

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1073

HALEY MCMINN,

Plaintiff-Appellant,

vs.

KIMBERLY COX and
ECONO CAR AUTO RENTAL INC.,

Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
1ST DISTRICT OF FLORIDA
Case No. 08-1181
8TH JUDICIAL CIRCUIT COURT
IN AND FOR ALACHUA COUNTY, FLORIDA
Case No. 01-05 CA 5029

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.....	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. REVERSAL IS WARRANTED BECAUSE ECONO IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BASED ON 49 U.S.C. § 30106.....	7
A. There Is No Conflict Between 49 U.S.C. § 30106 and Florida Law Governing the Financial Responsibility and Liability Insurance Duties of Short-Term Rental Car Owners Such as Econo.....	8
1. 49 U.S.C. § 30106 provides limited immunity for rental car owners while preserving state authority to impose motor vehicle insurance duties on rental car owners.....	8
2. Florida law imposes vicarious liability and “financial responsibility or liability insurance requirements” on motor vehicle lessors to ensure compensation for the harms committed by their lessees.	13
3. Florida’s “financial responsibility or liability insurance requirements” applicable to motor vehicle lessors such as Econo are preserved from preemption by the federal Act’s savings clause, § 30106(b).	16
II. CONGRESS LACKS THE CONSTITUTIONAL AUTHORITY TO ENACT 49 U.S.C. § 30106, A FLAT PROSCRIPTION OF STATE-IMPOSED LIABILITY	25
A. Section 30106 Rests on a Novel Theory of Congressional Commerce Power and Its Constitutionality Must Be Assessed Based on the Four Substantial-Effects Factors	27

B.	To Sustain The Constitutionality Of § 30106, This Court Would Have To Adopt An Unlimited View of Congressional Power— A Result That Supreme Court Precedent Forbids	36
CONCLUSION		39

TABLE OF AUTHORITIES

Cases

<i>Abdala v. World Omni Leasing, Inc.</i> , 583 So. 2d 330 (Fla. 1991)	14
<i>Ady v. American Honda Financial Corp.</i> , 675 So. 2d 577 (Fla. 1996)	14
<i>Allen-Bradley Local No. 1111, United Electric, Radio, & Machine Workers of America v. Wisconsin Employment Relations Board</i> , 315 U.S. 740 (1942)	16
<i>Allstate Insurance Co. v. Fowler</i> , 480 So. 2d 1287 (Fla. 1985)	18
<i>Allstate Insurance Co. v. RJT Enterprises, Inc.</i> , 692 So. 2d 142 (Fla. 1997)	18
<i>Altria Group, Inc. v. Good</i> , 129 S. Ct. 538 (2008)	12, 24
<i>Aurbach v. Gallina</i> , 753 So. 2d 60 (Fla. 2000)	13, 14
<i>Bates v. Dow Agrosiences L.L.C.</i> , 544 U.S. 431 (2005)	24, 34
<i>Bechina v. Enterprise Leasing Co.</i> , 972 So. 2d 925 (Fla. 3d DCA 2007)	19
<i>Brookins v. Ford Credit Titling Trust</i> , 993 So. 2d 178 (Fla. 4th DCA 2008)	5
<i>City of Columbus v. Ours Garage & Wrecker Service, Inc.</i> , 536 U.S. 424 (2002)	20
<i>City of New York v. Beretta U.S.A. Corp.</i> , 524 F.3d 384 (2d Cir. 2008), <i>cert. denied</i> (2009)	28, 29
<i>De Buono v. NYSA-ILA Medical & Clinical Services Fund</i> , 520 U.S. 806 (1997)	24
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938)	35
<i>Garcia v. Vanguard Car Rental U.S.A., Inc.</i> , 540 F.3d 1242 (11th Cir. 2008), <i>cert. denied</i> , 129 S.Ct. 1369 (2009)	passim
<i>Gibbons v. Ogden</i> , 22 U.S. 1 (1824)	33
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005)	passim

<i>Head v. New Mexico Board of Examiners in Optometry</i> , 374 U.S. 424 (1963).....	36
<i>Kesler v. Department of Public Safety of Utah</i> , 369 U.S. 153 (1962).....	11
<i>Kraemer v. General Motors Acceptance Corp.</i> , 572 So. 2d 1363 (Fla. 1990). 12, 13	
<i>Lucas v. Williams</i> , 984 So. 2d 580 (Fla. 1st DCA 2008).....	3
<i>Lynch v. Walker</i> , 31 So. 2d 268 (1947)	13
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	36
<i>McMinn v. Cox</i> , 7 So. 3d 651 (Fla. 1st DCA 2009)	3, 8, 19
<i>Meister v. Fisher</i> , 462 So. 2d 1071 (Fla. 1984).....	13
<i>Missouri Pacific Railway Co. v. Humes</i> , 115 U.S. 512 (1885)	36
<i>Morse v. Republican Party of Virginia</i> , 517 U.S. 186, 254 (1996).....	10
<i>Perez v. Campbell</i> , 402 U.S. 637 (1971)	11
<i>Rancho Viejo, L.L.C. v. Norton</i> , 334 F.3d 1158 (D.C. Cir. 2003).....	31
<i>Roth v. Old Republic Insurance Co.</i> , 269 So. 2d 3 (Fla. 1972).....	18
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	21, 22
<i>Sherlock v. Alling</i> , 93 U.S. 99 (1876)	37
<i>Sontay v. Avis Rent-A-Car Systems, Inc.</i> , 872 So. 2d 316 (Fla. 4th DCA 2004)	15
<i>Southern Cotton Oil Co. v. Anderson</i> , 86 So. 629 (Fla. 1920)	13
<i>St. Onge v. White</i> , 988 So. 2d 59 (Fla. 1st DCA 2008), rehearing denied, (Aug. 20, 2008).....	3
<i>State v. Rubio</i> , 967 So. 2d 768 (Fla. 2007)	7
<i>Susco Car Rental System of Florida v. Leonard</i> , 112 So. 2d 832 (Fla. 1959) .	13, 18
<i>Truck Discount Corp. v. Serrano</i> , 362 So. 2d 340 (Fla. 1st DCA 1978)	18

<i>United States v. Danks</i> , 221 F.3d 1037 (8th Cir. 1999).....	34
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	26
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	passim
<i>United States v. McManigal</i> , 708 F.2d 276, <i>vacated in part</i> , 723 F.2d 580 (7th Cir. 1983)	22
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	passim
<i>Vargas v. Enterprise Leasing Co.</i> , 993 So. 2d 614 (Fla. 4th DCA 2008)	passim
<i>Village of Euclid, Ohio v. Ambler Realty Co.</i> , 272 U.S. 365 (1926).....	36
<i>Volusia County v. Aberdeen at Ormond Beach, L.P.</i> , 760 So. 2d 126 (Fla. 2000)	7
<i>Western & Southern Life Insurance Co. v. State Board of Equalization of California</i> , 451 U.S. 648 (1981).....	16
<i>Wyeth v. Levine</i> , 129 S. Ct. 1187 (2009)	11, 12, 24

Constitutional Provisions

FLA. CONST. art. V, § 3	3
U.S. CONST. art. I, § 8	2, 6

Statutes

§ 324.011, Fla. Stat. (2007).....	5, 15
§ 324.021(7), Fla. Stat. (1981).....	18
§ 324.021(7), Fla. Stat. (2007).....	4
§ 324.021(9)(b), Fla. Stat. (1997)	14
§ 324.021(9)(b)(2), Fla. Stat. (2007)	passim
§ 324.032(1)(b), Fla. Stat. (2007)	15
§ 324.151(1)(a), Fla. Stat. (1981)	18

15 U.S.C. §§ 7901 <i>et seq.</i>	27, 28, 29
18 U.S.C. § 922.....	34
18 U.S.C. § 1963(a)	21, 22
42 U.S.C. §§ 300aa-1 <i>et seq.</i>	28
42 U.S.C. §§ 2210 <i>et seq.</i>	28
49 U.S.C. § 30106.....	passim
49 U.S.C. § 30106(a)	passim
49 U.S.C. § 30106(b)	passim
49 U.S.C. § 40101 note	28
Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005).....	8

Other Authorities

151 Cong. Rec. H1199-1204 (daily ed. Mar. 9, 2005)	9, 19
151 Cong. Rec. S5433-S5454 (daily ed. May 18, 2005).....	9
7A Russ, Lee R. & Segalla, Thomas F., <i>Couch on Insurance</i> § 109 (3d ed. 2005)	11
<i>Black's Law Dictionary</i> (7th ed. 1999).....	32
Blackstone, William, <i>Commentaries</i> (1765).....	36
Martin, Susan L., <i>Commerce Clause Jurisprudence and the Graves Amendment: Implications for the Vicarious Liability of Car Leasing Companies</i> , 18 U. FLA. J. LAW & PUB. POL'Y 153 (2007)	8, 9
The Federalist No. 17, at 103 (Alexander Hamilton) (Modern Library College ed. 1988).....	36
U.S. DEP'T OF COMMERCE, EC02/531-03, <i>Automotive Equipment Rental & Leasing: 2002 Economic Consensus, Real Estate and Rental and Leasing Industry Series</i> (July 2004)	34
Webster's Third New International Dictionary (1966)	32

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case concerns a purely local incident: a Florida resident, Ms. Kimberly Cox, rented a car in Florida from Econo Car Auto Rental Inc. (“Econo”), a car rental company lessor licensed to do business in the State, and drove the car solely in Florida, causing an accident on November 1, 2005, in which another Florida resident, Haley McMinn, was severely injured. (R. Vol. I, p. 1.)¹ There is no evidence in the record that, at the time of the accident, there was insurance available in the amount of \$100,000 per person and \$300,000 per incident of bodily injury liability, and \$50,000 for property damage, or \$500,000 combined property damage or bodily injury liability coverage. *See* § 324.021(9)(b)(2), Fla. Stat. (2007).

On December 21, 2005, Plaintiff-Appellant McMinn filed suit against Econo and Ms. Cox claiming damages in excess of \$15,000. (R. Vol. I, pp. 1-2). McMinn alleged that Cox negligently operated and/or maintained a rental car owned by Econo, causing McMinn serious permanent injury. (R. Vol. I, p. 2).

McMinn settled her claim against Cox and proceeded against Econo. Econo moved for final summary judgment, arguing that McMinn’s claim against it as the owner/lessor of the rental car is preempted by 49 U.S.C. § 30106 (2006). (R. Vol. I, pp. 82-146). McMinn filed a Memorandum in Opposition to Econo’s Motion for

Summary Judgment, arguing that her claim is not preempted by § 30106(a), but rather is preserved in accordance with the federal Act's savings provision, § 30106(b). (R. Vol. II, pp. 150-244). McMinn also argued that if § 30106 does have such preemptive effect, then the federal Act is unconstitutional on the grounds that Congress exceeded its authority under Article I, § 8, clause 3 of the U.S. Constitution ("Commerce Clause") when it enacted § 30106. (R. Vol. II, pp. 150-244).

The Circuit Court granted Econo's Motion for Final Summary Judgment on February 13, 2008, holding that § 30106 "has abrogated vicarious liability of automobile lessors in the State of Florida effective August 10, 2005 and, therefore, ECONO CAR AUTO RENTAL, INC. cannot be held vicariously liable to Plaintiff, HALEY McMINN in this case." (R. Vol. II, p. 266, ¶8). The court reasoned:

The maximum limits of vicarious liability for short term automobile lessors as stated in § 324.021 (9)(b)(2) Fla. Stat. are "caps" on vicarious liability and are not 'financial responsibility' requirements for the privilege of owning/operating a motor vehicle in the State of Florida. Further, the court finds that § 324.021(9)(b)(2) Fla. Stat. is no longer operative for cases filed after August 10, 2005, due to the fact that the 'Graves Amendment' has superseded all state laws imposing vicarious liability on automobile lessors.

¹ The record cites herein are to the record prepared by the Circuit Court for the First DCA.

(R. Vol. II, p 266, ¶9). The court also held § 30106 constitutional under the Commerce Clause. (R. Vol. II, p 266, ¶10).

McMinn appealed, seeking reversal on the grounds that her claim is not preempted and that § 30106 is unconstitutional. (R. Vol. II, pp. 268-272). On April 29, 2009, the First District issued a final order affirming with citation the final order of the Circuit Court granting Econo's summary judgment motion. *McMinn v. Cox*, 7 So. 3d 651 (Fla. 1st DCA 2009) (citing *St. Onge v. White*, 988 So. 2d 59 (Fla. 1st DCA 2008), *rehearing denied*, (Aug. 20, 2008); *Lucas v. Williams*, 984 So. 2d 580 (Fla. 1st DCA 2008); *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614 (Fla. 4th DCA 2008)). McMinn timely filed a Notice of Appeal on May 29, 2009, invoking the Supreme Court's mandatory jurisdiction pursuant to Article V, § 3(b)(1) of the Florida Constitution on the basis that the First District's decision declared invalid a state statute.² (Appellant McMinn's Notice of Appeal, at 3-4, filed May 29, 2009) (further explaining jurisdiction).)

² On June 3, this Court accepted review of the question of law certified to it by the Fourth DCA in *Vargas*. *Vargas v. Enterprise Leasing, Co.*, No. SC08-2269, Order Accepting Discretionary Review Jurisdiction (Fla. June 3, 2009); *see Vargas*, 993 So. 2d at 624 (Fourth DCA certifying as a question of great public importance: "DOES THE GRAVES AMENDMENT, 49 U.S.C. § 30106 PREEMPT SECTION 324.021(9)(b) 2, FLORIDA STATUTES (2007)?").

SUMMARY OF ARGUMENT

Rather than seek to harmonize the federal and state laws at issue in this case, the courts below have imagined a conflict between 49 U.S.C. § 30106 (2006) and Florida law governing the financial responsibility obligations of short-term rental car owners such as Appellee Econo—specifically, § 324.021(9)(b)(2), Fla. Stat. (2007), a provision of Florida’s Motor Vehicle Financial Responsibility Laws that alters the common-law dangerous-instrumentality doctrine.³ Their conclusion is erroneous because it fails to capture Congress’s intent in enacting § 30106, which is the touchstone in every preemption case.

The plain language of § 30106, read as a whole, evinces Congress’s design: States may not impose liability directly on owners who rent vehicles if the owners are not themselves negligent, *see* § 30106(a) (preemption clause), but states may continue to require rental car owners to comply with state-law financial responsibility or insurance requirements, *see* § 30106(b) (savings clause). What, then, is the scope of the federal Act’s savings clause in relation to its operative preemption clause? A careful reading of the savings clause’s text, which carves out two exceptions to preemption, against the backdrop of the operative preemption provision, demonstrates that Congress intended, in the second exception, § 30106(b)(2), to preserve state laws imposing “liability” on lessors who fail to

comply with state law “financial responsibility or liability insurance requirements . . .” *See id.*

Florida imposes motor vehicle insurance duties on owners generally, *see e.g.*, § 324.021(7), Fla. Stat. (2007), and entities engaged in the business of renting vehicles specifically, *see e.g.*, § 324.021(9)(b)(1) (imposing duties on long-term lessors); § 324.021(9)(b)(2) (imposing duties on short-term lessors). These laws establish “financial security requirements for such owners or operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle.” *See* § 324.011, Fla. Stat. (2008). None conflicts with § 30106.

This case illustrates the absence of a conflict. Econo rented a car to Cox for a period of less than one year. There is no evidence in the record that, at the time of the accident, there was insurance available in the amount of \$100,000 per person and \$300,000 per incident of bodily injury liability, and \$50,000 for property damage, or \$500,000 combined property damage or bodily injury liability coverage. *See* § 324.021(9)(b)(2), Fla. Stat. Section 324.021(9)(b)(2) allocates responsibility for bodily injury and property insurance coverage to Econo as the owner of the leased vehicle in statutorily-set amounts. *See id.*; *see also* § 324.011; *cf. Brookins v. Ford Credit Titling Trust*, 993 So. 2d 178, 178 (Fla. 4th DCA 2008)

³ 49 U.S.C. § 30106 is reproduced in full in Appendix 3. Fla. Stat. § 324.021 is

(holding that a long-term lessor that had submitted evidence of compliance with the liability insurance requirements under § 324.021(9)(b)(1) could not be held liable under state law). Had Econo met its responsibility, it would not be liable as a matter of state law because minimum compensation for McMinn’s bodily injury or property damages would come from the *insurer*—a result that is wholly harmonious with the federal Act. *See* 49 U.S.C. § 30106(a) (generally prohibiting states from imposing liability on *owners* of leased vehicles for the harms committed by their lessees). But because Econo failed to comply with § 324.021(9)(b)(2)’s “financial responsibility or liability insurance requirement,” it may be held liable under state law—a result that is equally harmonious with the federal act. *See* § 30106(b)(2).

Should this Court conclude that McMinn’s claim against Econo is preempted, it must consider whether Article I, § 8, cl. 3 of the U.S. Constitution (“Commerce Clause”) confers on Congress the power, through 49 U.S.C. § 30106(a)—which lacks express findings and jurisdictionally limiting language—to eliminate certain state-law tort suits against motor vehicle lessors. In view of modern Commerce Clause jurisprudence, which recognizes that Congress’s commerce power is broad but not unlimited, this Court should conclude that Congress exceeded its Commerce Clause authority when, through § 30106, it

reproduced in full in Appendix 4.

sought to blot out certain state-law tort suits, not as an incident to federal regulation, but on the unsupported (and unsupportable) belief that a single suit for damages, such as McMinn’s suit, “substantially” affects the billion-dollar motor vehicle leasing industry.

ARGUMENT

I. REVERSAL IS WARRANTED BECAUSE ECONO IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BASED ON 49 U.S.C. § 30106

The First DCA erred in affirming the final order of the Circuit Court granting Enterprise’s motion for summary judgment based on 49 U.S.C. § 30106 (2006). “Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (citation omitted). Because the facts are undisputed, this case raises only issues of statutory and constitutional interpretation, which are questions of law subject to de novo review. *See id.*; *see also State v. Rubio*, 967 So. 2d 768, 771 (Fla. 2007).

Upon de novo review, this Court should conclude that the federal Act does not preempt McMinn’s suit against Econo. Should it find that her suit is preempted, this Court should hold that Congress exceeded its Commerce Clause authority when it enacted 49 U.S.C. § 30106. On either ground, this Court should reverse the judgment of the lower court.

A. There Is No Conflict Between 49 U.S.C. § 30106 and Florida Law Governing the Financial Responsibility and Liability Insurance Duties of Short-Term Rental Car Owners Such as Econo

Econo has argued, based largely on the decisions in *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614 (Fla. 4th DCA 2008) (en banc), and *Garcia v. Vanguard Car Rental U.S.A., Inc.*, 540 F.3d 1242 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 1369 (2009), that 49 U.S.C. § 30106 preempts both § 324.021(9)(b)(2) and the common-law dangerous instrumentality doctrine. *See* Econo's Answer Brief at 8, No. 1D08-1181 (filed Nov. 17, 2008). The First DCA agreed, citing *Vargas* as authority. *See McMinn*, 7 So. 3d 651. For the reasons that follow, the court below, in finding McMinn's claim to be preempted, failed to capture Congress's intent in enacting § 30106, or the Florida Legislature's intent in enacting § 324.021(9)(b)(2). Careful consideration of these laws reveals that they do not conflict.

1. 49 U.S.C. § 30106 provides limited immunity for rental car owners while preserving state authority to impose motor vehicle insurance duties on rental car owners.

49 U.S.C. § 30106 is the single substantive provision of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005)—an appropriations act which provides funds for transportation projects throughout the United States. Representative Sam Graves introduced § 30106 as an amendment to an

appropriations bill, believing that vicarious liability suits burden the leasing industry. Susan L. Martin, *Commerce Clause Jurisprudence and the Graves Amendment: Implications for the Vicarious Liability of Car Leasing Companies*, 18 U. FLA. J. LAW & PUB. POL'Y 153, 164 (2007). The Amendment was adopted without the review of any congressional committee, without express findings, without hearings, without any debate in the Senate,⁴ and with only a 20-minute debate in the House of Representatives. *Id.*; see also 151 Cong. Rec. H1199-1204, H1201 (daily ed. Mar. 9, 2005) (statement of Rep. Conyers) (“[T]he issue of preempting state liability is under the jurisdiction of the Committee on the Judiciary, of which I am the Ranking Member, and no hearings have been held to examine the appropriateness of the language which would be included in the legislation should the amendment pass.”).

The Amendment has two operative provisions: first, a preemption clause, which 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

⁴ During a period of morning business, in which senators were permitted to speak on any topic, 151 Cong. Rec. S5433-01, Senator Santorum did make a statement in support of the version of the Amendment passed by the House. See 151 Cong. Rec. S5433-S5454, S5433-03 (daily ed. May 18, 2005).

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(a);⁵ and second, a savings clause, which provides:

(b) Financial responsibility laws.—Nothing in this section supersedes the law of any State or political subdivision thereof—

- (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
- (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements.

§ 30106(b).

Congress did not define “financial responsibility” in § 30106; accordingly, these words are assumed to carry their common meaning. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 254 (1996) (“When words in a statute are not otherwise defined, it is fundamental that they will be interpreted as taking their

⁵ The preemption clause, by its terms, does not apply if there is “negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).” *See*

ordinary, contemporary, common meaning.”) (citations and internal quotation marks omitted).

Commonly understood, financial responsibility laws require the procurement of an insurance policy in minimum amounts specified by statute. *See Garcia*, 540 F.3d at 1247 (“[T]he most common legal usage of the term “financial responsibility” is to refer to state laws which require either liability insurance or a functionally equivalent financial arrangement.”); *Vargas*, 993 So. 2d at 627-28 (Farmer, J., dissenting) (explaining that “financial responsibility,” commonly understood, means “security requirements for those owing a monetary obligation to someone affected by or involved in a motor vehicle accident. When the context is motor vehicles, the words plainly impart the duty of making provision for security to pay for injuries inflicted by a vehicle on a victim in an accident.”). These laws “furnish compensation for innocent persons . . . injured by the negligent operation of automobiles” 7A *Couch on Insurance* § 109:36 (3d ed. 2005); *see Kesler v. Dep’t of Pub. Safety of Utah*, 369 U.S. 153, 165 (1962) (discussing evolution of financial responsibility laws), *overruled in part on other grounds by Perez v. Campbell*, 402 U.S. 637 (1971).

49 U.S.C. § 30106(a)(2). McMinn has not alleged that Econo is itself negligent, and thus § 30106(a)(2) is inapplicable here.

In the course of delineating the scope of preemption, this Court “must be guided by two cornerstones of [the U.S. Supreme Court’s] pre-emption jurisprudence.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). As stated in *Wyeth*, these are:

First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); see *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Lohr*, 518 U.S., at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Id. at 1194-95 (parallel citations and footnote omitted); see *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (noting that the presumption against preemption applies in express preemption cases: “If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.”).

With these operative principles in mind, McMinn describes first Florida law governing the financial responsibility and liability insurance requirements of short-term rental car owners, such as Econo, and then considers their intersection with 49 U.S.C. § 30106.

2. Florida law imposes vicarious liability and “financial responsibility or liability insurance requirements” on motor vehicle lessors to ensure compensation for the harms committed by their lessees.

In Florida, vicarious liability is a creature of the common law, and is known as the dangerous instrumentality doctrine. The doctrine “is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation.” *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990) (*see S. Cotton Oil Co. v. Anderson*, 86 So. 629, 638 (Fla. 1920)). It “seeks to provide greater financial responsibility to pay for the carnage on our roads,” *id.* at 1365, and thus advances an important state interest that has appreciated with the increase in motor vehicle traffic. *See Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000) (“If Florida’s traffic problems were sufficient to prompt its adoption in 1920, there is all the more reason for its application to today’s high-speed travel upon crowded highways.” (quoting *Kraemer*, 572 So. 2d at 1365)); *see also Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (recognizing the states’ “compelling interest in highway safety”).

Thus, in *Southern Cotton Oil v. Anderson*, this Court found Southern Cotton Oil vicariously liable under the dangerous instrumentality doctrine for the negligence of its employee, who, while operating a car owned by Southern Cotton

Oil with its express or implied permission, drove the car negligently and caused an accident. 86 So. at 636. Thereafter, the Court extended the doctrine to the owner of a vehicle acting as a lessor or bailor for the negligent operation of the vehicle by the lessee or bailee. *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832, 835-36 (Fla. 1959); *Lynch v. Walker*, 31 So. 2d 268, 271 (1947), *overruled in part on other grounds by Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984).

In 1986, the Florida Legislature enacted § 324.021(9)(b), Fla. Stat., which “provides a statutory exception from vicarious liability under the dangerous instrumentality doctrine for owners of motor vehicles leased for one year or longer if there is strict compliance with the express provisions of that statute.” *Aurbach*, 753 So. 2d at 63 n.2; *see* § 324.021(9)(b), Fla. Stat. (1997) (“[L]essor, under an agreement to lease a motor vehicle for 1 year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than \$100,000/\$300,000 bodily injury liability and \$50,000 property damage liability . . . shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith.”), *cited in Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 580 (Fla. 1996). This portion of Florida’s financial responsibility statute, which deems a lessor of an adequately insured vehicle not to be the owner for purposes of the dangerous instrumentality doctrine, has withstood

constitutional scrutiny. *See Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 334 (Fla. 1991).

Subsequently, in 1999, the Florida Legislature provided a similar statutory exception for short-term lessors, i.e., owners of motor vehicles whose vehicles are leased for less than one year. That exception, which is codified at § 324.021(9)(b)(2), Fla. Stat. (2007), provides in relevant part:

The lessor, under an agreement to rent or lease a motor vehicle for a period of less than 1 year, shall be deemed the owner of the motor vehicle for the purpose of determining liability for the operation of the vehicle or the acts of the operator in connection therewith only up to \$100,000 per person and up to \$300,000 per incident for bodily injury and up to \$50,000 for property damage. If the lessee or the operator of the motor vehicle is uninsured or has any insurance with limits less than \$500,000 combined property damage and bodily injury liability, the lessor shall be liable for up to an additional \$500,000 in economic damages only arising out of the use of the motor vehicle.

Id.) And it, too, has withstood constitutional scrutiny. *See, e.g., Sontay v. Avis Rent-A-Car Sys., Inc.*, 872 So. 2d 316, 319 (Fla. 4th DCA 2004).

Section 324.021(9)(b) serves two related but distinct functions: first, it limits the liability exposure of short-term and long-term lessors; and second, it establishes “financial security requirements for such *owners* or operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle.” *See* § 324.011, Fla. Stat.; *see also* §

324.032(1)(b), Fla. Stat. (2007) (“A person who is either the owner or a lessee required to maintain insurance under s. 324.021(9)(b) and who operates limousines, jitneys, or any other for-hire passenger vehicles, other than taxicabs, may prove financial responsibility by furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.031.”); *see Vargas*, 993 So. 2d at 634 & n. 31 (Farmer, J., dissenting) (noting that the DCAs have “repeatedly” construed § 324.021(9)(b) as imposing a minimum insurance requirement).

3. Florida’s “financial responsibility or liability insurance requirements” applicable to motor vehicle lessors such as Econo are preserved from preemption by the federal Act’s savings clause, § 30106(b).

Contrary to the decisions of the courts below, there is no conflict between the scope of the federal Act’s preemption provision, properly understood, and Florida’s Financial Responsibility Laws, insofar as they require Econo to maintain liability coverage on its vehicle for the benefit of third parties. *See* § 324.021(9)(b)(2), Fla. Stat. Indeed, the federal Act itself, in its savings clause, 49 U.S.C. § 30106(b), expressly disclaims such a conflict by preserving from preemption the traditional authority of states to regulate insurance for rental cars.⁶ *See id.*

⁶ *See also Allen-Bradley Local No. 1111, United Elec., Radio, & Mach. Workers of Am. v. Wisc. Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (recognizing the state’s “historic powers over such traditionally local matters as public safety and order and the use of streets and highways”); *cf. W. & S. Life Ins. Co. v. State*

A careful reading of the savings clause’s text, which carves out two exceptions to preemption, against the backdrop of the operative preemption provision, demonstrates that Congress intended, in the second exception, § 30106(b)(2), to preserve state financial responsibility or insurance laws, such as § 324.021(9)(b)(2), which require rental car owners to maintain insurance coverage for third-party beneficiaries in specific amounts prescribed by statute. If rental car owners maintain this coverage, then, in the event of an accident, payment to third parties (such as Appellant McMinn) *comes from the insured*, not the owner itself. As such, there is no conflict with the federal Act’s preemption clause. *See* 49 U.S.C. § 30106(a). Moreover, if rental car owners do not maintain this coverage, then states may impose “liability” on them for their failure. *See* § 30106(b)(2).

This reading of the savings clause gives effect to the Act as a whole: States may not impose liability directly on owners who rent vehicles if they are not themselves negligent, § 30106(a), but states may continue to require rental car owners to comply with state-law insurance requirements directly applicable to

Bd. of Equalization of Cal., 451 U.S. 648, 653 (1981) (observing that Congress, in enacting the McCarran-Ferguson Act, declared “that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” (internal quotation marks omitted)).

them as owners. *See* § 30106(b). By contrast, the reading of § 30106 advanced by Econo in the courts below based on *Vargas v. Enterprise*, and accepted by the First DCA, effectively eliminates state authority to require rental car owners to comply with state-law insurance requirements directly applicable to them as owners. Indeed, Econo’s reading of the federal Act would preclude even the operation of § 324.021(7), which mandates that “[i]f the active tortfeasor does not own the vehicle that he was negligently operating, the first layer of coverage must come from the insurer of the owner of the vehicle, the only exception being when a lease situation exists and the lessor has properly shifted the burden of primary insurance coverage to the lessee pursuant to section 627.7263, Florida Statutes (1981).”⁷ *Allstate Ins. Co. v. Fowler*, 480 So. 2d 1287, 1289-90 (Fla. 1985). If States cannot require that the reparation security plan of a rental car owner extend coverage to

⁷ Although §§ 324.151(1)(a) and 324.021(7), Florida Statutes (1981), which were at issue in *Fowler*, 480 So. 2d 1287, apply to owners generally, the Florida Supreme Court has extended their application to owners who rent or lease vehicles and has made their financial responsibility primary even when they are not the active tortfeasors by incorporating principles of Florida’s common law dangerous instrumentality doctrine, which, under *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959), extends vicarious liability to lessors. *See Roth v. Old Rep. Ins. Co.*, 269 So. 2d 3, 6 (Fla. 1972) (extending, based on *Susco*, the lessor’s primary insurance policy certified under § 324.151 to cover a lessee’s permittee despite contractual limitation restricting coverage); *Allstate Ins. Co. v. RJT Enters., Inc.*, 692 So. 2d 142, 145 (Fla. 1997) (Grimes, C.J., dissenting) (citing *Fowler* for the proposition that “[u]nder the common law, where the vehicle was offered for rent or lease, the owner’s insurance would be primary up to the \$10,000 financial responsibility limit.”); *cf. Truck Discount Corp. v. Serrano*, 362 So. 2d 340, 343

third parties injured in an accident caused by the permissive driver of a rental car, because the rental car owner itself, by operation of the preemption provision, cannot be liable for the harms committed by its renters, then States have no mechanism to ensure minimum compensation for third parties, whether for \$10,000 or \$100,000.

Congress plainly did not intend the preemption provision to sweep so broadly, and the savings clause demonstrates Congress's commitment to ensuring that the states may continue to require rental car owners to maintain insurance in the event that an uninsured permissive driver causes an accident. *See* 49 U.S.C. § 30106; *see also* 151 Cong. Rec. H1202 (statement of Rep. Graves) (stating that “there are no uninsured rental vehicles on the road today,” and suggesting that the states retain authority to ensure minimum “compensation or means of compensation to folks out there who may be harmed). Accordingly, the sweeping construction of 49 U.S.C. § 30106's preemption provision advocated by Econo (based on *Vargas*) and accepted by the First DCA is erroneous because it effectively eliminates the very state authority that Congress sought to preserve in the savings clause: the authority to require rental car owners to maintain liability insurance for the benefit of injured third parties irrespective of whether the rental car owners are themselves at fault. *See McMinn v. Cox*, 7 So. 3d 651 (Fla. 1st

(Fla. 1st DCA 1978) (clarifying, post-*Roth*, that a lessor does not have “ultimate”

DCA 2009) (citing *Vargas v. Enterprise*, 993 So. 2d 614 (Fla. 4th DCA 2008)); *see also Bechina v. Enter. Leasing Co.*, 972 So. 2d 925, 926 & n.3 (Fla. 3d DCA 2007) (affirming trial court's entry of judgment for car lessor based on 49 U.S.C. § 30106, and concluding that § 30106 eliminates any obligation of lessors to provide compensation; § 30106 preempts “any vicarious liability, whether under subsection 324.021(7), subparagraph 324.021(9)(b)(2), or otherwise.”).

Econo, in the court below, based on *Vargas* and *Garcia*, also argued that the Court should adopt the narrowest possible reading of subsection (b)(2) of the savings clause—one that appears only to preserve state laws that impose liability for failure to comply with a financial responsibility laws requiring minimum insurance coverage as a privilege of registering or operating a vehicle—on the belief that this reading was necessary to further Congress’s general policy of shielding rental car owners from state-law liability. In Econo’s view, the phrase “financial responsibility or liability insurance requirements” in § 30106(b)(2) should be limited by the statutory language “privilege of registering and operating a motor vehicle,” which does not appear in § 30106(b)(2), but appears only in § 30106(b)(1). Based on this reading of the savings clause, Econo concludes that § 324.021(9)(b)(2) neither imposes such requirements nor imposes liability for the

primary liability and may be indemnified by lessee or permittee).

failure to meet such requirements. *See* Econo’s Answer Brief at 19, No. 1D08-1181.

But, as the U.S. Supreme Court has explained, “[a] congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal does not invariably call for the narrowest possible construction of the exception.” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002). And such a construction is easily resistible here, because requiring Econo to procure and make available liability coverage to McMinn up to the amounts specified in § 324.021(9)(b)(2), even though that provision does not apply as a privilege of registering or operating a vehicle, *does not* conflict with the preemption rule that rental car owners *qua* owners may not be held vicariously liable under state law, *see* 49 U.S.C. § 30106(a).

In addition, the narrow construction of subsection (b)(2) of the savings clause advanced by Econo should be resisted because it is generally presumed that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citation omitted). In accordance with this presumption, the Court refused to adopt a narrow construction of 18 U.S.C. § 1963(a)(1) (“any interest . . . acquired”) based on the

language of the succeeding subsection (a)(2) (“any interest in . . . any enterprise”). *Id.* The term “any interest” in subsection (a)(1), the Court in *Russello* reasoned, should not be narrowly construed to mean “any interest . . . in any enterprise,” because Congress did not so qualify the term “interest” in subsection (a)(1), as it had in subsection (a)(2). 464 U.S. at 23. The *Russello* presumption, the Court made clear, is an application of the plain-meaning rule: Courts presume that Congress, in drafting statutes, says what it means and means what it says. *See id.* (“‘The short answer is that Congress did not write the statute that way.’ We refrain from concluding here that the differing language in the two subsections has the same meaning in each.”) (citation omitted).

Notably, several lower courts had narrowly construed the term “interest” in § 1963(a)(1) to mean “interest in an enterprise” based on what appears to be the *noscitur a sociis* canon of construction. For example, the U.S. Court of Appeals for the Seventh Circuit reasoned that “[i]t is not really possible to determine the meaning of the word ‘interest’ simply from reading § 1963.” *United States v. McManigal*, 708 F.2d 276, 284, *vacated in part*, 723 F.2d 580 (7th Cir. 1983). It therefore resorted to the *noscitur a sociis* canon to resolve any ambiguity in the meaning of the term “interest” in § 1963(a)(1), reasoning that “it makes sense in construing the scope of the statute to read the prohibitory and penal sections in a

similar way. Thus the relevant ‘interest’ under Section 1963 would be only an interest in an enterprise. . . .” *Id.* at 285.

Russello, however, rejected this reasoning. *See* 464 U.S. at 23; *see id.* at 18 (citing *McManigal*, 708 F.2d at 283-87). Congress’s use of the same term interest in two subsections does not create an ambiguity simply because certain qualifying language (in an enterprise) is present in one subsection but not the other. The exclusion or inclusion of qualifying language, according to *Russello*, is presumed to be intentional, and courts should refrain from concluding that “differing language in the two subsections has the same meaning in each.” *Id.* at 23.

In light of *Russello*, it is clear that the reading of the savings clause adopted by the lower courts in this case, *Vargas*, and *Garcia*, and advanced by Econo is incorrect. *See, e.g., Garcia*, 540 F.3d at 1247 (relying on the *noscitur* canon of construction in interpreting § 30106(b) narrowly to preserve only financial responsibility laws that apply as a privilege of registering or operating a vehicle). The presence of the phrase “for the privilege of registering and operating a motor vehicle” in subsection (b)(1), and its absence in subsection (b)(2), reveals Congress’s design, which does not limit the category of financial responsibility laws preserved in subsection (b)(2) as it does in subsection (b)(1). Had Congress intended to restrict subsection (b)(2) to those financial responsibility or liability insurance laws that apply as a condition of registration, it would have done so

expressly as it did in subsection (b)(1). To read the savings clause otherwise, as suggested by these courts and Econo, disregards the legislative intention as clearly manifested by the savings clause's plain language.

Not only is Econo's artificially narrow view of "financial responsibility" without support in the savings clause's text, that narrow view is not supported by the definition of "financial responsibility" itself. *See supra* pp. 10-11. But even if the common meaning of "financial responsibility" itself were so limited, § 30106(b)(2) preserves "financial responsibility *or liability insurance requirements*." Section 324.021(9)(b)(2), for the reasons discussed above, plainly concerns liability insurance requirements. *See Vargas*, 993 So. 2d at 636 (Hazouri, J., dissenting) ("To conclude that section 324.021(9)(b)(2) does not fit within the exception of the Graves Amendment seems to me to be a very strained construction of 'financial responsibility' and 'liability insurance.'").

Lastly, consideration of the presumption against preemption supports McMinn's view that Econo's unduly narrow construction of the Act's savings clause does not fairly reflect Congress's intent. The presumption against preemption, imposes a "considerable burden" on the advocate of preemption—here, Econo. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). It applies with particular force in those instances in which Congress has legislated in a field which the States have traditionally occupied, as is the case

here. *See Wyeth*, 129 S. Ct. at 1194. Accordingly, the presumption against preemption, as applied here, counsels against adopting an unduly narrow reading of the federal Act’s savings clause. *See Good*, 129 S. Ct. at 543 (“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption’”) (quoting *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 449 (2005)).

For these reasons, this Court should conclude that the federal Act’s savings clause preserves state laws that require entities engaged in the business of leasing to maintain insurance for the benefit of accident victims and extend those benefits to third parties even if the permissive driver is solely at fault. That reading best reflects the careful balance Congress struck between shielding rental car owners from liability, and preserving the States’ traditional authority to require car owners to maintain minimum liability coverage for the benefit of third parties injured in accidents caused by permissive drivers.

II. CONGRESS LACKS THE CONSTITUTIONAL AUTHORITY TO ENACT 49 U.S.C. § 30106, A FLAT PROSCRIPTION OF STATE-IMPOSED LIABILITY

Pursuant to its commerce power, Congress can regulate three broad categories of activities: “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) (citations omitted).

The relevant text of the Graves Amendment is unambiguous: certain owners who rent or lease motor vehicles “shall not be liable under the law of any State or political subdivision thereof” 49 U.S.C. § 30106(a). Subsection (a) does not regulate who may own or lease a motor vehicle; it does not prescribe any standards that motor vehicles must meet; it does not compel any conduct on the part of anyone who owns, leases, or operates a motor vehicle. It does, effectively, create a rule of tort law: by sole virtue of its command, certain persons are not responsible for damages caused by their vehicles. It therefore regulates state-imposed liability, which is an intrastate activity.

State-imposed liability is neither a channel of interstate commerce nor an instrumentality of interstate commerce. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring) (explaining that “[t]he first two categories are self-evident, since they are the ingredients of interstate commerce itself.”) (citation omitted). Congress may regulate intrastate activity to benefit the use of the channels of interstate commerce or protect the instrumentalities in interstate commerce from intrastate threats, see *United States v. Lopez*, 514 U.S. 549, 558 (1995), but the Graves Amendment regulates liability for harm irrespective of whether that intrastate

activity is directed at the channels or instrumentalities “in” interstate commerce. It contains “no express jurisdictional element which might limit its reach to a discrete set of [intrastate activities] that additionally have an explicit connection with or effect on interstate commerce.” *Id.* at 562; *see* 49 U.S.C. § 30106(a).

Because § 30106 regulates liability in all cases without requiring an explicit connection with or effect on interstate commerce, it may be sustained only if this Court finds that vicarious liability substantially affects interstate commerce so as to render its regulation an “appropriate means to the attainment of a legitimate end.” *Lopez*, 514 U.S. at 555 (quoting *United States v. Darby*, 312 U.S. 100, 118 (1941)). Applying the substantial-effects factors, it becomes plain that there is no rational basis for Congress to proscribe flatly intrastate, non-economic activity as it has under the Graves Amendment. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) (requiring a plain showing that “Congress has exceeded its constitutional bounds.”).

A. Section 30106 Rests on a Novel Theory of Congressional Commerce Power and Its Constitutionality Must Be Assessed Based on the Four Substantial-Effects Factors

As the Eleventh Circuit observed in *Garcia*, Congress enacted § 30106 based on a “novel” theory of Congressional commerce power: the federal Act has “the sole effect and purpose of preempting state-law claims because Congress believed them to be a burden on an interstate market.” 540 F.3d at 1252. Section

30106 is “novel,” the *Garcia* court explained, because historically Congress has “expressly or impliedly preempt[ed] state tort law as an incident to federal regulation.” *Id.* The *Garcia* court could identify only one other federal statute that, like § 30106, had the sole effect and purpose of preempting state-law claims on the theory that such claims burden an interstate market: the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901-03) (“PLCAA”), which preempts certain third-party liability claims against gun manufacturers.

Traditionally, Congress, in those rare instances in which it has preempted state tort law, has either substituted a federal remedy in place of the displaced state remedy,⁸ or it has preempted state tort law in order to harmonize federal and state regulatory schemes. But Congress has never, before 2005, sought to blot out state tort law solely on the belief that a suit for damages “substantially” affects interstate commerce, rather than as an incident to federal regulation.

⁸ See, e.g., Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 note) (substituting a federal remedy for tort claims that 9/11 victims and their families could have asserted against the airlines whose planes were hijacked); 42 U.S.C. §§ 300aa-1 *et seq.* (federalizing all claims arising from personal injuries relating to the administration of vaccines); 42 U.S.C. §§ 2210 *et seq.* (federalizing all claims for personal and property damage arising from significant accidents at nuclear power plants).

Two federal courts of appeal have considered whether Congress exceeded its authority under the Commerce Clause when it enacted these novel laws. *See Garcia* 540 F.3d at 1253 (considering the constitutionality of § 30106); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 393-95 (2d Cir. 2008), *cert. denied* (2009), (considering the constitutionality of PLCAA). And both the Eleventh Circuit in *Garcia* and the Second Circuit in *Beretta* found the respective federal act at issue in their case to be a constitutional exercise of Congress’s authority to regulate intrastate activity that substantially affects interstate commerce. But their treatment of the “substantial effects” analysis is markedly different. For instance, the Second Circuit considered whether Congress exceeded its Commerce Clause authority in enacting the PLCAA based on the four considerations set forth in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), finding it to be constitutional. 524 F.3d at 395. It did not, however, apply the significantly more deferential rational-basis review outlined in *Gonzalez v. Raich*, 545 U.S. 1 (2005), in considering whether these tort suits substantially affect the national gun industry or the economy writ large. *See* 524 F.3d at 393-95. In fact, the Second Circuit in *Beretta* did not even cite to *Raich*, thus indicating that the court believed the *Raich* “substantial effects” analysis to be inapplicable where Congress seeks to regulate intrastate activity but does not do so incident to a federal scheme. *See id.*

In *Beretta*, the court upheld Congress’s authority under the Commerce Clause to preempt state tort law substantially affecting the interstate firearms industry. The federal statute at issue there, the PLCAA”), preempted certain third-party liability claims against the gun industry. In assessing the constitutionality of the PLCAA, the court did not hold that the statute was directly regulating firearms as a “thing” in interstate commerce, even though the statute contained jurisdictional language “in interstate or foreign commerce” which limited its reach. Rather, it considered whether the PLCAA was constitutional under the *Lopez* “substantial effects” factors. The court’s consideration of those factors is an acknowledgment that it considered the activity regulated by the PLCAA to be tort law—not the production of firearms. *See id.* This Court also should consider these factors in deciding whether the activity directly regulated by § 30106—tort law—substantially affects the motor vehicle leasing industry.

The *Beretta* court found the PLCAA to be constitutional because Congress: (1) made express findings regarding the threat state-law liability poses to the firearms industry; and (2) ensured that the “PLCAA only reaches suits that ‘have an explicit connection with or effect on interstate commerce.’” *Id.* at 394 (*citing United States v. Lopez*, 514 U.S. at 562). The court singled out the PLCAA’s phrase “shipped or transported in interstate or foreign commerce” as

jurisdictionally limiting language, *id.* (emphasis in original) (*citing* 15 U.S.C. § 7903(4))—not its language “engaged in the business.” *See* 15 U.S.C. § 7903(1).

In contrast with the PLCAA, Congress, in enacting § 30106, made no express findings regarding what threat, if any, vicarious liability laws pose to the vehicle leasing industry, and did not limit § 30106’s jurisdictional reach. *See* 49 U.S.C. § 30106. These differences are particularly pronounced given that Congress enacted the PLCAA and § 30106 in the *same* year.

Yet the Eleventh Circuit in *Garcia* refused to assess § 30106’s constitutionality based on the *Morrison/Lopez* substantial-effect factors. Instead, it considered § 30106’s constitutionality based on the substantial-effects analysis set forth in *Raich*, even as it acknowledged that § 30106 does not preempt tort law incident to a federal regulatory scheme. And it did so without considering whether preempting state tort suits that arise out of local accidents, such as those involving a leased vehicle that is not used for interstate transport, is “essential” to the effectuation of some larger federal regulatory scheme.⁹

⁹ *Raich*’s discussion of when Congress can regulate intrastate, non-economic activities pursuant to a comprehensive regulatory scheme that is itself constitutional, *see* 545 U.S. at 23-25, is inapplicable here because § 30106 is not itself a comprehensive regulatory scheme. It regulates a single activity, state liability for harm. *See* 49 U.S.C. § 30106. Nor is there a larger, comprehensive regulatory scheme that would be undercut or “frustrated” were § 30106 found to be unconstitutional. *See* 545 U.S. at 19.

More critically, the court in *Garcia*, in considering whether vicarious liability “substantially affects” interstate commerce, looked beyond the activity directly regulated by § 30106—state-imposed liability—to the commercial nature of the motor vehicle leasing industry that is ostensibly affected by that activity. In essence, the Eleventh Circuit asked whether “the effect of the statute . . . deregulat[ing] the rental car market” is commercial, 540 F.3d at 1252, and concluded, “It is plain that the rental car market has a substantial effect on interstate commerce.” *Id.* at 1253. But “ask[ing] whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so,” is inconsistent with the analyses of *Morrison* and *Lopez*. See *Rancho Viejo, L.L.C. v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (emphasis in original). Had the *Garcia* court correctly isolated the activity directly regulated by § 30106 and asked whether it has a substantial effect on the leasing industry or the national economy writ large, it would have had to confront the question whether seeking compensatory damages under state law following a local accident is itself commerce or any sort of economic enterprise.

Application of the four substantial-effects factors in this case demonstrates that Congress exceeded its commerce power when it sought to exert control over intrastate activities (certain state-law tort suits) in *isolation* rather than in

connection with a more comprehensive scheme of regulation, *see Raich*, 545 U.S. at 39. Florida imposes on certain owners, who, like Econo, engage in the business of renting or leasing vehicles, liability for the negligence of their lessees pursuant to the dangerous instrumentality doctrine. *See Susco Car Rental Sys. of Fla.*, 112 So. 2d at 835-36. Section 30106 regulates this state-imposed liability, but liability is not “‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561 (footnote omitted). Liability is not a commodity that can be produced, distributed, or consumed. *See Raich*, 545 U.S. at 25-26 (explaining that commerce is “quintessentially economic” and that “[e]conomics’ refers to ‘the production, distribution, and consumption of commodities.’” (citing *Webster’s Third New International Dictionary* 720 (1966))). Nor is liability a good or service that may be exchanged. *See Black’s Law Dictionary* 263 (7th ed. 1999) (defining commerce as “[t]he exchange of goods and services” or “[t]rade and other business activities.”). There is no trade or “intercourse” in battery or torts generally. *Compare Morrison*, 529 U.S. at 615 (concluding that gender-motivated violence is not commerce); *see Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824) (explaining that commerce is traffic, “but it is something more: it is intercourse.”).

Here, Ms. McMinn was not a willing participant to the harm visited upon her. Her suit engages the civil justice system for compensation for the injuries

caused by this car accident. If Florida awards her compensation, it is not doing so pursuant to or in furtherance of any cognizable “market.” This is true even though state-awarded compensation consists of the payment of monetary damages, often through insurance; the transfer itself does not create wealth, but rather provides compensation for what was lost in the accident.

More critically, the link between vicarious liability and its purported effect on interstate commerce is attenuated at best. Because liability is in this sense non-economic, Congress, pursuant to § 30106, can directly regulate an individual instance of liability only if it individually has a substantial effect on interstate commerce.¹⁰ *See Lopez*, 514 U.S. at 565-66. Here, it is beyond reasonable dispute that a single compensatory award will not substantially affect the national economy or the motor vehicle leasing industry, whose estimated revenue in 2002 was \$34.951 billion. U.S. DEP’T OF COMMERCE, EC02/531-03, *Automotive Equipment Rental & Leasing: 2002 Economic Consensus, Real Estate and Rental and Leasing Industry Series*, p. 1 Table 1 (July 2004), <http://www.census.gov/prod/ec02/ec0253i03.pdf>. Congress certainly made no

¹⁰ Again, this is distinguishable from the situation where Congress regulates tort law incident to a federal regulatory scheme, because the federal regulatory scheme itself is often indisputably economic. *Cf. Raich*, 545 U.S. at 23 (upholding the constitutionality of the CSA’s regulation of the intrastate, non-economic activity of growing and using marijuana for medicinal purposes because when the comprehensive regulatory scheme itself is “within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.”).

express findings to the contrary. *See* 49 U.S.C. § 30106. Accordingly, the effect of tort liability, in a single case involving a local accident, on interstate commerce is attenuated at best. *Cf. Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 446 (2005) (characterizing the aggregate effect of damages awards in that case as “even more attenuated” than the “indirect” pressures exerted by state-law requirements).

Holding § 30106 unconstitutional would not prevent Congress from enacting a more limited statute, such as one requiring an express connection between tort law and interstate commerce. *See, e.g., United States v. Danks*, 221 F.3d 1037, 1038-39 (8th Cir. 1999) (holding that the Guns-Free School Zones Act (18 U.S.C. § 922), which was amended after the Supreme Court’s decision in *Lopez* to include jurisdictionally limiting language, is facially constitutional because the federal Act was amended to require “the firearm in question [to] have been shipped or transported in interstate commerce”). Rather, such a holding would preserve the distinction between what is truly national and what is truly local, “one of the few principles that has been consistent since the [Commerce] Clause was adopted,” by prohibiting Congress from regulating intrastate activity where it does not substantially affect interstate commerce. *Morrison*, 529 U.S. at 618.

B. To Sustain The Constitutionality Of § 30106, This Court Would Have To Adopt An Unlimited View of Congressional Power—A Result That Supreme Court Precedent Forbids

The Supreme Court in *Morrison* ended the portion of its opinion discussing Congress's commerce power with these words:

The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. *See, e.g., Cohens v. Virginia*, 6 Wheat. 264, 426, 428, 5 L.Ed. 257 (1821) (Marshall, C.J.) (stating that Congress “has no general right to punish murder committed within any of the States,” and that it is “clear . . . that congress cannot punish felonies generally”). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

529 U.S. at 618 (footnote omitted; emphasis added). That coda applies with equal force to the states' primary and traditional role respecting tort law. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”). States traditionally have occupied the field in the administration of civil justice, whether for the recompense of personal or property injuries. *See* The Federalist No. 17, at 103 (Alexander Hamilton) (Modern Library College ed. 1988) (noting that the “administration of criminal and civil justice” is a province of the States); *cf.*

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926) (noting that the States have traditionally regulated real property). Indeed, the U.S. Supreme Court has long recognized that, as a historical matter and as a matter of constitutional design, “[i]t is the duty of every [S]tate to provide, in the administration of justice, for the redress of private wrongs.” *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885); see *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Holmes, J.) (recognizing that “the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury,” and “[o]ne of the first duties of government is to afford that protection”) (citing William Blackstone, 3 *Commentaries* 23 (1765)). And it has not understood the Commerce Clause as establishing a national police power through which Congress can “cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.” *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 428 (1963) (internal quotation marks omitted) (discussing dormant commerce clause) (quoting *Sherlock v. Alling*, 93 U.S. 99, 103 (1876)).

Morrison rejected that unlimited view of Congressional power with this reasoning: “[I]f Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated

violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.” *Morrison*, 529 U.S. at 615. That logic is equally applicable here: If Congress can blot out vicarious liability (through legislation that is not incident to federal regulation), it would be able to blot out any (and all) state tort law of its choosing since vicarious liability, as a subset of all tort liability, is certain to have lesser economic impacts than the larger class of which it is a part. Congress, for instance, based on this limitless view of federal power could blot out all tort law for motor vehicle accidents on the theory that it increases costs for a certain industry. But Congress has no such power. *See Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (“[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power”) (emphasis in original); *see also United States v. Bishop*, 66 F.3d 569, 597-600 (3d Cir. 1995) (Becker, J., dissenting) (“Federal power under the Commerce Clause, in my view, is not this broad. The fact that automobiles can be used as instrumentalities of interstate commerce does not grant to Congress plenary authority to regulate the use and operation of every individual's automobile. Such an approach would constitute a dramatic encroachment on the regulation of automobiles, a traditional area of state concern, and would permit Congress to pass federal laws requiring individuals to wear seatbelts (as opposed to requiring that cars be manufactured with seatbelts) or

banning motorists from making a right turn at a red light.”). It plainly exceeded constitutional bounds when it enacted § 30106, which fails to satisfy each of the four substantial-effects factors.

CONCLUSION

For these reasons, this Court should reverse the judgment of the Circuit Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Plaintiff-Appellant's Initial Brief** has been furnished via U.S. Mail, to all counsel of record listed below, this 17th day of June, 2009.

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The undersigned hereby certifies that the forgoing was prepared in accordance with the rule requiring Times New Roman 14 point.

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