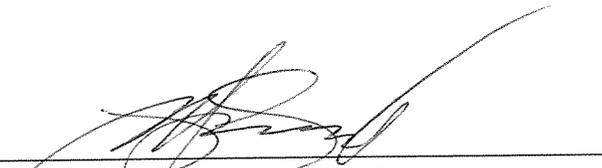
<sup>12</sup> According to the Circuit Court, “This case presents a unique factual scenario in that the property which makes up the “bridge complex” is partly owned by the federal government and partly owned by the defendant, DIBC.”

## CONCLUSION AND REQUEST FOR RELIEF

The Court should vacate the court of appeal's judgment and affirm the decision of the circuit court.

DATED this 21st day of June, 2007.

By



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