

**U.S. Real Estate, Insurance and Contracting Sectors
Support H.R. 3808, “Infrastructure Expansion Act”**

January 29, 2018

The Honorable Bob Goodlatte
Chairman
Judiciary Committee
U.S. House of Representatives
Rm. 2309 Rayburn Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
Judiciary Committee
U.S. House of Representatives
Rm. B351 Rayburn Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Nadler:

Our undersigned organizations represent the U.S. contracting, insurance and real estate sectors. We write in strong support of a bill scheduled for markup tomorrow by your Committee, the Infrastructure Expansion Act (H.R. 3808), sponsored by Representative John Faso. It is an important measure towards common sense tort reform. It provides that property owners, contractors and workers all share responsibilities for workplace safety at infrastructure construction and other economic development project sites that boost GDP, create jobs, and receive Federal financial assistance.

The bill specifies that lawsuits against property owners and contractors for injuries associated with slips, falls, and “gravity-related risks” at Federally-assisted projects must be judged under a “comparative negligence” standard. H.R. 3808 fosters the legal standard adopted by the overwhelming majority of courts, legislatures, and legal scholars across the United States. Principles of equity and fairness ground this modern tort law standard. When workers proximately cause their own injuries, “comparative negligence” factors such self-inflicted negligence as an element to proportionately limit damages awarded by judges and juries.

H.R. 3808 would enable a course correction for the proliferation of lawsuits relying on New York State’s outdated “Scaffold Law.” First passed during the Industrial Revolution, long before the advent of Federal and state OSHA and workers’ compensation laws, the Scaffold Law has been interpreted by the courts to subject property owners and contractors to “absolute liability.” This means that costs of injuries from commonplace painting, cleaning, remodeling, and construction activities are completely borne by property owners and contractors – even if they are not the direct employer of the injured worker. And, the Scaffold Law deems property owners and contractors as absolutely liable for height-related incidents *without regard to whether the worker caused the accident and intensified his or her own injuries*. Under the Scaffold Law, even an inebriated worker who stumbles and falls at a project site is not held accountable to the extent his intoxicated state caused his own injuries.

The “Infrastructure Expansion Act” is a 21st century solution to ameliorate the harsh impact of the 19th century law, which can restrain modern interstate commerce and economically burden transportation projects that cross state lines:

- The obsolete law is estimated to drive-up costs by as much as \$300 million for the Gateway Program, a rail tunnel project of overwhelming national significance that is seeking US-DOT assistance. This project will modernize the power grid, update a century-old tunnel inundated by Superstorm Sandy, and help eliminate the train “bottleneck” in the most congested segment of the nation’s key passenger rail route – the Northeast Corridor, which provides 260 million passenger trips each year, and moves a workforce that contributes \$50 billion to US GDP annually and transacts business from Washington, D.C. to Boston. H.R. 3808 can help reduce the substantial added costs from insurance coverage, excessive litigation pay-outs, and project delays for interstate infrastructure construction like Gateway.
- Likewise, the Tappan Zee Bridge spans the Hudson River as part of the interstate highway system, enabling southbound regional travel from New England to New Jersey and beyond (while avoiding New York City traffic). Its state-of-the-art, twin-span replacement will be completed in 2018. An estimated added cost of \$200 million is due to the Scaffold Law’s heightened liability standard. The innovative, multi-modal dual-span replacement is Federally-assisted with a critical financing component provided by a low-interest US-DOT loan.
- The Scaffold Law has hindered rebuilding efforts (and taxpayer dollars appropriated by Congress) to Superstorm Sandy disaster relief. The President and CEO for Habitat for Humanity of New York wrote in a recent editorial, “After Superstorm Sandy, our volunteer partners struggled to find insurance. Since the Scaffold Law holds contractors and property owners 100 percent responsible even if they were only 1 percent at fault, most insurers will not write policies in New York – the only state where this law exists. Many disaster relief and affordable housing projects flounder due to the inability to find coverage – coverage that is widely available in every other state.”¹ The Scaffold Law alone reportedly adds \$10,000 to the price of a new home.
- The U.S. government likely bears higher costs for general liability insurance at the dozens of Federally-owned and -managed properties in New York State. As Federal property managers hire contractors to perform commonplace cleaning, painting, renovation, and construction activities within the Scaffold Law’s scope, taxpayers are ultimately on the hook for more expensive insurance to cover accidents at U.S. facilities.

Opponents of common sense reform efforts (like H.R. 3808) maintain that the archaic Scaffold Law is still necessary to make construction sites safe. With respect, they misapprehend and overstate the effect of reform measures like the “Infrastructure Expansion Act”:

- H.R. 3808 does not bar valid tort claims by injured workers. They still get their day in court, even if they partially cause their own injuries. H.R. 3808 does not diminish the basic duty of owners and general contractors to furnish safe scaffold systems, hoists, ladders, and other similar devices that give proper protection to the class of workers within the Scaffold Law’s scope. In

¹ See <http://www.timesunion.com/opinion/article/Letter-Scaffold-Law-hinders-Habitat-for-Humanity-12312471.php>.

short: H.R. 3808 does not shield owner/contractor liability when rickety scaffolds or defective ladders cause workers' injuries.

- H.R. 3808 does not diminish or alter Federal or state OSHA obligations. An employer is always responsible to meet OSHA's Federal "Safety and Health Regulations for Construction" – including specific provisions that address scaffolds, hoists, fall protection, personal protective equipment, and safety training at worksites.
- H.R. 3808 does not foreclose "no-fault" workers' compensation. Without regard to relative or comparative fault – and even if a worker is negligent – an injured employee may pursue workers' compensation claims to recoup lost wages, benefits, and payment of medical bills.

When a driver carelessly fails to wear a seat belt, courts across the country are likely to reduce damages to the extent the driver's own negligence worsened injuries from a car accident. "Gravity-related" incidents should not be adjudicated any differently – when a construction worker acts without due regard for his or her own care, or flatly ignores safety precautions.

Fair and equitable apportionment of tort responsibility is H.R. 3808's objective. The bill simply makes property owners, contractors, and workers accountable for their own choices and conduct at construction sites benefitting from Federal taxpayer dollars. We encourage swift passage of the "Infrastructure Expansion Act."

**American Council of Engineering Companies
American Hotel & Lodging Association
American Insurance Association
American Resort Development Association
American Subcontractors Association
Associated General Contractors
Building Owners and Managers Association (BOMA) International
Independent Electrical Contractors
Leading Builders of America
NAIOP, the Commercial Real Estate Development Association
National Apartment Association
National Association of Home Builders
National Association of Surety Bond Producers
National Electrical Contractors Association
National Federation of Independent Business
National Multifamily Housing Council
National Roofing Contractors Association
Surety & Fidelity Association of America
The Real Estate Roundtable**

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Cc:

Members of Judiciary Committee, U.S. House of Representatives

The Honorable Bill Shuster, Chair, House Transportation and Infrastructure Committee

The Honorable Peter DeFazio, Ranking Member, House Transportation and Infrastructure Committee

H.R. 3808 Sponsors:

The Honorable John Faso

The Honorable Chris Collins

The Honorable Elise Stefanik

The Honorable Claudia Tenney

The Honorable Tom Reed