

07-4597-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MERCHANT'S INSURANCE GROUP and DEEJAY CARPET CO., INC.,

Plaintiffs-Appellants,

v.

**MITSUBISHI MOTOR CREDIT ASSOCIATION and
MITSUBISHI MOTOR CREDIT OF AMERICA, INC.**

Defendants-Appellees,

and

**TRI-ARC INSURANCE COMPANY,
d/b/a Tri-Arc Financial Services,**

Defendant.

**On Appeal from the United States District Court for the
Eastern District of New York**

**BRIEF OF *AMICUS CURIAE* TRUCK RENTING AND LEASING
ASSOCIATION, INC. IN SUPPORT OF DEFENDANTS-APPELLEES**

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March 3, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1(a), *amicus curiae* Truck Renting and Leasing Association, Inc. states that it is a not-for-profit corporation which has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

Respectfully submitted,

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INTRODUCTION

Defendants-Appellees Mitsubishi Motor Credit Association and Mitsubishi Motor Credit of America, Inc. (hereafter “Mitsubishi” or “Appellees”) seek affirmance of the District Court, which dismissed Plaintiffs-Appellants’ Complaint on the grounds that the cause of action under New York Vehicle and Traffic Law Section 388 was preempted by the Graves Amendment, 49 U.S.C. § 30106. Plaintiffs-Appellants (“Appellants”) assert that the lower court erred in dismissing the Complaint because their action was brought before the Graves Amendment became effective, and therefore their cause of action was not preempted. Mitsubishi posits several arguments for affirmance, including that the action should be adjudicated under California law, that the cause of action did not accrue and therefore was not properly commenced until after the effective date of the Graves Amendment, that Appellants’ argument that the Graves Amendment is unconstitutional should not be considered by this Court because that argument was not raised below, and that in any event the Graves Amendment is clearly constitutional.

Amicus curiae Truck Renting and Leasing Association (“TRALA”) supports Mitsubishi and provides additional argument on the constitutionality of the Graves Amendment and urges the court to affirm the District Court. This brief is intended to expound on Mitsubishi’s arguments that the Graves Amendment was a constitutional exercise of Congress’ power under the Commerce Clause of the United States Constitution. TRALA takes no position on the other issues raised by Appellants or Appellees.

STATEMENT OF THE ISSUE

1. Whether the Graves Amendment, 49 U.S.C. § 30106, preempts New York Vehicle and Traffic Law § 388.

2. Whether Congress had the authority under the Commerce Clause to the United States Constitution to enact the Graves Amendment.

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is a national trade association whose member companies rent or lease vehicles in interstate commerce. TRALA, among others, previously joined in a coalition to advocate for the adoption of 49 U.S.C. § 30106, commonly referred to as the “Graves Amendment,” enacted into law by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 10208 (Aug. 10, 2005) (“SAFETEA-LU” or the “Federal statute”), and the repeal of vicarious liability statutes in several states and in Canada. Vicarious liability laws adversely affect TRALA’s member companies by substantially raising the costs of doing business nationwide. Because rented and leased vehicles are routinely driven across state lines, and such vehicles are an integral part of the seamless flow of interstate transportation, TRALA’s members are forced to account for those states, such as New York, that impose vicarious liability on vehicle lessors. These extra costs are spread throughout the industry, costing vehicle rental and leasing companies an estimated \$100 million annually.

TRALA, headquartered in Alexandria, Virginia, is a voluntary, non-profit national trade association founded in 1978 to serve as a unified and focused voice for the truck renting and leasing industry. Its mission is to foster a positive legislative and regulatory climate within which companies engaged in leasing and renting vehicles and trailers and related businesses can compete fairly in the North American marketplace.

TRALA members engage in commercial truck renting and leasing,¹ vehicle finance leasing, and consumer truck rental. The membership encompasses the full spectrum of the industry, including major national independent firms such as Ryder System, Penske Truck Leasing, U-Haul, Budget and Enterprise Truck Rental, as well as small and medium-size businesses that generally participate as members of four group systems: Mack Leasing, Volvo Truck Leasing, NationalLease and PacLease. In total, these 400-plus companies operate more than 4,000 commercial lease and rental locations and more than 18,000 consumer rental locations throughout the United States, Canada and Mexico.²

The truck renting and leasing industry involves a vast network of truck transportation, logistics and related services. In 2003 there were 4,734,964 commercial trucks in classes 3 through 8³ registered in the United States. Of that total, some 896,155, or approximately 19 percent, were operated pursuant to some form of lease agreement. Moreover, TRALA members account for upwards of 40 percent of all of the new commercial motor vehicles in classes 3 through 8 purchased each year in the United States.

Truck leasing customers represent virtually every segment of the North American economy.⁴ Almost one-fifth of commercial trucks in the United States are operated under lease

¹ The term “renting” is a term of art in the vehicle leasing industry, generally meaning a transaction granting the exclusive use of a vehicle for 30 days or fewer, whereas a lease generally means a transaction granting the exclusive use of a vehicle for more than 30 days. Use of the term herein “lease” includes rentals.

² The TRALA membership also includes more than 100 supplier member companies providing equipment, products, and services to TRALA members.

³ Classes 3 through 8 include commercial trucks over 10,000 pounds Gross Vehicle Weight (“GVW”) to 80,000 pounds GVW and above. Commercial trucks over 10,000 pounds GVW are generally subject to federal and state motor carrier safety regulations. See 49 C.F.R. Part 390.

⁴ Those segments include the following: (1) wholesale/retail, (2) manufacturing, (3) general freight, (4) food processing/distribution, (5) miscellaneous other, (6) services, (7) forestry/lumber/wood products, (8) beverage processing/distribution, (9) agricultural farm, (10) moving and storage, (11) landscaping/horticulture/

agreements. For vehicles operating in interstate commerce, as much as 90 percent of the total number of commercial vehicles may be operating under a lease agreement.

Importantly, truck lessors do not control where a vehicle is operated once the lessee takes possession of the vehicle.⁵ For example, a vehicle may be leased to a customer in Illinois by a lessor located in Illinois, and with no commercial locations outside of that state, but the customer may operate the vehicle in dozens of states throughout the term of the lease without seeking permission from or even notifying the lessor. Further, according to data from the American Trucking Associations,⁶ the average length of a single trip for all trucking operations is 469 miles, indicating these vehicles operate over a wide range of states on a daily basis.

To aid in this freedom of movement, truck lessors generally register their vehicles over 26,000 pounds through the International Registration Plan, which allows the vehicles to be operated in all states without any special permits or additional licensing. Lessors also generally arrange to pay fuel taxes for these vehicles through the International Fuel Tax Agreement, which serves as a clearinghouse for state fuel tax payments to each state in which the vehicle is operated.

nursery service, (12) individual owner-operators, (13) petroleum, (14) sanitation/refuse, (15) government miscellaneous, (16) hazardous materials, (17) mining/quarry, (18) construction, (19) vehicle transporters, (20) specialized/heavy hauling, (21) sanitation-refuse combination, (22) general freight hazmat, (23) emergency vehicles, and (24) utility services.

⁵ See, e.g., *Truck Renting and Leasing Ass'n, Inc. v. Comm'r of Revenue*, 433 Mass. 733; 746 N.E.2d 143, 145 (2001) (Lessors “retained ownership of the vehicles and the lessees were granted ‘exclusive dominion and control at all times.’”); *Marx v. Truck Renting and Leasing Ass'n, Inc.*, 520 So.2d 1333 (Miss. 1987) (“[N]either Ryder nor Saunders have equipment here and do not consistently utilize the Mississippi highways. In fact, they have no control over which highways the lessees of their vehicles use once those vehicles are leased.”).

⁶ Thomas M. Corsi, *The Truckload Carrier Industry Segment, Trucking in the Age of Information*, Ashgate Publishing (2004); based on the author’s calculations from 2001 Motor Carrier Annual Report, American Trucking Associations, Inc., Alexandria, Virginia.

TRALA's members also include the Industry Council for Vehicle Renting and Leasing⁷ (the "Industry Council"), a coalition of automobile and truck lessors formed to address the issues facing the broader vehicle renting leasing industry, including state vicarious liability laws. Industry Council member American Car Rental Association ("ACRA") itself is a national trade association created in 2005 to represent the interests of all car rental operators. ACRA's membership encompasses more than 300 companies nationwide, including some 17 rental companies located in the State of Florida. Its members are both rental operators and car rental industry vendors/suppliers. ACRA's membership offers over 700,000 vehicles for rental that are operated throughout the United States.

This free flow of vehicles in interstate commerce illustrates why vicarious liability imposed by a single state can adversely affect vehicle leasing operations nationwide. In the above example, if the vehicle leased in Illinois is operated by the lessee in New York and is involved in an accident in this state, the lessor could be subject to the liability imposed under New York law, without ever having any intent to do business in the state or to subject itself to such laws.

Moreover, the leased vehicle does not have to be operated in New York to subject the lessor to vicarious liability. If the injured party is a resident of New York, or the parties have some other connection to the state, the trial court may, through choice of law principles, opt to apply the substantive law of New York, including its vicarious liability statute, even if the

⁷ The Industry Council members are the American Car Rental Association, Avis Budget Group, Daimler Chrysler Truck Financial, Dollar Thrifty Automotive Group, Enterprise Rent-A-Car, Key Equipment Finance, Navistar Financial Corporation, Penske Truck Leasing Company, Ryder System, Toyota Financial Services, U-Haul International, and Volvo Financial Services North America.

accident occurred outside of New York and/or the lawsuit is brought in the courts of another jurisdiction besides New York.⁸

New York's vicarious liability law therefore increases the costs of doing business for all car and truck lessors wherever their principal place of business or the location of their leasing facilities. For lessors located in New York or in a bordering state, the potential liabilities, and therefore the increased costs of operation, are much greater, resulting in significantly higher consumer prices. Because truck lessors provide vehicles to virtually every type of manufacturing, wholesale and retail entity in the country, the increased costs show up in higher costs of distributing virtually every type of product sold in the United States.

The history of the Graves Amendment illustrates the devastating impact that "liability without fault" laws have on vehicle lessors: many leasing entities were forced out of the market due to vicarious liability laws in just a handful of states.⁹ For example, a number of press articles described the additional costs and other effects of the New York vicarious liability law on vehicle lessors in that state. One article noted, "Try to reserve a Hertz or Avis vehicle in Brooklyn or the Bronx, and you may face a surcharge of \$60 or \$80 a day over what the same car would rent for in the rest of the country." Walter Olson, *Silver's Wreck*, N.Y. Post, June 9, 2003.

This cost imposed a heavy toll on lessors. An April 1, 2004 article from the New York Sun noted, "By most estimates there were still about 400 independent rental agencies operating

⁸ This possibility was discussed in congressional hearings during the consideration of a precursor to the Graves Amendment. See Prepared Statement of Rep. Oxley, The Rental Fairness Act, 1999 WL 959128 (Oct. 20, 1999).

⁹ See Prepared Statement of Ms. Sharon Faulkner, the Rental Fairness Act, 1999 WL 959129 (Oct. 20, 1999) (stating that due to vicarious liability laws she sold her small car rental company to a competitor and that over 300 car rental companies had closed in New York between 1990 and 1999).

in New York two years ago. Today, there are only about 50. Within a year, there may be none.” William Tucker, *The Great Car-Rental Wipeout*, N.Y. Sun, April 1, 2004. See also, Tom Incantalupo, *Auto Leasing may Return to NY, Companies Would Resume Leasing If Bush Signs Bill Freeing Them from 1924 State Law on Accident Liability*, Newsday, Aug. 2, 2005; Michael Cooper, *Congress Passes Bill Nullifying a State Law, and Making It Easier to Lease Cars in New York*, N.Y. Times, Aug. 4, 2005.

The Graves Amendment eliminated vicarious liability to impose a uniform, nationwide legal structure under which a vehicle lessor could not be held liable for damages resulting from an accident merely because it owned the vehicle. This approach affords consistent and predictable application of liability laws based on fault alone, which promotes the free flow of interstate commerce.

New York was one of a handful of states that retained vicarious liability before the Graves Amendment. Some 44 states had already eliminated vicarious liability for lessors.

The overwhelming weight of legal authority shows that Congress was within its power to pass the Graves Amendment. TRALA’s membership offers significant support for the notion that the Graves Amendment substantially impacts interstate commerce.

ARGUMENT

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE GRAVES AMENDMENT SHOWS CONGRESS’ INTENT TO PREEMPT THE NEW YORK VICARIOUS LIABILITY STATUTE

Appellants essentially rely on one case from the New York Supreme Court, *Graham v. Dunkley*, 827 N.Y.S.2d 513 (N.Y. Sup. Ct. 2006). As Mitsubishi points out in its brief, that trial court decision was recently overturned on appeal. *Graham v. Dunkley*, 2008 N.Y. Slip Op. 958, 2008 N.Y. App. Div. LEXIS 593 (N.Y. App. Div. Feb. 1, 2008). Thus, Appellants’ reliance on

the lower court's opinion in *Graham* is of no moment. Proper analysis of the constitutionality of the Graves Amendment demonstrates that the Appellate Division is correct and Section 388 of the New York Vehicle and Traffic Law is preempted.

Preemption may occur if the federal statute expressly preempts state law, if the federal statute occupies the field, or if the state law presents a conflict with the full accomplishment with the federal law. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007) ("Federal preemption of a state statute can be express or implied, and generally occurs: '[1] where Congress has expressly preempted state law, [2] where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or [3] where federal law conflicts with state law.'" (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005))). The plain language and the legislative history of the Graves Amendment show Congress expressly intended to preempt New York law. At the very least, New York law is an obstacle to accomplishing the Graves Amendment's purposes.

The Graves Amendment provides:

(a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) *shall not be liable under the law of any State or political subdivision thereof*, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 U.S.C. § 30106 (emphasis added). The highlighted section makes clear Congress' intent to preempt any state law imposing vicarious liability on vehicle lessors. Vehicle lessors may not be held liable merely on the basis of their ownership of the vehicle; liability may not attach unless the lessor was negligent or committed some criminal wrongdoing.

Mitsubishi falls within the protection of subsection (a) – it is in the business of renting and leasing vehicles, is not accused of any negligence or criminal wrongdoing, and Appellants seek to hold Mitsubishi liable solely on a theory of vicarious liability. Moreover, the New York statute unquestionably is a vicarious liability law because it imposes liability solely based on the ownership of the vehicle, and not because the owner was negligent in any way. *See Graham v. Dunkley*, 2008 N.Y. Slip Op. 958.

In addition to the plain language of the Federal and State statutes, legislative history illustrates Congress not only intended the Graves Amendment to have preemptive effect generally, but that it specifically intended to preempt New York Vehicle and Traffic Law § 388. The legislative history contains numerous references to the New York statute. In each instance, it is clear that Congress intended preemption.

In introducing his amendment, Rep. Sam Graves (6th Dist. - Mo.) stated the law’s purpose:

Mr. Chairman, I am here today to correct an inequity in the car and truck renting and leasing industry. By reforming vicarious liability to establish a national standard that all but a small handful of States already follow, we will restore fair competition to the car and truck renting and leasing industry and lower costs and increase choices for all consumers.

151 Cong. Rec. H11200 (daily ed. March 9, 2005). Other references in the legislative history show that New York was one of those “small handful of States.”

In an earlier version of the Graves Amendment, Congress considered the Rental Fairness Act of 1999 (“RFA”) H.R. 1954, 106th Cong. (2002), which contained language similar to the Graves Amendment but which did not pass Congress.¹⁰ The House Commerce Committee report

¹⁰ The court may consider the legislative history of the RFA because its language and purpose was nearly identical to the Graves Amendment. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 261-63 (1994).

on the RFA listed a number of states that maintained vicarious liability laws which Congress was attempting to eradicate. New York is listed as one of those states. The report states:

To provide appropriate levels of protection for people injured by motor vehicles, every State has established minimum financial responsibility laws. These laws establish a minimum level of insurance coverage that must be obtained on every vehicle. In most states the financial responsibility laws operate to cover the liability of any driver who operates a car. Some states have broader no-fault insurance laws which do not require liability on the part of the driver to trigger coverage. Only five States and the District of Columbia have not yet replaced their unlimited vicarious liability laws. (See, Conn. Gen. Stat. Ann. 14 154a; D.C. Code Ann. 40 408; Iowa Coe 321.493; Me. Rev. Stat. Ann. 29 A 1652 53; **N.Y. Veh. & Traf. 388**; R.I. Gen. Laws 31 33 6, 31 33 7).

H.R. Rep. 106-774, pt. 1, at 4-5 (July 20, 2000) (emphasis added). The “Minority Views” section of the House report also lists New York among those states whose laws would be preempted by the RFA. *Id.* at 13 (“The proponents of H.R. 1954 intend that the legislation preempt ‘vicarious liability laws in 11 states (Florida, New York, California, Iowa, Michigan, Minnesota, Nevada, Idaho, Maine, Connecticut, and Rhode Island) and the District of Columbia.”). A number of witnesses at Congressional hearings on the RFA also listed New York law as being preempted by the federal act.¹¹ Finally, several floor statements and other statements from members of Congress, even from opponents of the legislation, show that members believed the RFA would preempt New York law.¹²

Representative Jerrold Nadler, of the Eighth District of New York, an opponent of the legislation, listed New York as among the states with laws that would be preempted:

This amendment, if passed, would nullify the laws of 15 States and the District of Columbia and would have the disastrous effect of allowing rental car companies to lease vehicles to uninsured drivers with no recourse for innocent victims should

¹¹ See Prepared Statement of Ms. Sharon Faulkner, 1999 WL 959129, at 2 (Oct. 20, 1999) (listing New York as a state imposing vicarious liability); Prepared Statement of Mr. Richard H. Middleton, Jr., 1999 WL 9591131, at 3 (Oct. 20, 1999) (listing New York as a state with vicarious liability law); Prepared Statement of Mr. Raymond T. Wagner, Jr., 1999 WL 959130, at 4-5 (Oct. 20, 1999)(same).

¹² See Opening Statement of the Honorable John D. Dingell, 2000 WL 287012 (March 15, 2000).

an accident occur. . . . For example, my own State of *New York* is one of the most active rental car markets in the country. . . . *This situation is not unique to New York*. Anybody, Republican or Democrat, who is from Arizona, Connecticut, Delaware, Iowa, Maine, Nevada, *New York*, Rhode Island, the District of Columbia, California, Florida, Idaho, Michigan, Minnesota, Oklahoma, and Wisconsin should not vote for this amendment, Republican or Democrat, unless you want to say to your State legislators: *We are going to preempt the law of New York*, of California, of Florida, wherever, because we know better.

151 Cong. Rec. H1200 (daily ed. March 9, 2005) (Rep. Nadler) (emphasis added).

Both the plain language and the legislative history of the Graves Amendment demonstrate Congress expressly intended to give the statute preemptive effect. Not only was the Graves Amendment intended preempt state laws generally, but the legislative history confirms that Congress intended to preempt New York Vehicle and Traffic Law § 388 specifically.¹³

II. THE GRAVES AMENDMENT IS A LEGITIMATE EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

The United States Supreme Court has identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (internal citations omitted). The Court does not require Congress to have made specific findings with regard to the need for federal legislation,

¹³ Even if there were no express preemption here, New York law is an obstacle to accomplishing the Graves Amendment's purposes. See *SPGGC, LLC v. Blumenthal*, 505 F.3d at 188. Under Appellants' interpretation of the Graves Amendment and Section 388, vehicle lessors cannot escape vicarious liability. The full purposes of the Graves Amendment – to protect companies in the business of leasing vehicles from vicarious liability – will be thwarted if the New York statute is not preempted.

id. at 21, and only imposes the “modest” requirement that a “rational basis” exist for the legislation. *Id.* at 22.

Appellants assert that the Graves Amendment regulates intrastate tort law, which has no bearing on interstate commerce, principally relying on *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005), cases cited in the lower court’s opinion in *Graham v. Dunkley*. Appellant’s reliance on those cases not only is misplaced because those opinions are in many ways distinguishable from the present case, but, as the Appellate Division found in *Graham*, the Graves Amendment passes muster under those precedents. Moreover, Congress has legitimately exercised its Commerce Clause power to preempt state tort law in furtherance of interstate commercial activity.

1. *Lopez, Morrison and Gonzales Do Not Support Appellants*

In *Lopez*, the United States Supreme Court invalidated the Gun Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone. *Lopez*, 514 U.S. at 553. Plaintiffs correctly state that the Court characterized the law as a “criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 564.

Similarly, the Court in *Morrison* struck down a federal statute, the Violence Against Women Act, that provided a civil remedy provision for gender-based crimes. *Morrison*, 529 U.S. at 615. Like *Lopez*, *Morrison* found that the federal statute lacked a “substantial effect on interstate commerce” because the activity sought to be regulated – violence against women – was not an economic endeavor. Thus, in both *Lopez* and *Morrison*, the Court confronted a federal statute in which Congress sought to regulate criminal behavior which its supporters asserted had

adverse affects on interstate commerce. In neither case was the regulated activity a commercial or economic endeavor.

The Court’s opinion in *Gonzales* is even less helpful to Appellants. In that case, the petitioners had challenged the constitutionality of the federal Controlled Substances Act (“CSA”) as applied to their use of medical marijuana outside the stream of the interstate market that Congress was attempting to regulate. *Gonzales*, 545 U.S. at 15. The Court found that Congress’ regulation of even the narrow class of intrastate medical marijuana users was a constitutional exercise of their Commerce Clause authority because there was a rational basis for the imposition of blanket controls on the use of marijuana. Thus, even though the activity being regulated was arguably non-economic, the activity substantially affected interstate commerce and Congress rationally determined that the activity was an essential part of the larger regulatory scheme. *Id.* at 26-27.

2. The Graves Amendment Expressly Applies to Interstate Commercial Activity.

By its terms, the Graves Amendment seeks to regulate a quintessentially economic activity – the renting and leasing of motor vehicles to the public. Tellingly, the plain language of the Federal statute provides that its protections apply only if the owner of the vehicle “is engaged in the *trade or business* of renting or leasing motor vehicles.” 49 U.S.C. § 30106(a)(1).

Second, the Graves Amendment provides that its protections arise only when “[a]n owner of a motor vehicle . . . rents or leases the vehicle to a person . . .,” and there is harm to persons or property that arises out of the use, operation or possession of the vehicle “during the period of the rental or lease . . .” 49 U.S.C. § 30106(a). There can be no plainer statement of commercial activity. The protected party must be engaged in the leasing business to receive the protections

of the statute, which apply only when there is a business transaction (the lease) and only during the term of the lease transaction.

The rental or lease of a motor vehicle is a commercial transaction between two private entities. The vast number of these commercial transactions involve or are a direct consequence of interstate travel. As mentioned above, the truck renting and leasing industry itself has almost 900,000 commercial motor vehicles under lease or rental in any year. The total automobile leasing and renting industries have several million automobiles subject to lease or rental at any given time. The financial impact on vicarious liability laws were found by Congress to be extraordinary – estimated at \$100 million annually – such that Federal legislation was needed to confront this national issue. Further, Congress recognized that while the majority of states did not hold rental companies vicariously liable, the essentially interstate nature of the vehicle rental and leasing industry forced rental companies to account for those states that did, such as New York. This economic reality lead Congress to adopt a nationally uniform statutory scheme preventing states from holding rental and leasing companies vicariously liable, thus allowing such companies to engage in transactions involving interstate commerce without fear of facing liability in certain states based solely on the wrongdoing of their customers.

The Graves Amendment is a constitutional exercise of Congress' power to regulate interstate commerce under the Commerce Clause. Rented and leased motor vehicles are instrumentalities in interstate commerce, and renting and leasing vehicles are activities that substantially affect interstate commerce. *See Gonzalez*, 545 U.S. at 25-26; *United States v. Lopez*, 514 U.S. 549, 558 (1995). Further, rented and leased motor vehicles also affect the channels of interstate commerce. *See id.* It is difficult to imagine an enterprise that encompasses all elements of interstate commerce more comprehensively than car and truck renting and

leasing, where a commercial entity (the lessor) engages in a commercial transaction (the lease) with an individual or another commercial entity (the lessee) and the lessee uses the subject of that transaction to conduct its own commercial activities throughout the entire United States.

The Appellate Division in *Graham* correctly found that the Graves Amendment regulates instrumentalities and things in interstate commerce. *Graham*, 2008 N.Y. Slip Op. 958 at **9-10 (“Likewise, here, the plaintiff argues that the Graves Amendment regulates ‘state-imposed liability for harm’—which is not in itself an instrumentality of, or things or person in commerce. However, the statute aids in the regulation of the national market for leased and rented automobiles. Motor vehicles are ‘the quintessential instrumentalities of modern interstate commerce.’ [citations omitted] Moreover, leased and rented vehicles are ‘things in’ interstate commerce. ‘The leasing market for vehicles . . . is a national one.’ [citations omitted] The Graves Amendment, therefore, regulates both instrumentalities of, and things in, interstate commerce.”).

Unlike the attenuated connection the criminal statutes involved in *Lopez* and *Morrison* had to interstate commerce, here Congress acted to regulate an unquestionable economic activity, vehicle renting and leasing, by those engaged in the business of vehicle leasing and renting. Appellants’ attempts to compare this case to *Lopez* and *Morrison* simply do not support their contention that Congress acted unconstitutionally.

3. Congress Has Repeatedly Preempted State Law Tort Claims.

Appellants asserts that the proper focus of Commerce Clause analysis under *Lopez*, *Morrison* and *Gonzales* is whether the plain language of the federal statute regulates commerce, and not on the affects of the legislation on commerce. Appellants’ Brief at 15. Appellants argue that because the Graves Amendment regulates “tort activity,” *id.* at 14-15, it does not regulate

commerce, and thus is unconstitutional. As noted above, the Graves Amendment does not regulate “tort activity,” but rather regulates a quintessential interstate economic activity.

Moreover, Congress has repeatedly exercised its power under the Commerce Clause in several notable statutes enacted during the past approximately forty years to expressly preempt various categories of liability in tort, under state law, relating to motor vehicle performance and accidents.

The National Traffic and Motor Vehicle Safety Act, which was enacted in 1966, preempts state law tort causes of action based on allegations of motor vehicle design defects that are inconsistent with federal motor vehicle safety standards. 49 U.S.C. § 30103(b); *see e.g.*, *Geier v. American Honda Motor Co.*, 166 F.3d 1236, 1240-41 (D.C. Cir. 1999); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997). Subsequently, Congress created federal standards for motor vehicle bumpers, in order “to reduce economic loss resulting from damage to passenger motor vehicles involved in motor vehicle accidents,” 39 U.S.C. § 32501, and for motor vehicle parts identification and insurance claims reporting, in order to prevent or discourage the theft of motor vehicles and “help reduce the cost to consumers of comprehensive insurance coverage for motor vehicles.” 49 U.S.C. §§ 33102, 33103, 33112. In each of those statutes, Congress again expressly provided that any inconsistent state law standard is preempted by the federal law. 49 U.S.C. §§ 32511(a) (bumper standards), 33118 (theft prevention standards). Significantly, the statute at issue in this case, 49 U.S.C. § 30106, was codified in Title 49 of the United States Code, together with each of those other statutes that have long been recognized by the courts as a valid limitation on conflicting state laws that otherwise would impose liability arising from, *inter alia*, automotive accidents.

Congress has also exercised its regulatory powers in similar fashion to create federal standards and preempt state law in other fields that traditionally gave rise to claims arising in tort. For example, a federal statute passed in 1969 preempted State tort common law and statutes underpinning fraudulent misrepresentation and failure to warn claims concerning cigarette packaging. *Cipillone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The National Association of Attorneys General Air Travel Industry Enforcement Guidelines, that regulated airline fare advertising through the consumer protection laws of each State, were preempted by the Airline Deregulation Act, 49 U.S.C. § 1301 *et seq.*, as applied in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The ERISA statute broadly preempts state law. *See* 29 U.S.C. § 1144(a). The California Administrative Code was preempted by a federal statute that applied, *inter alia*, to weights and measures displayed on bacon packaging. Federal Meat Inspection Act ("FMIA") 21 U.S.C. § 601 *et seq.* *Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977) (enforcement of California flour package labeling requirements "must yield to the federal" regulations to ensure "the accomplishment and execution of the full purposes of Congress"). A California consumer fraud statute that provided a statutory tort remedy for damage caused by fraudulent consumer practices was preempted by the Airline Deregulation Act, 49 U.S.C. § 1301 *et seq.*, concerning deceptive practices in frequent flier incentives. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

Each of these statutes amply illustrates that Congress has ample authority to preempt state tort law. Appellants' argument that the Graves Amendment does not regulate commerce because it regulates "tort activity," even if true, must be rejected.

4. The Weight of Authority Has Held that the Graves Amendment is Constitutional.

A number of courts have considered the Graves Amendment, and the weight of authority has squarely held that the federal statute is constitutional. The lower court here discussed the authority extant at the time of the decision and found the first *Graham* decision unpersuasive, while noting two other cases which held the federal statute constitutional. *Merchants Ins. Group v. Mitsubishi Motor Credit Ass'n*, 2007 WL 2815744 at *3 n.4 (E.D.N.Y. Sept. 25, 2007). A number of other federal and state courts have also held the Graves Amendment to be constitutional. *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 821 (M.D. Fla. 2007); *DuPuis v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 980, 985 (M.D. Fla. 2007); *Jasman v. DTG Operations, Inc.*, 208 U.S. Dist. LEXIS 10372 at *8 (W.D. Mich. Feb. 13, 2008); *Berkan v. Panske Truck Leasing Canada, Inc.*, 2008 U.S. Dist. LEXIS 12090 at *12-13 (W.D.N.Y. Feb. 19, 2008); *Seymour v. Penske Truck Leasing Co., L.P.*, 2007 U.S. Dist. LEXIS 54843 (S.D. Ga. July 30, 2007); *Bechina v. Enter. Leasing Co.*, 2007 Fla. App. LEXIS 19704 (Fla. Dist. Ct. App. Dec. 12, 2007).

Amicus herein is aware of a few cases in which the Graves Amendment was held unconstitutional. The first is the lower court's decision in *Graham v. Dunkley* which, as stated above, was recently overturned by the New York Supreme Court Appellate Division. The only two federal court decisions to have held the statute unconstitutional were written by the same judge. *Vanguard Car Rental USA, Inc. v. Huchon*, 2007 U.S. Dist. LEXIS 76399 (S.D. Fla. Sept. 14, 2007) (J. Moore); *Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343 (S.D. Fla. 2007) (J. Moore). Each of those cases is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit.

CONCLUSION

For the reasons cited herein and in Appellees' brief, TRALA urges the court to affirm the District Court's decision.

Respectfully submitted,

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