

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CSX TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 05-338 (EGS)
	)	
ANTHONY A. WILLIAMS, et al.,	)	
	)	
Defendants.	)	

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MEMORANDUM OF TWENTY TRADE ASSOCIATIONS  
INTERESTED IN HAZARDOUS MATERIALS TRANSPORTATION  
AS *AMICI CURIAE* IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Association, Inc., International Warehouse Logistics Association, Institute of Makers of Explosives, National Association of Chemical Distributors, National Paint and Coatings Association, Inc., National Private Truck Council, National Propane Gas Association, National Tank Truck Carriers, Inc., Railway Supply Institute, Truckload Carriers Association, and The Sulphur Institute.

The Agricultural Retailers Association (“ARA”) is a trade association representing the interests of retailers across the United States on legislative and regulatory issues on Capitol Hill. As the political voice of agricultural retailers, ARA not only represents its membership, but also educates members on the political process and important issues affecting the industry.

The American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry. ACC is committed to improved environmental, health and safety performance through its Responsible Care® initiative; by means of common-sense advocacy designed to address major public policy issues; and with health and environmental research and product testing. The business of chemistry is a \$516 billion enterprise and a critical element of the nation's economy. It is the nation's largest exporter, accounting for \$109 billion in exports (about ten cents out of every U.S. export dollar).

The American Trucking Associations, Inc. (“ATA”) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA has approximately 2,000 direct motor carrier and industry supplier members and through its affiliated organizations represents more than 30,000 companies of every type and class of motor carrier operations. ATA regularly advocates the interests of the trucking industry before the United States Supreme Court, this Court, and other courts. ATA members are adversely impacted by locally-implemented

hazardous materials transportation restrictions, which delay the delivery of freight and require motor carriers to travel additional vehicle miles.

The American Petroleum Institute (“API”) is a nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. It is API’s objective to promote the interests of the petroleum and natural gas industry in all of its branches. API members own truck and rail fleets for the distribution of petroleum products. API and its members have a longstanding commitment to providing safe and secure transportation of petroleum products in compliance with federal hazardous materials law.

The American Pyrotechnics Association (“APA”) is the leading trade association representing the domestic fireworks industry. It has three principle aims: (1) to encourage safety in the design and use of all types of fireworks; (2) to provide industry information and support to its members; and (3) to promote responsible regulation of the fireworks industry. Individual APA members are typically involved in one or more aspects of the fireworks industry: sale and distribution, manufacturing, and public display. As part of their operations, many APA members hold a motor carrier registration, maintain a fleet of commercial motor vehicles, and transport shipments of pyrotechnics in both interstate and intrastate commerce.

The Chlorine Chemistry Council (“CCC”) is a self-funded business council of the American Chemistry Council (“ACC”). Established in 1993 to participate constructively in the public policy debate surrounding chlorine chemistry, CCC consists of producers and users of chlorine and chlorine-related products, as well as other companies with an interest in chlorine chemistry. CCC has seven members, including nearly all major chlorine-producing companies, and is a Responsible Care Partner.

The Chlorine Institute, Inc. (“CI”) is a 200 plus-member worldwide association of producers, packagers, distributors, users and suppliers of chlorine, sodium and potassium hydroxides, hydrogen chloride in all forms, and sodium hypochlorite. CI’s mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of those chemicals.

The Council on Safe Transportation of Hazardous Articles (“COSTHA”) represents manufacturers, shippers, distributors, carriers, freight forwarders, and container manufacturers involved in the transportation of hazardous materials in interstate, intrastate and foreign commerce. Some of COSTHA’s over 100 member companies operate their own truck fleets, while others ship goods via trucks and rail throughout the United States.

The Fertilizer Institute (“TFI”) is the leading voice of the nation’s fertilizer industry, representing the public policy, communication and statistical needs of manufacturers, producers, retailers and transporters of fertilizer.

The International Vessel Operators Hazardous Materials Association (“VOHMA”) is a United States-based international association, with a membership comprised of thirty-eight ocean common carriers, operating under the flags of several nations, with the purpose of serving the domestic and international trades in matters pertaining to vessel and intermodal transport of hazardous cargoes. The primary goal of VOHMA is to advocate and promote safe, consistent, and cost-beneficial transport of such cargoes based upon discussion and evaluation of issues impacting maritime operations and interconnecting feeder systems, and to develop consensus positions on all issues which may have a significant impact on transportation safety. Much of the freight that is transported by VOHMA members on the ocean is also transported by truck or rail before or after the water segment.

The International Warehouse Logistics Association (“IWLA”) represents 3PLs (third-party logistics providers), public and contract warehouse companies and their suppliers. Since 1891, the IWLA has worked to promote and advance the logistics outsourcing industry. The 550 IWLA members worldwide ship more than three trillion pounds of goods annually and operate more than 400 million square feet of public and contract warehouse space, providing the most timely and cost-effective global logistics solutions for their customers. As such, they are committed to protecting the free flow of goods and services across borders.

The Institute of Makers of Explosives (“IME”) is the safety and security association of the commercial explosives industry. The IME represents manufacturers of high explosives and other companies that distribute explosives or provide other related services. Over 2.5 million metric tons of explosives are consumed annually in the United States, of which IME member companies produce over 95 percent. IME members, as a part of or incidental to the business, use all modes to transport these products in every state in the Union and worldwide. IME members have developed and recommend best practice standards contained in the Institute’s safety library. Safety Library Publication No. 27 specifically addresses best practices for security in manufacturing, transportation, storage and use of commercial explosives.

The National Association of Chemical Distributors (“NACD”) is an international association of chemical distributor companies that purchase and take title to chemical products from manufacturers. Member companies process, formulate, blend, re-package, warehouse, transport, and market these chemical products for an industrial customer base of about 750,000. NACD’s more than 250 member companies are located in every region of the country and operate more than 1300 chemical distribution locations. NACD members have established themselves as leaders in health, safety, security, and environmental performance through

implementation of the *Responsible Distribution Process*<sup>SM</sup> (RDP), established in 1991 as a condition of membership in NACD.

The National Paint and Coatings Association, Inc. (“NPCA”) is a voluntary industry association incorporated under the laws of the state of Delaware. Originally organized in 1888, NPCA today comprises some 400 members who are engaged in the manufacture and distribution of paint, coatings, adhesives and related products and the raw materials used to produce these products. NPCA’s membership collectively produces about 95 percent of the total national volume of paints and allied products. The paint and coatings industry utilizes all transportation modes to distribute products throughout the nation, although the bulk of the industry’s products are shipped by motor and rail vehicles. Under Coatings Care®, NPCA and its members are committed to the safe, efficient, and secure transportation and distribution of raw materials and the industry’s finished products through compliance with uniform, national regulations. As part of or incidental to their business, virtually all of NPCA’s members transport or cause to be transported hazardous materials and will be adversely affected by locally adopted routing restrictions.

The National Private Truck Council, Inc. (“NPTC”) is a Virginia corporation operating as a trade association representing the interests of over 500 companies that operate truck fleets in furtherance of non-transportation primary businesses. The members operate trucks in interstate and intrastate commerce in all 50 states, and they range in size from Fortune 500 companies to smaller local distribution entities. They transport both raw materials and finished goods in a wide variety of businesses including food and beverages, heavy manufacturing, electronics, retail distribution, chemicals and petroleum products, and apparel.

The National Propane Gas Association (“NPGA”) is the national trade association of the LP-gas (principally propane) industry with a membership of over 3,600 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks.

National Tank Truck Carriers, Inc. (“NTTC”) is a trade association composed of approximately 185 trucking companies which specialize in the nationwide transportation of hazardous materials, hazardous substances and hazardous wastes in cargo tank motor vehicles. NTTC estimates that its members operate approximately 50,000 such vehicles and utilize 45,000 drivers.

The Railway Supply Institute is the international trade association of the railway and rail rapid transit supply industry. Its Committee on Tank Cars represents companies that own, manage and full service lease 180,000 tank cars – 70 percent of the tank car fleet.

The Truckload Carriers Association (“TCA”) is the only national trade association whose collective sole focus is the truckload segment of the motor carrier industry. TCA represents dry van, refrigerated, flatbed, and intermodal container carriers operating in the 48 contiguous states as well as Alaska, Mexico and Canada. Representing operators of over 200,000 trucks, a significant portion of TCA's membership transport hazardous materials.

The Sulphur Institute (“TSI”) is an international nonprofit organization supported by companies from around the world actively involved in producing, buying, selling, handling, transporting, or adding value to sulphur. TSI is a recognized international voice on sulphur with a mission to serve its members as the global advocate for sulphur on issues affecting production, marketing, handling, or transportation of sulphur. Current TSI members represent a major portion of North America's total sulphur production and shipments.

Each of these associations represents members who engage in the transportation of goods, including hazardous materials, in interstate commerce by commercial motor vehicles and/or by rail. Some of the member companies of these associations transport hazardous materials within the “Capitol Exclusion Zone” established by the Terrorism Prevention in Hazardous Materials Transportation Temporary Act of 2005, D.C. Act 16-78 (“Temporary Act”). Moreover, these companies ship and transport hazardous materials in other jurisdictions that will likely impose their own restrictions or prohibitions on hazardous materials transportation if the D.C. Temporary Act is allowed to stand. As such, the associations and their members are directly affected by the legislation and have a keen interest in the outcome of this case.

**B. RAIL AND TRUCK SHIPMENTS OF HAZARDOUS MATERIALS ARE NECESSARY TO MAINTAIN A HIGH QUALITY OF LIFE AND ARE VITAL TO THE ECONOMY**

Hazardous materials are ubiquitous and are an essential part of our way of life. They are needed to purify water, heat our homes, operate motor vehicles, and treat illness. Hazardous materials include industrial chemicals as well as household goods. Gasoline, paint, fertilizers, pharmaceuticals, medical oxygen, disinfectants and literally thousands of chemicals and products that we use every day are classified as hazardous materials when transported in interstate

commerce. The safe and secure shipment of chemicals is indispensable to the economic and physical well-being of our nation.

According to the latest statistics on hazardous materials transportation compiled by the federal government, approximately 800,000 shipments and over 1 million movements<sup>1</sup> of hazardous materials occur within the United States every day. *Hazardous Materials Shipments*, at 1, Office of Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation (October 1998). Restrictions on these shipments and movements in the District of Columbia and other localities would have a devastating impact on the nation's economy, as well as the essential functions of life in a modern society.

**C. THIS CASE HAS BROAD IMPLICATIONS AS THE D.C. ORDINANCE IS INDICATIVE OF A NATIONWIDE ISSUE**

The issue in this case goes far beyond the effect on a single railroad in a single jurisdiction. This issue will affect the shipment and transportation of goods by thousands of companies and will be replicated in jurisdictions throughout the United States. If the District prevails in this case, many other state and local governments will enact restrictions or outright bans on the transportation of hazardous materials by truck or rail into or through their jurisdictions.

The D.C. Temporary Act is only one of a number of state and local efforts across the United States to restrict the movement of hazardous materials in the name of security, mainly in urbanized communities. For example, the Cleveland, Ohio City Council is presently considering an "emergency ordinance" that would prohibit shipments of hazardous materials by rail through

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<sup>1</sup> A "shipment" is defined in the report as an individual movement of commodities from one establishment to one other location. A "movement" means transportation by a single vehicle, rail car, aircraft, vessel, or other mode from a point of origin to a point of either: a) transfer to another vehicle, train, aircraft, vessel or other mode or b) final delivery of the freight, whichever comes first. Thus, a single "shipment" can encompass one or more "movements."

portions of the city unless the fire chief issues a permit allowing such shipments. Cleveland City Council, Ordinance No. 928-05 (Exhibit A hereto). Several years ago, Cleveland adopted restrictions to truck transportation of hazardous materials through the city. The Department of Transportation found that the bulk of that Cleveland ordinance was preempted by the Hazardous Materials Transportation Act, 49 U.S.C. § 5125. *Notice of Administrative Determination of Preemption*, 66 *Federal Register* 29,867 (June 1, 2001) (Exhibit B).

The cities of Philadelphia, Pittsburgh, Baltimore, Boston and Chicago and the State of California are also considering legislation that would impede the flow of hazardous materials through their jurisdictions. The Philadelphia City Council adopted a resolution authorizing hearings into the operations of CSXT in and around the city and the impact those operations have on the health, safety and welfare of its citizens. (Exhibit C). Legislation was introduced in the Baltimore City Council that would restrict hazardous materials shipments by vehicle or rail car within the geographic limits of Baltimore city without a permit, except in cases of emergency. Baltimore City Council, Bill No. 05-0067 (Exhibit D). A resolution was introduced in the Chicago City Council that would prohibit any rail transportation of hazardous solids or liquids into an area within one-half mile of the city limits, with or without a permit, and prohibit rail transportation of hazardous waste within a similar zone without prior notification of the city's police, fire and environmental departments. Ordinance No. 11-4-2090 (Exhibit E).

The Boston City Council is considering in committee Ordinance No. 695, which is virtually identical to the Temporary Act. (Exhibit F). It would prohibit certain hazardous materials from being transported within an "Exclusion Zone" defined as all points within 2.5 miles of Copley Square in Boston without a permit. Ordinance No. 695, §§ CBC 12-14.3(a), 12-

14.2(b). It also would prohibit the operation of a vehicle or rail car that is capable of containing certain quantities of such hazardous materials. *Id.* § 12-14.3(b).

Press reports indicate that the Pittsburgh City Council is closely watching the instant action to determine whether to introduce legislation affecting that city. (See “Pittsburgh Eyes Hazmat Ban,” *Traffic World Magazine* (March 7, 2005)) (Exhibit G). Finally, the U.S. Court of Appeals for the D.C. Circuit took note in this case of a California proposal to ban shipments within three miles of the city hall in any urban region. *CSX Transportation, Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005). (California Senate Bill No. S 419, attached hereto as Exhibit H.)

## **II. BACKGROUND OF THE CASE**

On February 15, 2005, the Mayor of the District of Columbia signed into law the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, D.C. Docket No. B16-77 (“Emergency Act”). Citing the possibility of terrorist attacks on hazardous materials shipments in the District of Columbia, the Emergency Act prohibited shipments by truck or rail of certain types of hazardous materials within the “Capitol Exclusion Zone” without a permit. Emergency Act, § 4. The Capitol Exclusion Zone is defined in the Act as the area within a 2.2 mile radius of the United States Capitol building. *Id.*, § 3(1). The D.C. Department of Transportation (“D.C. DOT”) could issue a permit upon a demonstration that there is no practical alternative route. *Id.*, § 5. The permit may require the transporter to adopt certain safety measures, including time of day restrictions. *Id.* The Emergency Act authorized the D.C. DOT to collect fees for any permits issued. *Id.*

CSXT initiated a suit in this Court for a declaratory order that the Emergency Act was preempted by federal statute and the Constitution and enjoining enforcement of the Emergency Act. This Court’s order of April 18, 2005 denied CSXT’s motion for a preliminary injunction,

ruling that CSXT was unlikely to prevail on the merits and that the balance of equities were in favor of upholding the Emergency Act. The United States Court of Appeals for the District of Columbia Circuit reversed this Court’s ruling and remanded the case for entry of a preliminary injunction prohibiting enforcement of the Act. *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005). The Court of Appeals ruled that CSXT was likely to prevail on the merits of its argument that the Emergency Act was preempted by the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20101 *et seq.*<sup>2</sup>, and that CSXT had sufficiently demonstrated irreparable injury. *Id.* at 673. The Court also found that, balancing the risk of harms, the Emergency Act merely shifted at least some of the risk of the “calamitous consequences of a terrorist attack” to other jurisdictions. *Id.* at 674.

While the litigation over the Emergency Act was pending, the Mayor signed into law the Temporary Act. The Temporary Act is substantively identical to the Emergency Act as it prohibits transportation of certain hazardous materials by rail or truck within 2.2 miles of the Capitol without a permit. CSXT again moved for a preliminary injunction against enforcement of the Temporary Act and the District of Columbia voluntarily agreed to forego enforcement of the Temporary Act while this action is pending. This Court is now considering CSXT’s Motion for Summary Judgment.

The *amici curiae* herein support CSXT’s Motion. The Temporary Act, like the Emergency Act before it, is preempted by federal law. Both the FRSA and the Hazardous Materials Transportation Act (“HMTA”), as amended, 49 U.S.C. § 5101 *et seq.*, prohibit state

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<sup>2</sup> Because it ruled the Emergency Act was preempted by the FRSA, the Court did not decide whether it was preempted by the Hazardous Materials Transportation Act (“HMTA”), or otherwise prohibited by the Interstate Commerce Commission Termination Act or the Commerce Clause of Art. I, section 8 of the United States Constitution. *CSX Transportation, Inc. v. Williams*, 406 F.3d at 669 n.3. In a separate concurring opinion, Judge Henderson wrote that the Emergency Act was also likely preempted by the HMTA. *Id.* at 674-75.

and local acts of this type in order to promote federal uniformity and control in the regulation of hazardous materials transportation, including the enhancement of en route security of these materials. The Temporary Act is also an unconstitutional impediment to the free flow of interstate commerce, and should be invalidated pursuant to the Commerce Clause of the United States Constitution.

### **III. THE TEMPORARY ACT IS PREEMPTED BY THE HAZARDOUS MATERIALS TRANSPORTATION ACT AND THE FEDERAL RAILROAD SAFETY ACT**

Congress has clearly expressed its desire that state and local ordinances like the Temporary Act be preempted by federal law. In enacting both the HMTA and the FRSA, Congress carefully crafted a framework designed to promote and enhance nationwide uniformity in the regulations governing hazardous materials transportation. With these statutes, Congress has completely occupied the field of hazardous materials transportation and has provided for exceptions to the preemptive nature of these acts when it has deemed appropriate. Moreover, Congress continues to consider legislation in this area, indicating its strong desire to maintain federal control over hazardous materials transportation regulation. *See, e.g.*, S. 1052, 109<sup>th</sup> Cong. (2005); H.R. 1414, 109<sup>th</sup> Cong. (2005).

If the Court permits the District of Columbia government to supersede these federal statutory directives and impose its own restrictions, which amount to prohibiting affected hazardous materials traffic within the Capitol Exclusion Zone, then the nationwide regulatory uniformity designed by Congress will be destroyed and each local jurisdiction will begin to regulate, limit and even ban hazardous materials. Every border will become a potential barrier to interstate commerce with no demonstrable increase in safety and security.

**A. THE HAZARDOUS MATERIALS TRANSPORTATION ACT WAS ENACTED TO PROVIDE UNIFORMITY IN HAZARDOUS MATERIALS TRANSPORTATION REGULATIONS AND PREEMPTES THE TEMPORARY ACT**

The HMTA was initially adopted in 1975 “to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.” *Hazardous Materials Transportation Act*, Pub. L. No. 93-633, 88 Stat. 2156, Sec. 102 (1975).<sup>3</sup> Uniformity is the “linchpin” in the design of the HMTA. *Colorado Pub. Util. Comm’n v. Harmon*, 951 F.2d 1571, 1575 (10<sup>th</sup> Cir. 1991). “Under section 112(a) [now codified at 49 U.S.C. § 5125(a)], HMTA regulations preempt inconsistent state and local regulations. . . . Congress included this provision ‘to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.’” *City of New York v. U.S. Department of Transportation*, 715 F.2d 732, 740 (2d Cir. 1983) (*quoting* S. Rep. No. 93-1192, at 37 (1974)).

In 1990, Congress passed the Hazardous Materials Transportation Uniform Safety Act (“HMTUSA”), Pub. L. No. 101-615, 104 Stat. 3244 (1990). The HMTUSA was designed “to strengthen the [HMTA] program in a number of critical areas. . . .” S. Rep. No. 101-449, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4595. In adopting the HMTUSA, Congress made the following findings:

(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of

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<sup>3</sup> As CSXT and other *amici* have provided detailed argument with regard to the preemptive effect of the HMTA on rail, *amici* herein have not focused their arguments on that issue. Many of *amici*’s members, however, ship and transport hazardous materials by rail, and the HMTA preempts the Temporary Act’s effect on rail transportation to an equal extent as it does trucking. Judge Henderson’s concurrence in *CST Transportation, Inc. v. Williams* recognized that the Emergency Act was preempted by the HMTA because it posed an obstacle to carrying out HM-232. 406 F.3d at 675. For the reasons noted by Judge Henderson, this Court should also find that the Temporary Act is preempted by the HMTA with regard to both rail and truck transport of hazardous materials.

hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportations of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable . . .

*Hazardous Materials Transportation Uniform Safety Act of 1990*, Pub. L. No. 101-615, 104 Stat. 3244-45.

To accomplish Congress' purpose of ensuring uniformity in regulations governing the transportation of hazardous materials, section 5125 of the HMTA sets forth several distinct preemption standards including: Dual Compliance or "Impossibility" Preemption, §5125(a)(1); Obstacle Preemption, §5125(a)(2); Preemption of Certain Covered Subjects, §5125(b); Routing Preemption, §5125(c); and Highway Routing Preemption of Certain State-Based Fees, §5125(g). As demonstrated below, the Temporary Act is preempted by three of these preemption standards set forth in section 5125.

Moreover, after the attacks of September 11, 2001, Congress enacted the Homeland Security Act of 2002, Pub. L. No. 107-296 (2002), which created the Department of Homeland Security. Among its provisions, the Act explicitly provided the Secretary of Transportation with authority to issue regulations concerning the security of hazardous materials transportation. Pub. L. No. 107-296, § 1711(a) (2002), *codified at* 49 U.S.C. § 5103(b). The Act also expanded the preemption provisions in 49 U.S.C. § 5125(a) and (b) to include regulations issued by the

Secretary of Transportation under the HMTA and security regulations or directives issued by the Secretary of Homeland Security. Pub. L. No. 107-296, § 1711(b), 49 U.S.C. § 5125(a) and (b).

**1. It is Impossible for Carriers to Comply with the Temporary Act and the Hazardous Materials Regulations.**

The HMTA expressly preempts a state or local law if compliance with such law and the HMTA or regulations issued thereunder is “not possible.” 49 U.S.C. §5125(a)(1). The Temporary Act and similar proposed state/local laws restricting the transportation of hazardous materials that do not comport with the standards and procedures set forth in the HMTA, as discussed supra at pp. 9-11 (“Local Highway Restrictions”), are preempted under this provision in three ways.

First, Local Highway Restrictions create local impediments that causes delay in the delivery and pickup of hazardous materials. This is in direct conflict with the federal hazardous materials regulations, which require motor carriers to transport hazardous materials without “unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.” 49 C.F.R. § 177.800(d).<sup>4</sup> Local Highway Restrictions make it impossible for motor carriers to comply with this federal requirement, as a motor carrier would have to delay the delivery or pick-up of materials going into or leaving the restricted areas while waiting for the state/local jurisdiction to issue the necessary permit, if in fact a permit is available at all.

Second, Local Highway Restrictions also make it impossible for a motor carrier to comply with the U.S. Department of Transportation regulations for routing of hazardous materials shipments by truck. 49 C.F.R. § 397.67. Those federal regulations provide that a

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<sup>4</sup> There is also a federal requirement that hazardous materials shipments by rail must be forwarded promptly after acceptance by the carrier, normally within 48 hours of acceptance or on the first available train where biweekly or weekly service only is performed. 49 C.F.R. § 174.14(a).

motor carrier carrying placardable amounts of hazardous materials “shall operate the vehicle over routes which do not go through or near heavily populated areas, places where crowds are assembled, tunnels, narrow streets, or alleys, except where the *motor carrier determines* that:

- (1) There is no practicable alternative;
- (2) A reasonable deviation is necessary to reach terminals, points of loading and unloading, facilities for food, fuel, repairs, rest, or a safe haven; or
- (3) A reasonable deviation is required by emergency conditions . . .”

49 C.F.R. §397.67(b) (emphasis supplied). Under the federal regulations, the motor carrier is granted the discretion to determine when a reasonable deviation is necessary to reach a terminal or a customer’s facility, for example. Local Highway Restrictions, in contrast, remove that discretion and specifically prohibit a motor carrier from picking up cargo at a terminal or delivering to a customer within the restricted areas. Under the federal regulations, a motor carrier may operate a truck transporting hazardous materials in a populated area if the motor carrier determines there is no practicable alternative; Local Highway Restrictions negate this option by banning or authorizing additional safety requirements (including but not limited to time of day restrictions) on all affected truck transportation in the restricted areas. Therefore, it is impossible for a motor carrier to comply with Local Highway Restrictions and the federal highway routing regulations.

Third, the U.S. Department of Transportation has imposed security requirements on all shippers and carriers of placardable amounts of hazardous materials by all transportation modes. HM-232, 49 C.F.R. §§172.800 *et seq.*, 68 Federal Register 14,509 (March 25, 2003).<sup>5</sup> These regulations specifically require a company to develop and implement a security plan to address “the assessed security risks of shipments of hazardous materials covered by the security plan en route from origin to destination, including shipments stored incidental to movement.” 49 C.F.R.

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<sup>5</sup> HM-232 also requires initial and periodic training of employees in security awareness and the specifics of the security plans. *See* 49 C.F.R. §172.704(a)(4) and (5).

§172.802(a)(3).<sup>6</sup> Again, this regulatory scheme grants the carrier discretion to select routing options as part of its security plan.

The routing ban on hazardous materials or any “safety” requirement under Local Highway Restrictions, in contrast, make it impossible for CSXT or other affected carriers to comply with their individualized security plans developed and implemented under HM-232, and such restrictions are preempted under the HMTA. 49 U.S.C. §5125(a)(1).

## **2. The Temporary Act is an Obstacle to Accomplishing National Uniformity of Hazardous Materials Regulations.**

The HMTA further provides that a state or local law is preempted if compliance with such law and the HMTA or its implementing regulations is “an obstacle to accomplishing and carrying out” the requirements of the HMTA or the regulations implementing its provisions. 49 U.S.C. §5125(a)(2). The routing ban and permitting requirements in sections 4 and 5, respectively, of the Temporary Act and similar Local Highway Restrictions and local rail restrictions fall within this category of preemption.

The Temporary Act, as well as other similar proposed state and local restrictions on the transportation of hazardous materials as discussed *supra* at pp. 9-11, compromise national uniformity in hazardous materials regulation and amount to nonfederal restrictions that divert the flow of hazardous materials around the enacting jurisdiction. As such, they simply export the risk of hazardous materials transportation to neighboring jurisdictions and therefore constitute an obstacle to accomplishing the purposes of Congress under 49 U.S.C. §5125(a)(2).

Moreover, such restrictions force motor carriers and railroads transporting hazardous materials to circumvent the restricted areas. As such, the hazardous materials transported by

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<sup>6</sup> As the Court of Appeals noted, 406 F.3d at 671, The Department considered routing restrictions in the proposed rule in HM-232 but rejected that approach by allowing the regulated entities the flexibility to implement individualized security plans based on performance standards. 67 Federal Register 22,028, 22,035 (May 2, 2002).

these carriers will be forced to travel additional miles around the restricted areas and will be in transportation for a longer period of time than necessary. Statistically, this will result in additional hazardous materials incidents and therefore is in direct conflict with the purposes of the HMTA.

The federal hazardous materials highway routing regulations in 49 C.F.R. §397.67 provide the motor carrier discretion to determine the appropriate route in populated areas, using a rule of reasonableness. Local Highway Restrictions prevent a motor carrier from employing any discretion to make routing decisions for transportation into or through the restricted areas. Absolute bans on hazardous materials transportation and unfettered discretion granted to state/local agencies to impose requirements for a permit<sup>7</sup> for transportation of any affected hazardous materials into or through the restricted areas, serve as obstacles to the federal regulatory scheme for discretionary highway routing of hazardous materials shipments, and is therefore preempted under 49 U.S.C. §5125(a)(2).

Similarly, Local Highway Restrictions are obstacles to the carrying out of the federal security regulations in HM-232. In her concurring opinion in the Court of Appeals decision, Judge Henderson stated that the D.C. ban on rail transportation appears to be an obstacle to carrying out HM-232 for the same reason that the majority found that the Temporary Act is

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<sup>7</sup> The Temporary Act provides no guidance as to timing or what conditions the D.C. Department of Transportation may place on the application for or issuance of a permit other than the applicant must demonstrate that there is no practical alternative route and that a time of day restriction may be one type of safety requirement imposed. Nor does the Act clarify whether permits would be for a single trip or issued on a periodic basis. Moreover, carriers do not always know in advance the type and quantity of hazardous materials or destinations they will be required to service, precluding their ability to comply with the Temporary Act by procuring an annual permit. Lengthy pre-notification requirements, license requirements and unfettered discretion to require information before issuing a single-trip permit for hazardous materials transportation have been preempted under the “obstacle” standard of the HMTA, 49 U.S.C. §5125(a)(2). *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8<sup>th</sup> Cir. 1993), *affirming* 781 F. Supp. 612 (D. Minn. 1991).

likely “incompatible with” HM-232 under the Federal Railroad Safety Act. 406 F.3d at 674. The opinion noted that the District’s ban on hazardous materials transportation through the Capitol Exclusion Zone “circumscribes the discretion that the regulation expressly confers on CSXT to develop its own individualized security plan,” including measures to address the risks posed on routing from origin to destination. *Id. and cases cited therein*. By removing this discretion from CSXT and other regulated carriers, the District’s ban presents an obstacle to complying with the HM-232 security requirements on hazardous materials routing and is therefore preempted. 49 U.S.C. §5125(a)(2).

### **3. The HMTA’s Highway Routing Provisions Also Preempt the Temporary Act.**

Additionally, even if the Temporary Act can survive scrutiny under the preemption provisions of 49 U.S.C. §§5125(a)(1) and (2), the Act is preempted because the District failed to follow the federal requirements for state (including the District of Columbia) regulation of highway routing of hazardous materials. 49 U.S.C. § 5112. This section of the HMTA implements the Congressional framework for hazardous materials routing regulations to ensure that no local jurisdiction may transfer risk by unilaterally forcing hazardous materials shipments into the surrounding jurisdictions.

The HMTA requires the Secretary of Transportation to establish standards by which states and Indian tribes may regulate in the area of highway routing of hazardous materials, 49 U.S.C. §5112, including:

- a requirement that any state highway routing designation enhance public safety in the state’s jurisdiction and in other jurisdictions directly affected by the designation;
- minimum procedural requirements to ensure public participation in any state routing designation;

- a requirement that states imposing a routing designation, limitation or requirement consult with other state or local jurisdictions and with affected industries;
- a requirement that any state highway routing designation ensure through highway routing between adjacent areas;
- a requirement that the state routing designation only be permitted if it is agreed to by another affected state or by the Secretary of Transportation and if it does not unreasonably burden interstate commerce;
- a requirement that state routing designations provide reasonable routes for motor vehicles to reach terminals, facilities for food, fuel, repairs, and rest, and places to load and unload hazardous material;
- a requirement that states consider population densities, the types of highways, the types and amounts of hazardous material, emergency response capabilities, the results of consulting with affected persons, exposure and other risk factors, terrain considerations, the continuity of routes, alternative routes, the effects on commerce, delays in transportation, and other factors the Secretary considers appropriate.

49 U.S.C. § 5112(b)(1)(A)-(E), (G)-(I).

Under 49 U.S.C. §5125(c), states may prescribe regulations governing highway routing only if they comply with the procedural requirements in 49 U.S.C. §5112(b). The District government failed to meet any of these procedural requirements in enacting the Temporary Act.

The U.S. Department of Transportation regulations implementing the statutory requirements for highway routing designations, 49 C.F.R. § 397.71(b), mirror the HMTA requirements regarding enhancement of public safety, public participation, consultation with other localities and industries, ensurance of through routing, agreement of other localities to state routing designations, and the reasonableness of routes to terminals and other facilities. The regulations also prescribe the factors states must consider before adopting highway routing limitations. 49 C.F.R. 397.71(b)(9). The regulations further provide that any state routing

designation of nonradioactive<sup>8</sup> hazardous materials adopted after November 14, 1984 shall comply with the requirements of 49 C.F.R. § 397.71. If the state law does not comply, it is preempted. 49 C.F.R. § 397.69.

Under the standards set by Congress and the U.S. Department of Transportation, the Temporary Act is preempted by the HMTA. The District failed to consult with other jurisdictions and industries directly affected by the routing limitation. 49 U.S.C. §5112(b)(1)(C). The District failed to obtain the approval of neighboring jurisdictions or the Secretary of Transportation, and to demonstrate that the Act is not an unreasonable burden on commerce. §5112(b)(1)(E), or to meet any of the other requirements of Section 5112.

Enforcement of Local Highway Restrictions would result in delays of highway shipments of hazardous materials because motor carriers will have to travel additional miles to deliver their products. Requirements that carriers wishing to move goods through restricted areas must obtain a permit, comply with additional safety requirements, and pay fees would also cause delays and diversion of hazardous materials in transportation. The U.S. Department of Transportation has consistently found that state restrictions on highway routings that result in delays of hazardous materials shipments are preempted by the HMTA. *See Notice of Administrative Determination of Preemption*, 66 Federal Register 29,867, 29,871 (June 1, 2001) (Exhibit B) (citing several pre-1990 Inconsistency Rulings that state laws resulting in delays to transportation are preempted by the HMTA, and noting that Congress's 1990 amendments to the HMTA confirmed the Department's preemption rulings).

Local Highway Restrictions also affect the efficient movement of hazardous materials, causing an adverse impact on commerce. The Court of Appeals has already found, in relation to

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<sup>8</sup> State routing of radioactive hazardous materials is subject to other requirements. See 49 C.F.R. § 397.103.

the Emergency Act, that this type of legislation has an adverse impact on interstate commerce. *CSX Transportation, Inc. v. Williams*, 406 F.3d 673.

Further, Local Highway Restrictions will require transporters to use alternative highways that could carry hazardous materials through other heavily populated areas surrounding the restricted areas. Many local governments believe their core areas are special targets for criminal or terrorist attacks like the District, and are drafting similar prohibitions.

Perhaps most importantly, the District was required to ensure that the routing limitation enhances public safety in the area subject to its jurisdiction and in areas not subject to its jurisdiction. 49 U.S.C. § 5112(b)(1)(A); 49 C.F.R. § 397.71(b)(1). As the Court of Appeals found in rejecting the Emergency Act, unilateral local restrictions merely shift the risk to other jurisdictions. 406 F.3d at 674. Indeed, additional delays in highway routing of hazardous materials reduces rather than enhances public safety.

#### **B. THE TEMPORARY ACT IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT**

Considering the persuasive memorandum and other supporting papers submitted by CSXT in support of its motion, the *amici curiae* will not discuss in detail the preemptive effect of the FRSA. Like the HMTA, the FRSA was intended by Congress to provide uniform federal regulation of hazardous materials transportation by rail. The FRSA provides, “Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106. States<sup>9</sup> may adopt or continue in force laws relating to railroad safety or security until the

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<sup>9</sup> CSXT is correct that the District of Columbia is prohibited from adopting laws relating to railroad safety at all because the FRSA applies only to “states.” *See* Memorandum of Points and Authorities in Support of CSXT’s Motion for Summary Judgment as to the Temporary Act, at 4 n.3. Unlike other federal statutes, the HMTA among them (*see* 49 U.S.C. § 5102(11) (defining “state” to include the District of Columbia and other jurisdictions)), the FRSA does not define

Secretaries of Transportation or Homeland Security adopt regulations or orders covering the subject of the state law. Beyond that, Congress has allowed states to adopt additional or more stringent laws (1) only if necessary to eliminate or reduce an essentially local safety or security hazard, (2) only if the state law is not incompatible with a federal requirement, and (3) only if the state law does not unreasonably burden interstate commerce. 49 U.S.C. § 20106.

In promulgating HM-232, the Department of Transportation has “covered the subject matter” addressed in the Temporary Act. *See CSX Transportation, Inc. v. Williams*, 406 F.3d at 672 (finding that CSXT was substantially likely to succeed on its claim that the subject matter of the Emergency Act was covered by HM-232). The question then becomes whether the Temporary Act could survive based on the three-pronged exception in Section 20106.

Again, the Court of Appeals has already opined that the substantively identical Emergency Act does not satisfy any of the three prongs. With regard to the first prong, the Court first found that the Emergency Act did not address an “essentially local safety hazard” because uniform federal regulations are, at least, capable of being adequately addressed in nationally uniform standards. The Court found unavailing the District’s argument that the federal authorities had not adequately addressed the vulnerability of the District with respect to hazardous materials transportation in the city. *Id.* The Court also found persuasive the United States’ argument that there could be no more quintessentially national security concern than protecting the Capitol from a terrorist attack. *Id.*

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the term “state” at all. 49 U.S.C. 20102. Giving the term its plain meaning, and noting that Congress in other transportation laws took pains to define “state” as including the District of Columbia when it desired to do so, it appears that Congress did not intend for the District to be permitted to legislate in this area at all, let alone under the exceptions found in Section 20106.

On the second prong, the Court found that the Emergency Act was incompatible with HM-232 because the routing restrictions contained in the Act do not allow carriers to exercise the discretion in routing under their security plans that was mandated by HM-232. *Id.* at 673.

On the third prong, the Court found that the Emergency Act unreasonably burdens interstate commerce. *Id.* The burden on interstate commerce is all the more real considering the “practical and cumulative impact” of other states enacting similar legislation. *Id.* As discussed above, many more jurisdictions than just California, the example cited by the Court of Appeals, are considering legislation similar to the Temporary Act.

In sum, the Court of Appeals found that the Emergency Act fails to satisfy any of the three prongs of the exception in Section 20106. The Temporary Act, of course, fares no better. For these reasons, this Court should follow the opinion of the Court of Appeals and find that the Temporary Act is preempted by the FRSA.

#### **IV. THE D.C. ORDINANCE VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION**

The Commerce Clause provides that Congress has the power to regulate commerce among the several states. U.S. Const. art. I, § 8, cl. 3. As CSXT has argued previously, the Commerce Clause “has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Oregon Waste Systems, Inc. v. Dep’t of Environmental Quality*, 511 U.S. 93, 98 (1994). The Temporary Act violates this “dormant” commerce clause by restricting the free flow of commerce through the District of Columbia. The Act is invalid *per se* because of its protectionist effect on interstate commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

As the Court of Appeals has already found in considering the Emergency Act, the Temporary Act “does ‘unreasonably burden interstate commerce.’” *CSX Transportation, Inc. v. Williams*, 406 F.3d at 673. The Court there noted the appropriateness of considering the Act’s “practical and cumulative impact were other States to enact legislation similar to the D.C. Act. *Id.* As noted above, in addition to the California proposal referenced by the Court of Appeals, several other jurisdictions have adopted, proposed, or are considering similar restrictions on hazardous materials transportation.

Restrictions on routing of such materials would have a devastating impact on interstate commerce and the quality of life in the United States. The Temporary Act’s adverse impact on interstate commerce is real and substantial, and the Act must be rejected under the Commerce Clause.

WHEREFORE, for the foregoing reasons, the associations comprising the *amici curiae* herein urge the Court to grant CSXT’s Motion for Summary Judgment.

Respectfully submitted,

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