New York Supreme Court

Appellate Division—Second Department

SHARON GRAHAM,

Plaintiff-Respondent,

– against –

RAYON S. DUNKLEY,

Defendant,

– and –

NILT, INC.,

Defendant-Appellant.

Docket No.: 2006-09666

BRIEF FOR AUTOMOBILE DEALERS, VEHICLE FINANCE COMPANIES, VEHICLE LEASING COMPANIES AND AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* SUPPORTING DEFENDANT RAYON S. DUNKLEY AND DEFENDANT-APPELLANT NILT, INC.

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MISCELLANEOUS

STATEMENT OF INTEREST

Amici represent companies in New York and around the country that are in the business of selling, financing, leasing and manufacturing cars and trucks driven in New York. The *amici* are:

- the New York State Automobile Dealers Association, which represents nearly 1,200 franchised car and truck dealers in New York State who: (i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to consumers; and (iii) engage in service, repair, and parts sales;
- the Greater New York Automobile Dealers Association, which represents approximately 650 franchised motor vehicle dealers located in New York City, on Long Island, and in Westchester and Rockland Counties, who: (i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to consumers; and (iii) engage in service, repair, and parts sales;
- the American Financial Services Association, which represents all of the manufacturer "captive" vehicle finance and leasing entities in New York, *e.g.*, Nissan Motor Acceptance Corporation, GMAC, Ford Motor Credit, Daimler Chrysler Services, Toyota Motor Credit and American Honda Finance, and most of other major independent (non-bank) vehicle finance companies doing business in New York that are either engaged in leasing in New York or may be interested in doing so in the future (*e.g.*, World Omni

Finance, AmeriCredit Finance, CitiFinancial Auto and Capitol One Auto Finance);

- the Association of Consumer Vehicle Lessors, which represents the major retail automobile lessors including the primary bank lessors that offer or may in the future offer leasing in New York (Chase Manhattan Automotive Financial Services, U.S. Bank, Wells Fargo Bank) and all of the manufacturer captive finance companies;
- the National Vehicle Leasing Association, a trade association whose membership consists of independent leasing companies, credit unions, captive funder banks and industry suppliers. The NVLA has a New York based chapter with 119 member companies;
- the Consumer Bankers Association, which represents virtually all of the state and federally chartered banks in the country including all of those that have in the past or now offer vehicle leasing in New York;
- the Rochester Automobile Dealers Association, which represents approximately 168 franchised automobile and truck dealers, as well as the recreation vehicle and motorcycle dealers in Monroe and the nine surrounding counties who:(i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to consumers; and (iii) engage in service, repair and parts sales;

- the Niagara Frontier Automobile Dealers Association, which represents more than 160 franchised automobile and truck dealers and related industries in Erie, Chautauqua, Cattaraugus, Niagara, Genesee, Orleans, and other surrounding counties in Western New York, who: (i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to consumers; and (iii) engage in service, repair, and parts sales;
- the Eastern New York Coalition of Automotive Retailers, Inc., which represents 95 new car franchised dealers in thirteen counties in and around Albany, New York, who: (i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to consumers; and (iii) engage in service, repair, and parts sales;
- the National Automobile Dealers Association, which represents approximately 20,000 franchised automobile and truck dealers in all 50 states and the District of Columbia who: (i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to consumers; and (iii) engage in service, repair, and parts sales; and
- the Alliance of Automobile Manufacturers, a trade association of car and light truck manufacturers: BMW Group, DaimlerChrysler, Ford Motor Company, General Motors, Mazda, Mitsubishi Motors, Porsche, Toyota and Volkswagen.

Amici will *directly* face the legal and business consequences of the decision being appealed. As a result, they have a strong incentive to ensure that this Court has the benefit of their perspective while reviewing the decision below.

STATEMENT

The relevant facts of this case are simply stated. Plaintiff Sharon Graham asserts that she was injured in a two-car automobile accident that took place in Queens County, New York. Alleging negligence, she sued the driver of the other automobile, Rayon Dunkley, a Connecticut resident who leased his vehicle from a dealership in that State. She also sued NILT, Inc., a Delaware leasing trust with an office in Chicago, Illinois, that owned the vehicle driven by Dunkley. Plaintiff sought to premise NILT's liability on N.Y. Veh. & Traf. Law § 388(1), New York's vicarious liability provision, which states in relevant part:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries resulting to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

NILT responded by moving to dismiss, arguing that the action against it is preempted by a federal statute, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59 Title IX, § 10208(a), 119 Stat. 1935 (Aug. 10, 2005), codified at 49 U.S.C. § 30106. As applied to commercial lessors of motor vehicles, that statute expressly displaces state laws like Section 388, providing:

> 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 a 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 the motor vehicle; and
> >
> > (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

The trial court denied the motion. 2006 WL 2596327 (N.Y. Sup. Sept. 11, 2006). The court recognized that, "[b]y its express language, the Transportation Equity Act of 2005, 49 U.S.C. § 30106, intends to preempt all state statutes to the extent they hold those owners in the business of renting or leasing motor vehicles vicariously liable for the negligence of drivers, except when there is negligence or criminal wrongdoing on the part of the owner." *Id.*, at *1. The court further acknowledged that Section 388 is just such a state statute, "imput[ing] to all motor vehicle owners the negligence of those who operate the vehicle with the owner[']s permission." *Id.*, at *3. Without receiving briefing on the subject or inviting the United States to express its views, however, the court concluded that this provision of SAFETEA-LU is unconstitutional, for two principal reasons.

First, the court expressed the view that defining the scope of tort liability "is an attribute of New York State sovereignty reserved [to the state] by the Tenth Amendment" and therefore "necessarily a power the Constitution has not conferred on Congress." 2006 WL 2596327, at *6. The court reasoned that "the federal

courts have looked to the states for the substantive law of torts since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), where the United States Supreme Court recognized that 'Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or general, be they commercial law or part of the law of torts.'" *Id.*, at *9 (quoting *Erie*, 304 U.S. at 78, 58 S. Ct. at 822). Because "[t]he expansion of the definition of vicarious liability by the New York State Legislature in [Section 388] was a lawful exercise of the legislature's inalienable power over the substantive law of civil tort actions" (*id.*), the court concluded that application of SAFETEA-LU was impermissible on the theory that it would "subvert[] the inherent authority of the New York State Legislature to legislate according to the collective will of its citizens, and * * * abrogate[] a long-standing substantive law of torts in New York State." *Id.*, at *10. The court added that "[t]he substantive law of torts is not to be faintly acquiesced to legislation by Congress, particularly when there is no preponderance of constitutional authority to support such a conclusion." *Id.*, at *11.

Second, the trial court held that enactment of SAFETEA-LU was beyond Congress's authority under the Commerce Clause of the U.S. Constitution. The court recognized that, under U.S. Supreme Court precedent, "Congress can regulate all activities, including intrastate activities, which have a 'substantial effect' [o]n interstate commerce." 2006 WL 2596327, at *8 (quoting *United States*

v. Darby, 312 U.S. 100, 119, 61 S. Ct. 451, 459 (1941)). The court also acknowledged that "effects on commerce that seem individually trivial may appropriately be deemed 'substantial' when considered together with the activity of other similarly situated individuals." *Id.* (citing *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195 (2005)). And it agreed that "[c]ourts should defer to a congressional finding that a regulated activity affects interstate commerce if there is any 'rational basis' for such a finding." *Id.* (citing *Raich*).

Notwithstanding all this, however, the court held Congress to be without the Commerce Clause authority to enact SAFETEA-LU. The court reasoned that Section 388 "is a statute that defines the scope of vicarious liability as part of the substantive law of torts, and it has nothing to do with 'commerce.' An individual's pursuit of justice in the New York State Supreme Court is not an 'economic class of activity' or 'economic enterprise,' no matter how broadly those terms may be defined." 2006 WL 2596327, at *10. See *id.* (SAFETEA-LU addresses an area "which is beyond the realm of commerce in the ordinary and usual sense of the word"; Section 388 "does not concern a commodity or instrumentality of interstate commerce"). For this reason, the court explained, it could "not conclude that Vehicle and Traffic Law § 388 has a substantial effect on interstate commerce or that there is a rational basis for 49 U.S.C. § 30106." *Id.* To find such an effect on interstate commerce or rational basis for the federal law, the court concluded,

"would require th[e] court to 'pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states.'" *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 567, 115 S. Ct. 1624, 1634 (1995)).

SUMMARY OF ARGUMENT

The trial court erred in two fundamental respects. First, the trial court was plainly wrong in holding that the rules governing liability for injuries caused by a leased vehicle lie outside the scope of Commerce Clause authority because they do not concern "economic activity" and do not have a "substantial effect" on interstate commerce. In fact, those rules have an obvious and direct impact on the availability and price of products (*i.e.*, leased vehicles) that are part of an enormous national market. There can be no denying the interstate nature of that effect. Leased vehicles cross state lines (and, often, international borders) to reach the ultimate consumer; they are owned by leasing companies that typically are headquartered in states other than that of the lessee; once leased, they are themselves quintessential instrumentalities of interstate commerce in that they may be driven across state lines; the willingness to lease in a given state is tied directly to the state's liability rules; and because of the mobility of leased automobiles, the existence of vicarious liability in even a single state affects the prices charged by

lessors in *all* states where they do business. These manifold effects more than satisfy the U.S. Supreme Court's Commerce Clause test.

Second, congressional authority to displace state tort rules – even rules that the state regards as essential to the safety and well-being of its citizens – is settled and not subject to serious challenge. The U.S. Supreme Court has made clear that state tort rules (whether common law or statutory) are subject to exactly the same preemption analysis as is other state law. Congress has preempted state tort laws repeatedly and, so far as we are aware, no court (let alone the United States Supreme Court) ever has invalidated such an enactment on the ground that tort rules are matters committed by the Constitution to the states or that the Tenth Amendment constrains Congress's ability to so act. And the Supreme Court has held time and again that, under the Supremacy Clause, the importance of the state interest protected by the preempted state law has absolutely no bearing on the preemption analysis.

ARGUMENT

The principles that govern this case are settled and straightforward. As a general matter, "Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' Art. VI, cl. 2. Thus, since [the] decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it

has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128 (1981)). In identifying whether there is such a conflict, "the purpose of Congress is the ultimate touchstone in pre-emption analysis." *Id.* (citations and internal quotation marks omitted). That rule makes the court's "task is quite simple if, in the federal enactment, Congress has explicitly mandated the pre-emption of state law." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501, 104 S. Ct. 3179, 3185 (1984). As the trial court itself acknowledged, Congress indisputably took precisely that step when it enacted SAFETEA-LU.

Ordinarily, that would be the end of this case so far as NILT's involvement is concerned, since there is no claim that it was itself negligent. In nevertheless refusing to apply SAFETEA-LU, the trial court relied on two premises: (1) that the vicarious liability rule at issue here is not within congressional authority under the commerce power; and (2) that the U.S. Constitution limits Congress's authority to displace state tort law. Both of those premises are manifestly wrong.

A. Congress Has Authority Under The Commerce Clause To Enact SAFETEA-LU

To begin with, there is absolutely no basis for the trial court's belief that enactment of SAFTEA-LU exceeded Congress's authority under the Commerce Clause. While there may be room to disagree about the scope of the commerce

power at the margins, the rules that govern here are settled and unambiguous. In its brief, NILT shows that SAFETEA-LU must be upheld as a direct congressional regulation of instrumentalities of interstate commerce. Here, *amici* focus on a second, independent basis for overturning the decision below: the state vehicle leasing rules at issue here have a *substantial effect* on interstate commerce.

The U.S. Supreme Court's case law "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17, 125 S. Ct. at 2205 (quoting *Perez v. United States*, 402 U.S. 146, 151, 91 S. Ct. 1357, 1360 (1971)). Indeed, "'even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.'" *Id.* (quoting *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 89 (1942)). Moreover, the Court has "reiterated that when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* (quoting *Lopez*, 514 U.S. at 558, 115 S. Ct. at 1629). When Congress acts in such an area, the Court has "never required Congress to make particularized findings [regarding an effect on interstate commerce] in order to legislate." *Id.* at 21. And a court "need not determine whether [the activities at issue], taken in the aggregate, substantially affect

interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22 (quoting *Lopez*, 514 U.S. at 557, 115 S. Ct. 1629). SAFETEA-LU more than passes that test. *See also United States v. Evans*, 2007 WL 218731, No. 06-10907 (11th Cir. Jan. 30, 2007) at *3 (upholding federal law prohibiting child prostitution, finding a rational basis for Congress to believe that the action "has an aggregate economic impact on interstate and foreign commerce").

1. The Vicarious Liability Rules Preempted by SAFETEA-LU Have a Substantial Effect on Interstate Commerce. In denying congressional authority, the trial court opined that it could find New York's vicarious liability rule to have a substantial effect upon interstate commerce only by "'pil[ing] inference upon inference.'" 2006 WL 2596327, at *10 (citation omitted). That conclusion was demonstrably incorrect. In fact, the impact of Section 388(1) on interstate commerce is direct, immediate, and obvious.

At the outset, the imposition of vicarious liability had dramatically changed the vehicle leasing market in New York (and, presumably, in other states with similar rules).[1] "The existence of such laws drove many lessors to cease leasing

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[1] When SAFETEA-LU was enacted in 2005, sixteen states in addition to New York had laws that impose some sort of vicarious liability on the owners of vehicles involved in accidents. *See* Christenfeld & Melzer, *Queens Ruling May Prompt Renewed Vicarious Liability*, N.Y.L.J. (Dec. 7, 2006), at n.3, *available at* www.fulbright.com/images/publications/Melzer.pdf.

cars in jurisdictions having them." Christenfeld & Melzer, *Queens Ruling May Prompt Renewed Vicarious Liability*, N.Y.L.J. (Dec. 7, 2006) at 1, *available at* www.- fulbright.com/images/publications/Melzer.pdf. In 2003, for example, the leasing arms of General Motors, Ford, Honda, JPMorganChase, and BankOne withdrew from New York as a direct reaction to its vicarious liability rule. *See The Effect of the Withdrawal of Automotive Leasing on the State of New York Economy*, Inst. of Labor & Ind. Relations, Univ. of Michigan & Ctr. for Automotive Research (Feb. 2004), app. 8, *available at* www.cargroup.org/pdfs/CARNewYork.pdf ("*Withdrawal of Automotive Leasing*").[2] Leasing companies that continued to do business in New York, including DaimlerChrysler, BMW, and Toyota, increased the acquisition fees they charged lessees. *Id.*[3] As a consequence, the number of new automobiles leased in New York dropped by more than a third. *See* Christenfeld & Melzer, *supra*; C. Territo, *A Victory for the Good Guys*, VEHICLE LEASING TODAY, *at* www.datakey.org/vlt/4q05/goodguys.php3. That development, in turn, inevitably

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[2] Small and medium-sized leasing firms also left the New York market, "fear[ing] giant settlements, loss of insurance and bankruptcy." Fernandez, *Albany jam has car lessors heading for the exit ramps*, CRAIN'S NEW YORK BUSINESS 12 (May 13, 2003).

[3] These increases were substantial, amounting to $400 or more per vehicle. *See, e.g.*, Lundegaard & Simon, *Lawsuits Drive Up Car-Lease Prices*, THE WALL STREET JOURNAL D1 (Jan. 22, 2003); Merrill, *Auto leasing firms threaten to abandon NY*, CRAIN'S NEW YORK BUSINESS 1 (Jan. 20-26, 2003). *See also* Stape, *General Motors to nearly triple leasing fees in R.I.*, The Providence Journal (Jan. 23, 2003), available at http://www.projo.com/cgi-bin/gold_print.cgi.

reduced the number of new vehicles obtained by consumers in New York – an outcome with significant economic implications because there are close to a million annual new vehicle automobile and truck registrations in New York. *See Withdrawal of Automotive Leasing* (preface).[4]

These effects were not confined to New York, but had obvious interstate consequences. The new vehicle leasing and financing markets are national in nature: as the identities of the companies that withdrew from doing business in New York themselves make clear, "[t]he major providers of vehicle financing, such as money-center banks and the finance arms of the Big Three and various foreign car makers, all operate nationally." Christenfeld & Melzer, *supra*, at 3. And the vehicles that are the subject of these leases, of course, themselves travel across state lines to reach the consumer; "currently, there are no vehicle assembly plants located in New York." *Withdrawal of Automobile Leasing*, at 4. The vicarious liability rule thus operated to reduce the flow of automobiles and financing into New York. At the same time, diminution of the market for vehicle leases in states like New York from which lessors withdrew inevitably affected the supply and price of automobiles available for lease in other jurisdictions.

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[4] On the other side of the coin, shortly after enactment of SAFETEA-LU, Mercedes-Benz, Audi, and Volkswagen announced their intention to reduce acquisition fees for leased vehicles in New York, while General Motors and Ford resumed leasing in the State. *See* Christenfeld & Melzer, *supra*. Chase Auto Finance and others also resumed leasing in the State.

By the same token, large vicarious liability judgments in *any* jurisdiction have effects on consumers nationwide. As members of Congress noted during the debate on SAFETEA-LU, "[v]icarious liability laws for rental cars in a handful of States drive up costs for consumers nationwide by an average of $100 million annually" because

> companies must build the costs of these arbitrary damage awards into their rental and lease rates. Regardless of where a car or truck company is headquartered or where the vehicle is rented or leased, the company is subject to vicarious liability when its vehicle is driven to a vicarious liability State and is then involved in an accident. Therefore, the laws of a mere handful of States are driving up the rental rates for rental consumers nationwide.

151 Cong. Rec. at H1201 (Mar. 9, 2005) (remarks of Rep. Boucher). *See id.* at H1200 (remarks of Rep. Graves); *id.* (remarks of Rep. Blunt); *id.* at S5422 (remarks of Sen. Santorum) (vicarious liability "affect[s] consumers and business in all 50 States" by imposing "higher consumer costs in acquiring vehicles and buying insurance"). "The higher costs have driven many small companies out of business, reducing the consumer choice and competition that keeps costs down." *Id.* at H1200 (remarks of Rep. Graves).[5]

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[5] There could be no denying the substantial aggregate effects of this litigation: in early 2003, at least eight leasing companies faced 215 lawsuits stemming from accidents in leased vehicles, claiming damages exceeding $1 billion. Lundegaard & Simon, *supra*, at D4.

By directly changing the market for new automobiles in certain states, vicarious liability laws also have spillover effects beyond the vehicle leasing industry. For example, "a decline in vehicle sales in New York could lead to a reduction in vehicle production in Michigan." *Withdrawal of Automobile Leasing*, at 2. That, in turn, "could trim purchases from auto suppliers" in other states. *Id.* Meanwhile, as the congressional debate on SAFETEA-LU indicated, vicarious liability affects the rates charged and profits earned by insurers doing business nationally, and thus has an impact on the insurance premiums paid by consumers across the country. The ripple effects throughout the economy are virtually limitless.

The facts of this case demonstrate that reality. The automobile alleged to have caused the accident that gave rise to this suit was leased in Connecticut by a resident of that State. It is owned by a Delaware leasing trust with offices in Chicago, which would be responsible for a vicarious liability judgment and could be expected to factor that (and similar) judgments into the rates it charges customers across the country. The accident occurred in New York, allegedly injuring a resident of this State. It is inconceivable that the imposition of vicarious liability in such a case – and, in the aggregate, in other cases like it – would not have significant interstate implications.

Against this background, the notion that state vicarious liability laws have a substantial effect on interstate commerce "is not just 'plausible[,]' * * * it is readily apparent." *Raich*, 545 U.S. at 30, 125 S. Ct. at 2213. That conclusion follows necessarily from decisions like *Wickard* and *Raich*, where the Supreme Court held that even seemingly "trivial" intrastate activities (in those cases, respectively, cultivation of wheat for personal consumption and personal use of marijuana for medical purposes) have an effect on interstate commerce when, in the aggregate, they affect "price and market conditions" prevailing in a national market. *Id*. at 19, 125 S. Ct. at 2207. If anything, the effect on interstate commerce in this case is many magnitudes greater than was that supporting congressional authority in *Wickard* and *Raich*; here, state vicarious liability laws demonstrably distorted a nationwide leasing market that is comprised, in substantial part, of national businesses that move both financing and financed automobiles across state lines.

2. The Trial Court's Contrary Ruling Misapplied the Law. In ruling to the contrary, the trial court opined that "[a]n individual's pursuit of justice in the New York State Supreme Court is not an 'economic class of activity' or 'economic enterprise'" and that N.Y. Veh. & Traf. Law § 388(1) accordingly "does not concern a commodity or instrumentality of interstate commerce." 2006 WL 2596327, at *10. This reasoning, however, is wrong on its own terms and "is at odds * * * with the general understanding of common-law damages actions."

Cipollone, 505 U.S. at 521, 112 S. Ct. at 2620 (plurality opinion). Whether or not tort plaintiffs regard themselves as "pursuing justice," tort liability is *designed* to affect primary behavior – in this case, commercial leasing behavior. State "'regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id*. (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S. Ct. 773, 780 (1959)). Here, the state law displaced by SAFETEA-LU was intended to, and plainly did, affect the actions of businesses that lease vehicles and provide financing; its effect on interstate businesses, many of which withdrew from the jurisdiction, was manifest.

Even more fundamentally, the trial court was wrong in its belief that Congress may exercise the commerce power only to regulate commercial commodities or transactions directly. The U.S. Supreme Court has held time and again that Congress has the authority to regulate even activities that "'may not be regarded as commerce'" so long as those activities "'exert[] a substantial economic effect on interstate commerce.'" *Raich*, 545 U.S. at 17, 125 S. Ct. at 2205 (quoting *Wickard*, 317 U.S. at 125, 63 S. Ct. at 87). *See id*. at 18, 125 S. Ct. at 2206 ("Congress can regulate purely intrastate activity that is not itself 'commercial'").

The point is illustrated by *Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720 (2003), where the U.S. Supreme Court recently upheld the constitutionality of 23 U.S.C. § 409, which precludes the use of certain state-generated traffic safety documents in any state or federal damages action. Rejecting the argument that section 409 lay outside Congress's commerce power, the Court held that "Congress could reasonably believe" that excluding such documents from use in damages suits would encourage information-gathering and better informed decision-making about highway hazards, and therefore lead to "greater safety on our Nation's roads." *Id.* at 147, 123 S. Ct. at 731-32. Consequently, the Court concluded that section 409 could have been "aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, [it] fall[s] within Congress' Commerce Clause power." *Id.* The result here follows necessarily from *Pierce County*. If anything, the impact on commerce of the statute at issue in *Pierce County* was considerably more attenuated than that of SAFETEA-LU; section 409 simply excluded certain evidence from use at trial of suits (like the one in *Pierce County* itself) arising out of automobile accidents, while SAFETEA-LU *directly limits liability* in such suits and therefore directly affects the behavior of participants in interstate commerce. A unanimous Court nevertheless had no difficulty holding section 409 constitutional.

The trial court here also misunderstood the Commerce Clause decisions on which it principally relied, *Lopez* and *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000). The Court in those cases struck down Congress's attempt to regulate intrastate conduct through statutes that addressed criminal activity and that "by [their] terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1630-31; *see Morrison*, 529 U.S. at 613, 120 S. Ct. at 1751. The Court rejected the argument that the offenses targeted by the laws – possession of a firearm near a school and gender-motivated violence – had a sufficient connection to interstate commerce to justify congressional action, reasoning that those offenses were "not directed at the instrumentalities, channels, or goods involved in interstate commerce." *Id.* at 618, 120 S. Ct. at 1754.

SAFETEA-LU is decisively different. By its terms, the statute comes into play *only* when triggered by the existence of a commercial transaction; it does not limit liability unless a vehicle's owner "is engaged in the trade or business of renting or leasing the motor vehicle." Thus, SAFETEA-LU necessarily has *something* "to do with 'commerce' or [some] sort of economic enterprise." *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1630-31. The statute expressly assigns economic responsibility between parties to a commercial relationship, providing that a faultless lessor will not be held liable for injury caused by its lessee. And

SAFETEA-LU was explicitly designed to encourage economic activity; its sponsors in Congress emphasized that the statute was intended to keep small leasing companies in business and increase competition in the leasing and rental markets. Because state vicarious liability laws "have a significant impact on both the supply and demand sides of the market" for leased vehicles (*Raich*, 545 U.S. at 30, 125 S. Ct. at 2213) – and because SAFETEA-LU was intended to, and demonstrably did, affect that market – it passes the Commerce Clause test.

B. State Tort Rules Are Not Entitled To Special Constitutional Protection

The trial court was equally wrong in its belief that state tort law is entitled to a special constitutional status. The U.S. Supreme Court has repeatedly applied federal statutes to preempt imposition of state tort liability, without the slightest suggestion that there is a constitutional impediment to such preemption. *See*, *e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446, 125 S. Ct. 1788, 1799-1800 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136v(b), preempts inconsistent state labeling requirements, whether imposed by statute or common law); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 121 S. Ct. 1012 (2001) (applying Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913 (2000) (applying National Traffic and Motor Vehicle Safety Act of 1966, §§ 103(d), 108(k), 15 U.S.C. §§ 1329(d), 1397(k)); *CSX Transp., Inc. v. Easterwood*, 507

U.S. 658, 113 S. Ct. 1732 (1993) (applying Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-447); *Cipollone*, 505 U.S. 504, 112 S. Ct. 2608 (applying Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 98 S. Ct. 2620 (1978) (applying Price-Anderson Act, 42 U.S.C. § 2210).

Other courts have, without exception, expressly rejected constitutional challenges to congressional authority in this area. *See*, *e.g.*, *Kelley v. United States*, 69 F.3d 1503, 1507-09 (10th Cir. 1995) (upholding Federal Aviation Administration Authorization Act of 1994); *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1309 (9th Cir. 1982) (upholding Warsaw Convention liability limits); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp.2d 244 (E.D.N.Y. 2005) (upholding Protection of Lawful Commerce in Firearms Act); *Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp.2d 631 (E.D. Pa. 2004) (upholding General Aviation Revitalization Act of 1994); *O'Connor v. Commonwealth Edison Co.*, 770 F. Supp. 448 (C.D. Ill. 1991) (upholding Outer Continental Shelf Lands Act).

Moreover, Congress has enacted innumerable other statutes expressly intended to preempt state tort law – statutes that remain in effect and have been applied innumerable times. *See*, *e.g.*, National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300-aa10 – 300-aa34; Air Transportation Safety and System Stabilization Act of 2001, 49 U.S.C. §§ 40101, 44302-44306; Federal

Aviation Act, 49 U.S.C. § 44112(b). Indeed, numerous state and federal courts – including this one – have applied SAFETEA-LU itself (or held it inapplicable on the facts for reasons not relevant here) without ever so much as hinting that it has a constitutional defect.[6]

In assessing the legitimacy of congressional action preempting state tort law, it is wholly beside the point that, as the trial court here observed of vicarious liability rules, state authority in this area is "traditional[]" (2006 WL 2596327, at *9) or expresses "the collective will of [the state's] citizens." *Id.* at *10. As the U.S. Supreme Court has held repeatedly, even when the state's interest is "compelling," "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108, 112 S. Ct. 2374, 2388 (1992) (citations and internal quotation marks omitted). This "principle[] is not

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[6] *See Jones v. Bill*, 2006 NY Slip Op. 08930, 34 A.D.3d 741 (2d Dep't Nov. 28, 2006) (applying SAFETEA-LU); *Hampson v. Gelco Corp.*, Index No. 22130/06, slip. op. (Sup. Ct., Suffolk Co. filed Feb. 8, 2007) (same); *Davis v. Ilama*, 41 Conn. L. Rptr. 178 (Conn. Super. Ct. 2006) (same); *Infante v. U-Haul Co. of Florida*, 11 Misc.3d 529, 815 N.Y.S.2d 921 (Sup. Ct. Queens Cty. 2006) (same). *See also Pinche v. Nugent*, 2005 WL 2428156 (D. Me. Sept. 30, 2005) (SAFETEA-LU inapplicable because case commenced before statute's effective date); *King v. Car Rentals, Inc.*, 813 N.Y.S.2d 448, 29 A.D.3d 205 (2d Dep't 2006) (same); *Roper v. Team Fleet Fin. Corp.*, 10 Misc.3d 1080(A), 814 N.Y.S.2d 892 (Sup. Ct. Bronx Cty. 2006) (same); *Leuchner v. Cavanaugh*, 13 Misc.3d 654, 820 N.Y.S.2d 786 (Sup. Ct. Erie Cty. 2006) (same).

inapplicable here simply because [the] law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 (1982) (quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 1092 (1962)).

In *Raich* itself, the Supreme Court held that Congress may preempt California's criminal, health, and safety authorities, areas that are at least as central to a state's mission as is tort law. Indeed, even asking the question whether a law involves a "traditional" authority invites a semantic game, given that legal regulation almost inevitably touches on a range of areas. For instance, the SAFETEA-LU provision at issue here involves (at minimum) transportation, leasing, safety, and commerce, in addition to torts. Giving a special status to certain areas of state law will simply lead parties to try game the system by asserting that a challenged statute does or does not fall into that category.

In nevertheless ruling as it did, the trial court in this case believed that *Erie* denied Congress the authority to preempt tort liability rules enacted by the legislature. But as Judge Weinstein recently observed in rejecting an identical argument, *Erie* is "irrelevant" here. *Beretta*, 401 F. Supp.2d at 288. *Erie* held only that federal courts sitting in diversity should apply state law rather than federal

common law rules of decision. When a federal statute "is operative in a diversity case the statute will be applied. * * * Where state law is operative in a diversity case it will continue to be applied as *Erie* requires. *Erie* overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which applied federal common law in diversity cases; it did not purport to control the application of federal statutes in such cases." *Id.*, at 288-289. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27, 108 S. Ct. 2239, 2243 (1988) ("a district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers"); *Erie*, 304 U.S. at 78, 58 S. Ct. at 822 (*Erie* principle of deference to state law does not apply "in matters governed by the Federal Constitution or by acts of Congress"). *Erie* thus says nothing at all about the constitutional authority of Congress to displace state tort law when it acts by statute under the Commerce Clause.

In short, nothing about the nature of the state law affected by SAFETEA-LU detracts from the preemptive force of the federal statute. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be." *Raich*, 545 U.S. at 29, 125 S. Ct. at 2212 (citations and internal quotation marks omitted).

And insofar as the trial court's ruling here would permit tort "actions that 'actually conflict' with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect." *Geier*, 529 U.S. at 872, 120 S. Ct. at 1920. In these circumstances, "preemption follows * * * as a matter of substantive right" (*Brown*, 468 U.S. at 503, 104 S. Ct. at 3186) and the trial court should have held New York's vicarious liability statute to be "without effect." *Cipollone*, 505 U.S. at 516 (citation omitted).

CONCLUSION

The decision of the trial court should be reversed.

Respectfully submitted,

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APPELLATE DIVISION – SECOND DEPARTMENT

CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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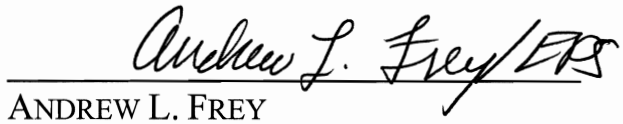

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