IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO MOTOR CARRIERS ASSOCIATION Plaintiff/Appellee, v. TOWN OF VAIL and POLICE CHIEF RYAN KENNEY, Defendants/Appellants.	Case No. 24-1017

On Appeal from the United States District Court
For the District of Colorado
The Honorable Charlotte N. Sweeney
Civil Action No. 23-cv-02752-CNS-STV

***AMICUS CURIAE* BRIEF OF THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANTS/APPELLANTS, TOWN OF VAIL AND POLICE CHIEF RYAN KENNEY**

Respectfully Submitted,

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Colorado Municipal League ("CML"), formed in 1923, is a non-profit, voluntary association of 271 of the 273 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 107 home rule municipalities, 163 of the 165 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000.

Among its many roles in support of its members, CML provides training and an opportunity for peer-to-peer information exchange on a variety of topics, including matters having to do with municipal challenges and the proper exercise of municipal police powers. Officials and staff from our members learn from each other's experiences, which allows them to address potential problems in their communities before they become serious.

CML's participation as an *amicus curiae* provides the Court with a statewide municipal perspective to emphasize how the outcome of this case will impact all cities and towns in Colorado. Municipalities serve the public interest by exercising traditional police powers sanctioned by constitutional and statutory authority that Congress preserved in the federal statutes at issue. One such manifestation of these powers includes the regulation of local roads for various purposes, including ensuring the safety of motorists, pedestrians, and property. CML will articulate

how affirming the use of exacting scrutiny applied by the District Court in this case would hinder municipalities in maintaining safe local main streets and roadways that are essential assets to Colorado's communities.

CML has obtained the consent of the Plaintiff-Appellee, Colorado Motor Carriers Association, as well as the Defendants-Appellants, Town of Vail and Police Chief Ryan Kenney, to the filing of this *amicus curiae* brief pursuant to Fed. R. App. P. 29(a)(2).

II. RULE 29(a)(4)(E) STATEMENT

This brief was authored by undersigned counsel, who does not represent any other party to this case. No party or party's counsel contributed money that was intended to fund preparation or submittal of this brief. No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

III. ARGUMENT

A. All Colorado municipalities possess the important and traditional police power to regulate local roadways that is broadly preserved by the federal exemptions.

Main streets are a key part of the identities of Colorado's municipalities, especially smaller towns. These vital areas may be only a few blocks long and often include historic structures. They bring together retail businesses, restaurants, bars, music venues, offices, hotels, residences, playgrounds, and seating areas.

These community spaces are the vibrant heart of a municipality or neighborhood. Creating, maintaining, and cultivating safe and vibrant community spaces around local streets is a complex but essential function of local government.

As expressed by the Town of Vail in its Opening Brief, Congress preserved the traditional police power of state and local governments regarding streets through exceptions in the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") at 49 U.S.C. § 14501(c)(2)(A), and the Airline Deregulation Act of 1978 ("ADA") at 49 U.S.C. § 41713(b)(4)(B). *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 426, 432 (2002) (emphasizing that the FAAAA does not restrict "the preexisting and traditional state police power over safety"); *Cal. Tow Truck Ass'n v. City & Cnty. of San Francisco*, 693 F.3d 847, 858 (9th Cir. 2012) (citing *Ours Garage* to reiterate that police powers of the state "have historically been entrusted by states to local government units").

Municipalities "possess extensive and drastic police powers with respect to the care, supervision, and control of streets." 10A McQuillin Mun. Corp. § 30:41 (3d ed. 2024); *see also Crossroads W. Liab. Co. v. Town of Parker*, 929 P.2d 62, 64 (Colo. App. 1996) (holding that, in Colorado, "municipalities have a broad and general police power to institute regulations for the public good," including traffic regulation). These entities exercise their powers to regulate streets for the benefit of the general public. *See* 10A McQuillin Mun. Corp. § 30:41 (3d ed. 2024). The

Colorado Supreme Court has recognized that local governments are in the best position to determine proper regulations for streets in their jurisdiction. *See Asphalt Paving Co. v. Cnty. Comm'rs of Jefferson Cnty.*, 425 P.2d 289, 294 (Colo. 1967) ("Due to the varying situations which need to be regulated in our complex system of municipal, county, state and federal highways, obviously only local authorities are in a position to determine which non-federal or state streets in a residential area need to be regulated in a 'reasonable' manner, or would know about those problems in any detail."). As stated by Janette Sadik-Khan, former Commissioner of the New York City Department of Transportation and a renowned authority on transportation, recognized this as a common short-coming: "[C]reating streets that are safe, navigable, and accessible for everyone—no matter their age, income, or physical ability—is one of a city's most important, yet most overlooked, responsibilities." Richard Florida, *A Playbook on the Politics of Better Streets*, BLOOMBERG (Mar. 10, 2016), https://www.bloomberg.com/news/articles/2016-03-10/janette-sadik-khan-on-her-new-book-streetfight.

Colorado municipalities derive their authority to regulate streets by delegation through statute. *See Carl Ainsworth, Inc. v. Town of Morrison*, 539 P.2d 1267, 1268 (Colo. 1975) (recognizing that the Colorado legislature gave general power to regulate streets to municipalities). Home rule municipalities derive authority to regulate matters of local concern on streets directly from the state

constitution. *See, e.g.*, *Wiggins v. McAuliffe*, 356 P.2d 487, 489 (Colo. 1960) (holding that home rule city could regulate speeding on local streets as a matter of local concern under Article XX of the Colorado Constitution). The statutory grant of police power in Colorado authorizes municipalities to regulate the use of streets, public grounds, and sidewalks and to regulate traffic in those places. *See* C.R.S. § 31-15-702(1)(a)(I) (authorizing municipalities to regulate the use of streets and public grounds); C.R.S. § 31-15-702(1)(a)(III) (authorizing municipalities to regulate the use of sidewalks along streets); C.R.S. § 31-15-702(1)(a)(VII) (authorizing municipalities to regulate traffic on streets, sidewalks, and public places).

Colorado's municipalities are also authorized by statute to establish pedestrian malls on municipal streets through the Public Mall Act of 1970. *See* C.R.S. §§ 31-25-401 to -409. That law recognizes that "in certain areas in municipalities and particularly in retail shopping areas thereof, there is need to separate pedestrian travel from vehicular travel and that such separation is necessary to protect the public safety or otherwise to serve the public interest and convenience." C.R.S. § 31-25-402(1). Municipalities have authority to use this power, in addition to their existing police power, to establish pedestrian malls and "[t]o prohibit, in whole or in part, vehicular traffic on a pedestrian mall." C.R.S. § 31-25-402(2)(b).

Municipalities have used their traditional authority to create and preserve unique, shared spaces that include and center on streets. They use their authority to limit vehicular access permanently or temporarily. For example, during the COVID-19 pandemic, many municipalities allowed businesses to use public streets to expand seating areas; this required limiting traffic or, in some cases, prohibiting vehicular access. Most municipalities issue permits to close streets for special events. In each case, the regulatory action is directly connected to separating incompatible uses of the space by pedestrians and drivers.

This case must be examined considering the importance of the traditional police power over traffic regulation held by municipalities in Colorado. Courts across the country have recognized that the safety exceptions in the FAAAA and ADA are intended to be broadly construed for this very reason. Recognition of this foundation ultimately necessitates rejecting the District Court's improperly high standard for establishing the applicability of safety exceptions of the FAAAA and the ADA as discussed further in the following section.

B. Regulations limiting vehicular access to local, pedestrian-heavy roads have a significant and inherently logical nexus to road safety under the proper deferential level of scrutiny.

The safety concern that supports limiting vehicles on a unique street in the Town of Vail – pedestrian safety in pedestrian mall areas as it relates to delivery vehicles – is manifest from the inherent nature of the town's regulations. As

recognized by the District Court, the Town of Vail's limited vehicular restrictions over a short stretch of unique local road were motivated by legitimate traffic safety concerns. *See* App. Vol. I at 281-82 (finding traffic safety a "legitimate concern"). The District Court erred, however, in its examination of the nexus between Vail's regulations and safety of users of the streets. Instead of considering whether Colorado Motor Carriers Association was reasonably likely to succeed in overcoming the deferential standard that justified Vail's law, the District Court applied a form of strict, searching scrutiny.

Safe pedestrian access is a critical component of main streets and other local roads surrounding downtown areas. Common sense and experience easily show the connections between foot traffic and the vitality of town centers or between increased foot traffic and the ability of those visitors to navigate the area safely. By discounting Vail's legislative determination that pedestrian safety justified the ordinance, the District Court improperly narrowed the scope of the police power preserved by the FAAAA's and ADA's exceptions and placed too high a burden on the municipality to justify the use of its police power.

The safety exceptions in the FAAAA and ADA are broadly construed, providing great deference to state and local regulations. *See VRC LLC v. City of Dallas*, 460 F.3d 607, 612 (5th Cir. 2006) ("Case law both predating and applying the principles discussed in *Ours Garage* has on the whole given a broad

construction to the safety regulation exception."). Courts analyzing the safety exceptions in the FAAAA and ADA have found a "logical connection" between safety and the local regulation in a variety of cases across the country involving less apparent connections than Vail's obvious goal of limiting the potential for delivery vehicles to strike pedestrians.

- **Recordkeeping requirements**: The Second Circuit upheld recordkeeping requirements for towing companies, as well as requirements regarding licensing, display of information, reporting, criminal history, insurance, posting of bond, and maintenance of storage and repair facilities as being "so directly related to safety or financial responsibility and impose so peripheral and incidental an economic burden that no detailed analysis was necessary to conclude that they fall with the § 14501(c)(2)(A) exemptions." *Ace Auto Body & Towing, Ltd. v. City of N.Y.*, 171 F.3d 765, 776 (2d Cir. 1999). Relying on a more detailed inquiry, the court in *ArcBest II, Inc. v. Oliver*, 593 F. Supp. 3d 957, 973 (E.D. Cal. 2022), upheld recordkeeping requirements for household movers, amongst other regulations, because eliminating the requirement "would hinder enforcement meant to minimize safety risks."
- **Permit and registration requirements**: The Ninth Circuit viewed permit requirements for tow trucks as having a "significant and logical

relationship to safety" because they allowed for policing of misconduct. *Cal. Tow Truck Ass'n v. City & Cnty. of San Francisco*, 807 F.3d 1008, 1026-31 (9th Cir. 2015); *see also Cal. Tow Truck*, 693 F.3d at 862 (upholding a tow truck permitting system because "aspects of the Permit System were, at least in part, responsive to articulated safety concerns."). In *Professional Towing & Recovery Operators of Illinois v. Box*, 965 F. Supp. 2d 981, 997-98 (N.D. Ill. 2013), the court upheld a registration certificate requirement for towing companies that "frustrated" wreck chasing; the numerous shortcomings of the regulation did not undermine that it provided *some* safety benefit.

- **Signage requirements**: In *VRC*, the Fifth Circuit upheld a municipal requirement to post signage warning of the threat of towing on grounds that it would help remedy "the *possibility* of violent confrontation between unwarned vehicle owners and tow truck drivers" and thus, was responsive to safety concerns. 460 F.3d at 615 (emphasis added).

The logical connection between Vail's ordinances and public safety is both far less attenuated and far more obvious than the nexus between safety and the local requirements regarding recordkeeping, permits and registration, and signage considered by these courts. On this basis alone, a local regulation like Vail's that limits delivery truck access in pedestrian mall areas should satisfy the FAAAA and

ADA's safety exceptions. The town also relied on adequate evidence to justify its use of the police power to address a real or perceived safety problem.

To establish a "logical connection," a government is not required to rely on a particular type or amount of evidence or actually be effective. *See, e.g., Cal. Tow Truck*, 807 F.3d at 1025 (not requiring city to produce evidence of statistical or other empirical data and holding that "the safety exception is concerned with legislative *intent*, not legislative *effectiveness*"). Consistent with the evidentiary standards for the exercise of the police power, the record supporting such an ordinance can be based on expertise, experience, records, and/or testimony. For example, in *VRC*, the Fifth Circuit refused to discount the testimony and opinion of a city employee regarding the safety benefits of preventing driver conflicts with tow truck operators. 460 F.3d at 610. That court still found that the connection between the local law and safety was logical even though the city did not support its regulation with "any documentary evidence, reports, or studies of the phenomenon of vehicle owner/tow truck driver altercations." *Id.*

The "logical connection" analysis requires no more than a review like that of any other ordinance evaluated under a rational basis standard. *See Dodger's Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994) (holding that when regulations do not impact a fundamental right, there only needs to be a rational basis for the exercise of the government's police power);

Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n, 325 P.3d 1032, 1039 (Colo. 2014) ("In the police power context, we have consistently evaluated the reasonableness of an ordinance by examining the relationship between the provisions of the ordinance and the government interest or objective to be achieved."). The presence of multiple purposes for, or benefits of, a local ordinance is irrelevant unless one is illusory. *See United Motorcoach Ass'n v. City of Austin*, 851 F.3d 489, 498 (5th Cir. 2017) (finding city's accomplishment of economic goals through permitting regulations does not undermine safety purpose as they "are not mutually exclusive"); *VRC*, 460 F.3d at 612, 615 (holding that while safety and consumer protection are not mutually exclusive, state and local governments cannot "hide economic regulation under the guise of safety regulation"). Similarly, the existence of a more exacting solution or a solution that has less impact on a protected interest is irrelevant. *See, e.g.*, *Pro. Towing*, 965 F. Supp. 2d at 998. In such an analysis, the wisdom of the governing body's decision is not at issue and the existence of a less-restrictive alternative will not justify an ordinance's invalidation.

By ignoring appropriate evidence that plainly supports a "logical connection" to safety, the District Court held the town to a stricter standard. The District Court looked far beyond the "obvious and logical connection" to safety and instead evaluated the preemption exceptions of the FAAAA and the ADA as if

they required a stricter scrutiny, like the restrictions that the First Amendment places on the local regulation of streets.

For example, the First Amendment requires that content-neutral ordinances affecting pedestrian speech on roadways be "narrowly tailored to serve . . . substantial and content-neutral government interests." *See, e.g.*, *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1209 (10th Cir. 2021) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989)). This Court has held that while the government can support its interest in its regulation through "prior caselaw and common sense," this higher standard requires "case-specific evidence that the restriction actually serves a stated goal without burdening too much speech in order to satisfy the narrow tailoring inquiry." *Id.* at 1214 (quoting *Martin v. City of Albuquerque*, 396 F. Supp. 3d 1008, 1029 (D.N.M. Aug. 5, 2019), in discussing the "roadmap for conducting a narrow tailoring inquiry" outlined by the United States Supreme Court in *McCullen v. Coakley*, 573 U.S. 464 (2014)). Anecdotal evidence and personal speculation do not meet that higher burden when considering a First Amendment challenge and the existence of a less restrictive alternative justifies striking down an ordinance.

The FAAAA and ADA do not impose the same evidentiary burdens or searching inquiry as the First Amendment or other laws subject to intense judicial review. Yet, the District Court penalized the Town of Vail for the quality, type,

and quantity of evidence it relied upon to enact its ordinances; overlooked the congestion issue altogether when there was unrebutted evidence of safety risks in these pedestrian zones due to congestion from delivery vehicles; and questioned whether less restrictive alternatives existed. In doing so, the district conducted the type of searching inquiry "into the legitimacy of the municipality's safety concern" that the Fifth Circuit rejected in *VRC*. *See* 460 F.3d at 612-13 (rejecting a test requiring "close nexus between the safety concern and the regulation"). The FAAAA and ADA do not provide vehicles for courts to second-guess the wisdom of a town's ordinances or whether another legislative choice may have been more appropriate.

Local governments need only demonstrate safety concerns that are "real enough" and can meet the exceptions if "the relation between safety is obvious and logical." *See United Motorcoach*, 851 F.3d at 498. They should not be required to wait for a pedestrian fatality or injury when they can use the police power to prevent such incidents in areas where they are more likely to occur. Nor should they be required to conduct expensive studies to support a "logical connection." Municipal officials experienced in road safety and traffic management can evaluate local roadways that they police daily. Local governing bodies can use their knowledge of their communities to make the obvious connection between vehicle restrictions and safety. A higher burden is an unfair and excessive restriction on the

exercise of municipal police power and is inconsistent with the requirements of the FAAAA and ADA.

The Town of Vail also should not be penalized simply because the town—a well-known tourist destination like many places in Colorado—recognized that protecting pedestrians from being hit by vehicles has benefits for the town's major industry. Pedestrian safety is inextricably intertwined with the economic benefits of such regulations, particularly in the main streets and the business districts of Colorado's smaller municipalities and tourist destinations. The existence of an alternative benefit does not diminish the logical connection of the ordinance to safety, even if the other benefit is another motivating factor for the governing body. *See id*.

If the underlying order is affirmed, Colorado's municipalities will be improperly restricted in their ordinary and rational use of the police power. They will not be able to rely on the common sense, experience, and expertise of their staff or officials in exercising their police powers, as they do on a regular basis for a variety of laws subject to the more lenient "rational basis" review. Instead, onerous evidentiary requirements may have to be met, hindering the efficient operation of municipalities across Colorado and imposing undue burdens that would require the expenditure of significant municipal revenue—a cost that is ultimately borne by taxpayers. Municipalities also could not be proactive for the

protection of their residents and visitors. Most significantly, they would have to ignore the obvious and logical connection between their vibrant main streets and community safety.

IV. CONCLUSION

The safety exceptions in the FAAAA and ADA broadly preserve state and local police power over roads. The District Court's order improperly made it harder for government to use these exceptions, hindering the ability of municipalities throughout Colorado to exercise their police power and provide for the safety needs of their community in the future. Accordingly, CML urges this Court to reject the District Court's exacting standard.

Respectfully submitted,

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I hereby certify that with respect to the foregoing:

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Dated: September 26, 2024

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I hereby certify that on September 26, 2024, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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