Gary Sprung
3675 Aspen Ct., Boulder, CO 80304

TESTIMONY REGARDING SB24-184

Before the Senate Transportation and Energy Committee; March 27, 2024
By Gary Sprung

I live in Boulder, Colorado and am very excited about the prospects for passenger rail service on the RTD Northwest line and Front Range Passenger Rail line to Ft. Collins. I think **this bill is a brilliant solution to the funding problems**. The combination of the car rental fee with RTD's Northwest Rail savings account should produce significant dollars and enable us to match a much larger grant from the Federal Railroad Administration. I thank all the Colorado legislators who came up with this plan, as well as all the U.S. Congress members who voted for the bipartisan Infrastructure Investment and Jobs Act that provides the FRA money.

Passenger rail depends on the basic technology of **steel wheels running on steel rails**. This extremely energy efficient technology can support high volumes, heavy loads, and very fast speeds. The successes of high-speed rail in Japan, France, Germany, Italy, Spain, China, and even Turkey demonstrate that this old technology is very capable of serving our future. While Front Range Rail will not be high-speed rail for the foreseeable future, it can achieve the more important qualities of frequency and reliability without spending the big sums necessary for higher speeds.

I serve on the board of Colorado Rail Passenger Association but am speaking for myself. I also am a friend to Greater Denver Transit and I think they have some good points about the **initial service** on Front Range Passenger Rail. From what we have heard – but have never seen in writing – the Service Development Plan is studying a frequency of just three round-trips per day. Colorado can do much better, even at the beginning. I understand the feeling that FasTracks overpromised and under-delivered. Perhaps political people want to avoid that by under-promising and over-delivering. But three round-trips per day is too much of a swing in the other direction. With such a limited startup, the service could fail to gain traction and then critics might have grounds to call it a failure. I think a separate, dedicated track for passenger rail is a good goal, but not necessary at the start.

The Service Development Plan for Front Range Passenger Rail has been **the opposite of transparency**. Though the FRPR District and CDOT have explained its process, its

content is a mystery. Even FRPR District board members do not know what level of services it is studying. The legislature should tell CDOT and its consultants to open up that process and let the public comment and help, now.

I also am concerned that the bill does not mandate that **RTD must contribute its Northwest Rail saved money to this project**. While it seems obvious that they would want to do so, it also would not hurt for that to be a requirement in state law.

On a personal level, I would definitely use commuter and inter-city rail to get around the Front Range. I would spend more of my dollars in Denver for its restaurants and cultural attractions, and more in Fort Collins for its beer and bicycling. I would take the train to Colorado Springs and then transfer to the classic Manitou and Pikes Peak Railroad, or I might visit the Garden of the Gods. I don't travel to those cities as much as I want, and the trains would induce me to such travel.

Speaking of **induced travel**, the expansion of highways has failed to reduce traffic congestion. Look at the T-Rex project. The road was relatively empty and free-flowing for some years after construction. That is much less the case now. Look at Los Angeles. Their 14-lane expressways still slow to a crawl. It is easy to predict that the recent widening of I-25 around Castle Rock will fill up in the not distant future. Highway expansion only induces more highway travel. Everything we do to make automobile driving easier makes people drive more.

Passenger rail is the answer. It can handle vastly more traffic in much less land area compared to expressways. It does that while emitting much less carbon and it has a higher potential for achieving zero carbon emissions. It also is more fun! While riding a train, you can safely work, read a book, chat with your family or friends, or sleep.

Colorado and America once had a dense, successful network of **passenger trains operated by private companies who competed against one another**. Between Colorado Springs and Denver we had the Denver and Rio Grande Western, the Santa Fe, the Rock Island, and the Burlington/Colorado & Southern. They all operated Front Range Passenger rail. Our public investment in superhighways outcompeted them and destroyed that capitalist enterprise. We now need to invest in passenger rail – be it public or private – to restore choice to our transportation system.

Thank you for considering these comments.

Gary Sprung

March 27, 2024

Chair Winter and the Committee,

We are writing on behalf of the Mountain Rail Coalition (MRC) to express our strong support for SB24-184, assisting surface transportation infrastructure development by providing funding and operational flexibility needed for the development of diverse multimodal transit options including passenger rail infrastructure.

Mountain Rail Coalition members have been advocating for the re-purposing of Union Pacific's Northwest Colorado rail line since the announcement of coal-fired power plant retirements in Routt and Moffat Counties. It was not until CDOT's recent commitment of funds to create a Mountain Corridor Service Development Plan that the MRC came together with representation from Routt, Moffat, and Grand Counties and began to formalize as a Coalition. Our purpose is to serve as a liaison between communities along the mountain rail corridor and state and federal entities. We write to you today in this spirit.

Once membership is fully established, the MRC will have representation from all communities along the Northern Rocky Mountain rail corridor to support the creation and development of regular mountain passenger rail service from Denver's Union Station through Grand County and Routt County and into the City of Craig. Our project is synergistic with other efforts on Colorado's Front Range, and we look forward to working positively and productively to ensure that Colorado is well-positioned to receive the millions of federal dollars available for the development of passenger rail service and infrastructure across the state.

To seize this once in a lifetime opportunity to bring transformative transportation solutions to our state, we need a statewide funding source. SB24-184 will create a needed and lasting funding mechanism that will allow Colorado to unlock federal dollars for passenger rail projects. In Northwest Colorado, passenger rail will provide much needed transportation alternatives for commuters, residents, and visitors; support a just transition for coal impacted communities; improve access to attainable housing for employees in tourism-based communities; reduce traffic congestion and degradation of existing transportation infrastructure; and assist with the statewide effort to reduce greenhouse gas emissions on our already overburdened highway systems.

Mountain passenger rail service proposes using existing rail infrastructure which will soon lack freight movement due to the retirement of our coal-fired power plants. The community enthusiasm and support for passenger rail service is palpable from Craig to Winter Park and the Front Range. There are few examples of stakeholder alignment as instep as the communities located along the Northern Rocky Mountain rail corridor. We believe that the momentum created by SB24-184, with support from this strong coalition, will bring the mountain rail project to reality.

As tourism-based communities, we recognize the impact of the nominal fee on rental cars to our visitors. And we feel this is an appropriate tradeoff to leverage funds for passenger rail service development. Passenger rail has the promise of reducing congestion and lessening greenhouse gas emissions along the I-70 corridor and along Highway 40.

In closing, we reiterate our strong support for SB24-184 and are available to speak with you about the importance of this bill to our communities and economy.

Sincerely,

The Mountain Rail Coalition Steering Committee

Sonja Macys, Chair
County Commissioner, Routt County

Nick Kutrumbos, Vice Chair
Mayor, Town of Winter Park

Michael Buccino
City Councilor, City of Steamboat Springs

Randy George
County Commissioner, Grand County

Rob Perlman
EVP, Alterra Mountain Company

Mathew Mendisco
Town Manager, Town of Hayden

Jennifer Holloway
Executive Director
Craig Chamber of Commerce and Moffat Visitor Center

Tim Wohlgenant
Executive Director,
Yampa Valley Community Foundation

Sarah Jones
Director of Social Responsibility
Steamboat Ski & Resort Corporation

Sky Foulkes
COO, Winter Park Resort

AMERICAN CAR RENTAL ASSOCIATION

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STATEMENT OF THE AMERICAN CAR RENTAL ASSOCIATION
BEFORE THE
COLORADO SENATE COMMITTEE ON
TRANSPORTATION AND ENERGY

OPPOSITION TO CURRENT DRAFT OF SB24-184

March 27, 2024

Chair Winter, Vice Chair Priola, and Members of the Colorado Senate Transportation and Energy Committee -- The American Car Rental Association (ACRA) respectfully offers this testimony in **opposition** to SB24-184 with respect to the bill's funding mechanism. This bill would increase the state short-term car rental excise tax by $3.00 per day. ACRA respectfully asks that the committee either amend the bill to drop that funding source or reject this measure.

ACRA is the national representative for over 98% of our nation's car rental industry. ACRA's membership is comprised of over 300 car rental companies, including all of the brands you would recognize such as Alamo, Avis, Budget, Dollar, Enterprise, Fox, Hertz, National, Sixt and Thrifty. ACRA members also include many system licensees and franchisees, mid-size, regional and independent car rental companies as well as smaller operators. ACRA members have over 2.1 million registered vehicles in service in the United States, with fleets ranging in size from one million cars to ten cars and employ over 160,000 workers at rental locations in every county and state across the nation. If a visitor or Colorado resident (and voter) rents a car in Colorado, chances are they are renting it from an ACRA member.

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ACRA opposes the funding mechanism contained in the current version of SB24-184 for several reasons:

1. The car rental excise tax that would be imposed on both visitors to Colorado and Colorado citizens who rent cars in the state is unlawful under federal law in at least two different ways:

    a. First, Congress in 2018 made the tax under consideration by the Committee today unlawful as a restriction on interstate commerce (Attachment #1); At ACRA's request, a law firm with a national reputation for its expertise in state and local taxation and the Interstate Commerce Clause drafted a legal opinion that the proposed tax violates the 2018 federal law (Attachment #2); and,

    b. Second, the federal Anti-Head Tax Act, enacted by Congress in 1974, prohibits the imposition of a state tax on businesses doing business at federally-assisted airports; this tax would violate the AHTA.

    Due to this fundamental conflict between the funding mechanism of SB24-184 and existing federal law prohibiting discriminatory car rental excise taxes, maintaining the car rental tax as the funding mechanism in the bill likely will lead to litigation in federal court. This litigation could delay the light rail projects envisioned by the bill's advocates for perhaps as long as several years.

2. Contrary to the "sales job" on the bill by its sponsors, the tax rental tax funding mechanism in the bill will impact Colorado citizens (and voters) to the same extent as tourists coming to the state. Approximately 50% of car rentals in Colorado are

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"local" – insurance replacement rentals or residents renting a car because they don't own a car or need a different once for a trip, vacation or family outing. Thus, this proposed car rental tax is not a tax solely on out of state tourists. It is a tax that will be imposed on Colorado residents as well.

3. The tax imposed by this bill is regressive – hitting the lowest income Coloradans harder than those with ample income to withstand the imposition of such a tax. Historically, approximately 18% of the taxes paid on local car rentals are paid by Colorado households earning less than $50,000 annually.

4. The tax proposed by this bill will put upward pressure on both car rental rates in Colorado and personal car insurance rates for citizens in the state as rental car companies and insurers seek to pass through the increased costs of this tax to renters and insured Colorado drivers.

5. The car rental tax funding mechanism of SB24-184 violates the spirit, if not the letter, of Colorado Proposition 117 as the bill proposes a tax policy change that must be put to Colorado voters via a ballot initiative before adoption.

ACRA is aware of several amendments that have been filed with respect to SB24-184. None of the amendments of which ACRA has been made aware "cure" the fundamental conflict between the funding mechanism contained in the bill and federal law:

A. Amendment #11 – Would actually exacerbate the conflict with federal law by exempting insurance replacement rentals from the proposed tax. This would result in the vast majority of revenue from the car rental tax being derived

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from car rentals at the states airports – the exact outcome Congress prohibited in the 2018 federal statute.

B. Amendment #10 – Would shift the burden of the bill's car rental tax entirely on to the backs of Colorado residents and would impose the tax regressively on the Colorado citizens least able to afford a significant tax increase on their daily transportation needs – likely in violation of Proposition 117.

C. Amendment #9 – Seeking the legal opinion of the Colorado Attorney General after the enactment of the bill regarding the legality of the car rental tax embedded in SB24-184 likely would create more problems than it solves:

    i. If that legal opinion finds that the tax conflicts with federal law as ACRA asserts, then the light rail projects funded by SB24-184 would be delayed until the legislature could come up with a new funding mechanism and pass a new law; and,

    ii. Even if the Attorney General's opinion concluded that the car rental tax did not conflict with federal law, that would not stop interested parties from challenging the car rental tax in court for violating either federal law or Proposition 117.

For the reasons above, ACRA respectfully **opposes** the current funding mechanism embodied in SB24-184 and asks the Committee to either drop the car rental tax provisions of the bill or reject this measure.

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If ACRA's statement has given rise to questions, please contact Gregory M. Scott, ACRA's Government Relations Advisor, at 202-297-5123 or gscott@merevir.com. Thank you for the opportunity to submit this testimony.

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March 21, 2024

Via E-Mail

Sharon Faulkner
Executive Director
American Car Rental Association
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Re: Analysis of Proposed Colorado Congestion Impact Fee

Dear Ms. Faulkner:

The American Car Rental Association asked us to review Colorado Senate Bill S.B. 24-184 (the "Bill"), which would impose a new "Congestion Impact Fee" on short-term rentals of motor vehicles within the state.[1]

We conclude that the proposed Congestion Impact Fee is preempted by federal law – specifically, the prohibition clause of the Federal Aviation Administration Reauthorization Act of 2018 ("FAA Reauthorization Act").[2] This federal statute provides that states may not impose new fees on airport vehicle rental businesses after October 5, 2018 if the state does not generally impose the fee on all services and the funds derived from the fee are not *wholly* used for airport or aeronautical purposes.[3]

For the reasons discussed below, the Congestion Impact Fee will run afoul of the FAA Reauthorization Act if applied to airport-based rentals. This violation of the federal statute results in a violation of the Supremacy Clause of the United States Constitution that prohibits states from adopting laws that are contrary to federal statutes.[4]

[1] Colo. S.B. 24-184 (2024) available at: https://leg.colorado.gov/bills/sb24-184 (last visited March 30, 2024).
[2] 49 U.S.C. 40116(d)(2)(A)(v).
[3] Pub. L. No. 115-254, § 159(a), 132 Stat. 3220 (2018) (codified at 49 U.S.C. § 40116(d)(2)(A)(v)).
[4] The Supremacy Clause of the U.S. Constitution provides that Federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. [2]. *See e.g., Wolf v. Central Oregon & Pacific R.R., Inc.*, 216 P.3d 316, 320 (2009) (holding that the Supremacy Clause means that "[s]tate laws that conflict with or are expressly preempted by federal law are, thus, 'without effect.'") (citations omitted); *McCulloch v. Maryland*, 17 U.S. 316, 436, 4 L.Ed. 579 (1819) (states have "no power" to enact laws interfering with "the operations of the constitutional laws enacted by Congress"; such a state law "is unconstitutional and void").

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I. Colorado's Daily Vehicle Rental Fee

Since 2009, Colorado imposes a Daily Vehicle Rental Fee of $2 per day on all short-term vehicle rentals under 30 days.[5] The Daily Vehicle Rental Fee is adjusted annually for inflation.[6] The Daily Vehicle Rental Fee also applies to car-sharing programs for any short-term vehicle rental of 24 hours or longer that is enabled by the car sharing program.[7]

The Daily Vehicle Rental Fee is credited to the highway users tax fund and allocated between state agencies, counties, and municipalities using a statutory formula.[8] The state highway users fund can be used for a variety of enumerated purposes, including paying for state patrol, maintaining the state highway system and general department of transportation operating expenses.[9] Because the Daily Vehicle Fee has been imposed since 2009, it is not preempted by the FAA Reauthorization Act's prohibition against new fees.

II. Proposed Congestion Impact Fee

The Bill authorizes the Congestion Impact Fee, as a new user fee to be imposed by the Colorado High-Performance Transportation Enterprise ("Transportation Enterprise"), a division of the Colorado Department of Transportation operated as a business with a mission to "actively seek out opportunities for public-private partnerships for the purpose of completing surface transportation infrastructure projects."[10] "Surface transportation infrastructure" means a highway, a bridge other than a designated bridge, or any other infrastructure, facility, or equipment used primarily or in large part to transport people on systems that operate on or are affixed to the ground.[11]

The Congestion Impact Fee can be imposed in maximum amounts of up to $3 per day on the short-term rental of a motor vehicle that is powered by an internal combustion engine and up to $2 per day for electric and hybrid-electric vehicles.[12] The Congestion Impact Fee is adjusted for inflation and can be decreased if the Transportation Enterprise determines that the rates may generate more revenue than needed to pay the overall costs of providing services.[13] The Congestion Impact Fee is collected by the Colorado Department of Revenue in the same manner as the Daily Vehicle Rental Fee and then forwarded to the state Treasurer for distribution to the transportation special fund.[14]

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[5] Colo. Stat. §§ 43-4-804(b)(I)(A). Unlike the Congestion Impact Fee, the Daily Vehicle Fee is not a user fee imposed by a specific state agency. Colo. Dept. Rev. Form DR 1777. A "short-term vehicle rental" means the rental of any motor vehicle with a gross vehicle weight rating of twenty-six thousand pounds or less that is rented within Colorado for a period of not more than thirty days. Colo. Stat. § 43-4-804(b)(I)(B).

[6] Colo. Stat. § 43-4-804(b)(I)(A), (1)(b)(IV)(A). The fee is required to be separately stated on rental invoices as a "Colorado Road Safety Program Fee."

[7] *Id.* A "Car sharing program" means a person that is in the business of operating an online platform to connect third-party vehicle owners with third-party vehicle drivers to enable peer-to-peer car sharing within Colorado. Colo. Stat. § 6-1-1202(4)(a).

[8] Colo. Stat. §§ 43-4-201(1)(a), (3)(a)(II), 43-4-804(1).

[9] Colo. Stat. § 43-4-206(1).

[10] Colo. Stat. § 43-4-806(1)(c).

[11] Colo. Stat. § 43-8-804(22). Emphasis added.

[12] Prop. Colo. Stat. 43-4-806(7.6)(a)(I)(Colo. S.B. 24-184 (2024) as introduced).

[13] *Id.*

[14] Prop. Colo. Stat. 43-4-806(7.6)(b)(Colo. S.B. 24-184 (2024) as introduced).

The Transportation Enterprise may expend moneys in the transportation special fund to pay bond obligations, to fund *surface transportation infrastructure projects*, and for the acquisition of land to the extent required in connection with any surface transportation infrastructure project.[15] The Bill also contains legislative declarations that tie the Transportation Enterprise's creation of "diverse multimodal transportation options" to a reduction in road traffic congestion and the degradation of existing surface transportation infrastructure.[16] The Bill's legislative declarations specifically state that the funds from the Congestion Impact Fee "are imposed *for the specific purpose* of allowing the Transportation Enterprise to defray the costs of completing, operating, and maintaining the *surface transportation infrastructure network*."[17] The Bill contains no provisions to limit the fees collected from airport-based rentals for use in airport-related infrastructure project.

III. AHTA and FAA Reauthorization Act

The Anti-Head Tax Act (AHTA)[18] and FAA Reauthorization Act limit the ability of states and localities, including Colorado, to tax vehicle rentals at airports. The AHTA, enacted by Congress in 1994, prevents state authorities from imposing an undue burden on airlines, passengers, and related businesses engaged in interstate commerce, and preserves revenue from airport-related taxes and fees for the support of airport and aeronautical activities.[19] The AHTA prohibits "unreasonable burdens and discrimination against interstate commerce," including "a tax, fee, or charge, first taking effect after August 23, 1994, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes." (the "Prohibition Clause")[20]

In 2018, Congress expanded the scope of the AHTA by adopting the FAA Reauthorization Act, which clarifies that states may not impose a "levy or collect a tax, fee, or charge, first taking effect after the date of enactment of this clause, upon any business located at a commercial service airport or operating as a permittee of such an airport that is not generally imposed on sales or services by that State, political subdivision, or authority unless wholly utilized for airport or aeronautical purposes."[21] Thus, "discriminatory fees" are prohibited as of October 5, 2018, the enactment date of the FAA Reauthorization Act.[22]

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[15] Colo. Stat. § 43-4-806(3)(d).
[16] Prop. Colo. Stat. 43-4-806(a) (Colo. S.B. 24-184 (2024) as introduced).
[17] Prop. Colo. Stat. § 43-4-804(1.5)(b)(I)(Colo. S.B. 24-184 § 1 (2024) as introduced). Emphasis added.
[18] 49 U.S.C. § 40116.
[19] 49 U.S.C. 40116; *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 10 (1983).
[20] 49 U.S.C. 40116(2)(A)(iv). The term "airport" as used in the AHTA and FAA Reauthorization Act is defined as "a landing area used regularly by aircraft for receiving or discharging passengers or cargo." 49 U.S.C. § 40102(9). Meanwhile, "commercial service airport" means "a public airport in a State that the Secretary determines has at least 2,500 passenger boardings each year and is receiving scheduled passenger aircraft service." 49 U.S.C. § 47102(7). "Aeronautics" means the science and art of flight. 49 U.S.C. § 40102(a)(1).
[21] 49 U.S.C. § 40116(d)(2)(A)(v).
[22] The FAA Reauthorization Act clarifies that the Prohibition Clause in 49 U.S.C. § 40116(d)(2)(A)(v) does not "affect a change to a rate or other provision of a tax, fee, or charge under section 40116 of title 49, United States Code, that was enacted prior to the date of enactment of this Act." A tax, fee, or charge existing prior to the enactment of the Prohibition Clause "shall continue to be subject to the requirements to which such provision was subject under that section as in effect on the day before the date of enactment of this Act." 49 U.S.C. § 40116(d)(2)(A)(v). Accordingly, in order to meet the first element of the Prohibition Clause, a tax must be a new tax – one that is not merely an expansion of the rate or applicability of an existing tax.

A tax or fee is not banned if it is *generally imposed* on sales or services. The exclusion for "generally imposed" taxes allows for taxes and fees on a car rental business (or other businesses) that are imposed generally on other sales or services, rather than taxes and fees that are targeted. The FAA Reauthorization Act's prohibition against targeted taxes and fees is an extension of federal legislation that bans other targeted state and local taxes and fees on transportation and other industries.

For instance, the FAA Reauthorization Act's approach is the same as the approach taken in a long-standing federal statute that limits state and local taxation imposed on railroads – the Railroad Revitalization and Regulatory Act of 1976 (the "4-R Act").[23] The 4-R Act prohibits states from unreasonably burdening and discriminating against interstate commerce by imposing taxes that target rail carriers. The 4-R Act also allows for generally imposed taxes – those state and local taxes that do not target the industry.[24] Thus, a tax or fee that is only imposed on vehicle rental transactions and not imposed on other sales or services – is not "generally imposed."

This application of the FAA Reauthorization Act finds further support in application of the federal Internet Tax Freedom Act ("ITFA"), which is a federal statute that prohibits targeted state and local taxes on electronic commerce. The definition of "discriminatory taxes" is contained in ITFA § 1105(2)(A)(i) and (ii).[25] ITFA prohibits a state or local tax, or a rate of tax, from being imposed on electronic commerce that is "not generally imposed" on transactions that involve similar property, goods, services, or information accomplished through other means than the Internet. For example, in *Performance Marketing Association v. Hamer,* the Supreme Court of Illinois struck down Illinois' "click-through" nexus law as preempted by ITFA because the law imposed a use tax collection obligation on out-of-state retailers reaching a $10,000 sales threshold through marketing via website links while not imposing a similar use tax collection obligation on out-of-state retailers reaching the same sales threshold through broadcast or print marketing.[26]

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[23] 49 U.S.C.A. § 11501(b) provides that states, including a subdivision thereof or authority acting on behalf of, are prohibited from engaging in certain acts deemed to "unreasonably burden and discriminate against interstate commerce." There is a similar provision for motor carriers that "was patterned after and is virtually identical to [§ 306(b) of the 4-R Act]." *ABF Freight System, Inc. v. Tax Div. of the Arkansas Pub. Service Comm'n*, 787 F.2d 292, 293 n. 1 (8th Cir. 1986).

[24] Similar to § 306(b) there is no other qualifying language to this provision of the Prohibition Clause. Nor is there any indication in the legislative history of the FAA Reauthorization Act that the intention of the provision is to be contrary or anyway different than the language of the statute itself. Furthermore, as with § 306(b), the purpose of the Prohibition Clause is to prohibit discriminatory taxation. And like § 306(b), the Prohibition Clause has no intent requirement. Instead of railroads, the Prohibition Clause is designed to prohibit discriminatory taxes on "any business located at a commercial service airport or operating as a permittee of such airport," which includes car rental businesses. A state or local tax imposed on a railroad is only permissive under § 306(b) if it is imposed at a ratio or rate on "other commercial and industrial property" taxed by such taxing authority. Similarly, a state or local tax imposed on a business located at a commercial service airport or operating as a permittee of such airport is permissive under the Prohibition Act if it is generally imposed on *other* sales or services by such taxing authority.

[25] Pub. L. No. 105-277, Title XI, 112 Stat. 2681 (1998) (enacted as a statutory note to 47 U.S.C. § 151). ITFA § 1105(2)(A) defines the term "discriminatory tax," in relevant part as "any tax imposed by a State or political subdivision thereof on electronic commerce that – (i) is *not generally imposed* and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means; (ii) is *not generally imposed* and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period."

[26] *Performance Marketing Ass'n, Inc. v. Hamer*, 998 N.E.2d 54, 60 (Ill. 2013). The type of contractual relationship at issue in this case is known as "performance marketing." Performance marketing refers to marketing or advertising programs in which a person or organization which publishes or displays an advertisement (often referred to as an "affiliate" or "publisher") is paid by the retailer when a specific action, such as a sale, is completed. In performance marketing, the retailer tracks the success or "performance" of the marketing campaign, and sets the affiliate's compensation accordingly. Such contractual arrangements are not limited to the Internet. They are also

Analogous to ITFA's bar on a targeted tax on ecommerce unless the same tax applies to a similar transaction that is conducted through traditional commerce, the FAA Reauthorization Act bars a targeted tax or fee on businesses located at, or licensees of, a commercial service airport, including vehicle rental companies, unless the same tax or fee is generally imposed on *other* sales or services.

IV. The Proposed Congestion Impact Fee Violates the FAA Reauthorization Act

As applied to airport-based car rental companies, the proposed Congestion Impact Fee violates the FAA Reauthorization Act.[27] Under the FAA Reauthorization Act, a new state or local tax, fee, or charge is preempted if it: (i) first takes effect after October 5, 2018; (ii) is levied or collected "upon any business located at a commercial service airport or operating as a permittee of such an airport"; (iii) "is not generally imposed on sales or services by that State, political subdivision, or authority"; and (iv) does not provide that the proceeds thereof are "wholly utilized for airport or aeronautical purposes."[28]

The proposed Congestion Impact Fee violates the FAA Reauthorization Act because Colorado does not generally impose the Congestion Impact Fee on other services. A fee only on rental cars – whether only at the airport or anywhere within the state of Colorado – "is not generally imposed on sales or services by that State, political subdivision, or authority."[29] It targets and discriminates against rental cars by singling them out and charging those transactions while excluding nearly every other service.

Moreover, the funds from the proposed fee are not <u>*wholly*</u> used for airport services as defined by federal law. The Bill directs the proceeds from the Congestion Impact Fee to be used by the Transportation Enterprise, which is specifically tasked with developing "surface transportation infrastructure," namely a proposed new statewide train and bus network.[30] By its very terms, the Congestion Impact Fee is not "wholly utilized for airport or aeronautical purposes" as required by the exception to the prohibition cause of the FAA Reauthorization Act.[31]

Accordingly, Colorado will be unable to legally impose the Congestion Impact Fee on vehicle rental businesses operating at the state's airports because the fee violates federal law.[32]

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used in print and broadcast media, where promotional codes are used to generate and track sales. The case was brought by a performance marketing trade association concerned that its members advertising via the Internet vs. print and broadcast mediums were being taxed unequally.

[27] Pub. L. No. 115-254, § 159(a), 132 Stat. 3220 (2018) (codified at 49 U.S.C. § 40116(d)(2)(A)(v)).

[28] 49 U.S.C. 40116(d)(2)(A)(v).

[29] 49 U.S.C. § 40116(d)(2)(A)(v).

[30] Colo. Stat. § 43-4-803(23). Emphasis added.

[31] 49 U.S.C. 40116(d)(2)(A)(v).

[32] The Prohibition Clause also extends to locations of a business encompassed by the clause that are not located at a commercial service airport, *e.g.*, a car rental business' non-airport related business locations.

Sincerely,

Jeffrey A. Friedman
Partner, Eversheds Sutherland (US) LLP

2018 FAA BILL REVENUE DIVERSION AMENDMENT

Section 159 of Public Law No. 115-254. Effective date – 10-5-18

Adds a new subparagraph (v) to 49 USC 40116(d)(2)(A).

Section 159. STATE TAXATION.

(a) IN GENERAL.—Section 40116(d)(2)(A) of title 49, United States Code, is amended by adding at the end the following:

"(v) except as otherwise provided under section 47133, levy or collect a tax, fee, or charge, first taking effect after the date of enactment of this clause, upon any business located at a commercial service airport or operating as a permittee of such an airport that is not generally imposed on sales or services by that State, political subdivision, or authority unless wholly utilized for airport or aeronautical purposes.".

(b) RULE OF CONSTRUCTION.—Nothing in this section or an amendment made by this section shall affect a change to a rate or other provision of a tax, fee, or charge under section 40116 of title 49, United States Code, that was enacted prior to the date of enactment of this Act. Such provision of a tax, fee, or charge shall continue to be subject to the requirements to which such provision was subject under that section as in effect on the day before the date of enactment of this Act.

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March 27, 2024

The Honorable Faith Winter, Chairwoman
Senate Transportation and Energy Committee
State Capitol Building
200 E Colfax Avenue
Denver, CO 80203

Dear Senator Winter:

On behalf of the National Consumers League, I am writing to express concerns about Senate Bill 184, which would impose a new tax on car rental consumers of up to $3 per day. While the purpose of the tax may be laudable, i.e., to create new rail light line service, NCL does not believe the cost should be borne by consumers who, for many reasons, need to rent automobiles. This would also be the third highest tax on car rentals in the country.

A common misperception about taxes on car rentals is that the overwhelming majority of these taxes are paid by tourists or businesses flush with cash. This is simply not true. The fact is the majority of this new tax will be paid by Colorado consumers, not tourists. Consumers from all corners of the state rent cars for a multitude of reasons:

- Many of these consumers simply can't afford to own a vehicle, so they rent one on the weekends to do errands, move a family member or visit a parent in another town.
- Many consumers may have had car accidents – or worse, have had their cars stolen – and need a replacement vehicle.
- Many need a larger or newer vehicle to take a vacation they have been saving for.
- Many need a larger vehicle to take a child to college.

In other words, Colorado consumers of modest means are in actuality the most frequent renters of vehicles. NCL has long taken the position that average consumers who rent cars for a variety of important reasons should not have to bear the cost of extraneous taxes for projects, like civic centers, stadiums or in this case, light rail, from which they may not benefit and that have nothing to do with the service they are receiving when they rent a car.

The mission of the National Consumers League (NCL) is to protect and promote social and economic justice for consumers and workers. That is why we have, along with many other consumer and taxpayer advocates, often spoken out on the misconception that taxing car rental consumers is a good policy. We would suggest that the Committee consider amending Senate Bill 184 to lift the financial burden off of consumers who rent cars and spare them of yet another increased cost of what is often a vital service to them.

We appreciate the opportunity to share our views on this legislation. If you or anyone on the committee would like to discuss further, I can be reached at the email below.

Sincerely,

Sally Greenberg
CEO
National Consumers League
Sallyg@nclnet.org