No. 20-1425

IN THE

Supreme Court of the United States

C.H. ROBINSON WORLDWIDE, INC.,

Petitioner,

v.

ALLEN MILLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE TRANSPORTATION INTERMEDIARIES ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

RICHARD D. GLUCK
Counsel of Record
BENJAMIN J. LAMBIOTTE
FOSTER GARVEY PC
1000 Potomac Street, N.W.
Suite 200
Washington, D.C. 20007
(202) 965-7880
richard.gluck@foster.com

Counsel for Amicus Curiae

May 19, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Transportation Intermediaries Association, Inc. ("TIA") is a not-for-profit membership trade association. For over 40 years, TIA has provided leadership, education and training resources, and public policy advocacy to the $213 billion per year third-party transportation logistics industry, which includes freight brokerage. TIA has over 1,700 member companies, ranging from small start-ups to international shipping companies, including large and small freight brokers. The outcome of the question presented by Petitioner C.H. Robinson will deeply and immediately affect the interests of TIA members, whose core service is to arrange on behalf of their shipper customers interstate freight shipments and placement of loads with interstate motor freight carriers, in millions of transactions each year, to, from and between every state in the Union and countries and territories around the world. Brokers generally do not own or control the trucks, vessels, trains, and aircraft that move their customers' goods.[2] They do not maintain

---

[1] Pursuant to Rule 37.3, the parties have provided written consent to the filing of this brief *amicus curiae.* Petitioner, by blanket consent letter dated April 13, 2021, of record on the docket in this case, consented to TIA's submission of this brief. By an electronic mail received by undersigned counsel, dated April 19, 2021, counsel for Respondent Allen Miller granted written consent to TIA's submission of this brief. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

[2] The Interstate Commerce Act defines "broker" as "a person, other than a motor carrier or an employee or agent of a

the vehicles or hire the drivers, and usually have no rights to control the carriers' operational, business or hiring practices.

TIA has a practical industry perspective that may be valuable to the Court in considering whether to review the erroneous holding of the majority panel of the United States Court of Appeals for the Ninth Circuit that common law negligent carrier selection claims brought in state courts against freight brokers are not pre-empted under 49 U.S.C. § 14501(c)(1) ("FAAAA"), because such claims are an exercise of the state's "safety regulatory authority with respect to motor vehicles" (49 U.S.C. § 14501(c)(2)) (the "Safety Exception"). Granting the instant petition would permit this Court to settle an emerging divergence of lower court decisions on the question presented. The current unsettled state of broker civil liability for carrier selection exposes freight brokers to enormous potential liability and uncertainty in selecting carriers for a movement crossing several states' lines, because the standards of care applied in civil negligence actions – and the specific steps brokers must take to meet them – often vary from state to state. Therefore, TIA and its members, and the entire logistics and supply chain management industry, have an abiding interest in the outcome of the petition before the Court.

---

motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2).

SUMMARY OF ARGUMENT

For reasons set forth in this brief, TIA respectfully submits that the majority panel below broadened the Safety Exception beyond the limited scope compelled by the plain meaning of its language, to indulge effectively a presumption against FAAAA preemption disfavored in this Court's recent express preemption jurisprudence. Allowing to stand the panel's holding that such claims are not pre-empted under the Safety Exception effectively subjects brokers to a patchwork of disparate state common law standards of care in performing their core service of matching shippers' freight loads with carriers willing to move the load, typically across multiple state lines – one of the very evils of excessive state regulation Congress explicitly intended to curtail in the preemptive provisions of the FAAAA.

Freight brokers arrange transportation of goods on behalf of shippers from one point to another, either within, or across multiple states or internationally, according to the specific needs of the shipper. These services may involve use of more than one transportation mode, such as air, rail, truck, and ocean, but they typically involve movements across multiple states, and sometimes multiple nations. The freight broker engages carriers to provide transportation, but does not itself control or operate the equipment used. Brokers do not maintain the vehicles or hire the drivers, and usually have no right to control or dictate the carriers' operations, business, or hiring practices. Their role is to arrange the efficient, timely and cost effective movement of the cargo. They are sometimes described as "travel agents for freight."

Plaintiffs in negligent selection cases applying state law urge courts and juries to find brokers liable based on a variety of failures to take specific steps and to rely on specific information that brokers, left to the discipline of the free market, would not rely upon in the carrier selection process, or which the common law standard of care in other states may not require the broker to use. Thus, selection standards, made state-by-state, case-by-case, jury-by-jury, in carrier selection civil actions govern directly the manner in which a broker must provide its core service of arranging transportation on behalf of shippers. Congress explicitly intended that state exercises of motor vehicle safety regulatory authority under the Safety Exception not amount to disguised *de facto* regulation of interstate freight brokers' services and markets, demarcating the intended limits of the exception. But varying inconsistent state civil litigation decisions in carrier selection cases amount to just that: regulation of brokers' core services in interstate markets. Fairly read in accordance with its intended purpose, as required by this Court's express preemption decisions, the Safety Exception simply does not reach the brokers' services at issue here – arranging transportation of property on behalf of shippers. The growing uncertainty created by inconsistent application by the lower courts of the Safety Exception in carrier selection claims against brokers is itself having an ongoing adverse impact on the businesses of TIA's members, and the essential service they perform in the efficient operation of vital interstate supply chains. The time is ripe for this Court to end that uncertainty.

ARGUMENT

I. Regulatory Background of the FAAAA and Safety Exception

The ultimate source of federal authority to regulate transportation in interstate commerce is the Commerce Clause of the United States Constitution, which directly confers upon Congress the power to "regulate commerce with foreign Nations and among the several States." U.S. Const. art. I, § 8, cl. 3. In 1935, Congress enacted the Motor Carrier Act, Pub. L. No. 74-255, 49 Stat. 543 (1935), seeking to protect the then-fledgling trucking and bus industries against predatory pricing and uncontrolled competition, as well as to develop a sound national system and policy for transportation of goods and people in interstate and foreign commerce. William J. Augello, *Transportation, Logistics and the Law* 31 (2d. ed. 2001).

In the decades just prior to adoption of the Motor Carrier Act, the interstate trucking business was relatively new. William E. Thoms, *Rollin' On . . . To a Free Market Motor Carrier Regulation 1935-1980*, 13 Transp. L.J. 44, 44-47 (1983-84). In the early 20th century, the condition of roads and highways was poor, and heavy duty trucks suitable for long distance hauling did not emerge until the 1920s. *Id.* Interstate freight transportation was dominated by railroads. Trucking was an adjunct to rail, used by the railroads for local pickup and delivery and to funnel traffic to their routes. *Id.*

To the extent it existed at all, regulation of motor carriers was under state control. *Id.* at 47. Interstate motor carriers were subject to multiple states' regulations, requiring operating authority from each state through which the carrier passed. *Id.* State regula-

tory barriers to entry were already having the effect of stifling competition and burdening interstate commerce in the nascent interstate trucking industry. In 1925, this Court decided *Buck v. Kuykendall*, 276 U.S. 307 (1925), holding that the State of Washington imposed an unconstitutional burden on interstate commerce by denying authority to a carrier seeking to operate between Seattle, Washington and Portland, Oregon, on the grounds that there was already adequate rail and highway service on that route. The Court held that the primary purpose of Washington's regulatory scheme

> is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner.

276 U.S. at 315-16.

At that time, about forty states required motor carriers – both interstate and intrastate – to obtain certificates of "convenience and necessity." Thoms, 13 Transp. L.J. at 47. Professor Thoms described the effect of the decision on state regulation as follows: "The effect of *Buck v. Kuykendall* was to eliminate state controls on entry for motor carriers, limiting regulation by states of interstate service to historic police power areas of motor vehicle safety and highway conservation." *Id.*

After *Buck* curtailed on constitutional grounds the authority of the states to regulate entry into interstate trucking, Congress began to consider federal regula-

tion of motor carriers. It perceived that unrestrained competition from unscrupulous, marginal and "wildcat" operators led to detrimental "oversupply" and anti-competitive pricing practices. *Id.* at 48. *See also* Note, *Federal Regulation of Trucking: The Emerging Critique*, 63 Colum. L. Rev. 460, 461-64 (1963). In adopting the 1935 Motor Carrier Act, Congress adopted a comprehensive "public utility" system of regulating entry, rates, routes, and provision of services in interstate motor carriage.

Under the federal 1935 Motor Carrier Act, interstate motor carriers were subject to heavy regulation by the Interstate Commerce Commission ("ICC") in nearly all aspects of their business. Market entry, entering and exiting routes and services, approving rates and charges in filed tariffs, rules of carriage, business practices, safety, and insurance; all were regulated by the ICC. This system created barriers to entry, disincentives to innovation, and expensive regulatory compliance and operating requirements, and often discouraged healthy competition.

Starting in the late 1970s and continuing through the 1990s and the present, Congress and several Administrations reversed course, and embarked on a path of deregulation. By the 1970s, the former consensus in government and academia that government market intervention was necessary to ensure reasonable non-discriminatory interstate transportation rates and service was crumbling. Joseph D. Kearny & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1334-35 (1998). In 1978, Congress adopted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) ("ADA"), amending the Interstate Commerce Act to largely dismantle a system of heavy

federal regulation of the domestic airline industry similar in approach to the 1935 Motor Carrier Act. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Among other reforms, the ADA eliminated the duty of air carriers to file their rates in tariffs with the Civil Aeronautics Board, and to secure the agency's approval before instituting service on a particular route. Kearny & Merrill, *supra*, 98 Colum. L. Rev. at 1335. Henceforth, the airlines would be able to contract for and charge market rates, and operate on whatever routes they wished (subject to securing available airport slots), without federal agency approval. *Id.*

Congress' stated legislative rationale was that "maximum reliance on competitive market forces" would best promote "efficiency, innovation, low prices, and variety [and] quality" of transportation services. *Id.* (citing 49 U.S.C. App. § 1302(a)(4)). The 1978 ADA also contained an express preemption provision, addressed to state regulation. Legislative history indicates that Congress was concerned about potentially conflicting and inconsistent regulation by the states that might undermine its deregulatory goals. H.R. Rep. No. 1211, at 15-16 (1978). To ensure that the states would not "undo federal deregulation with regulation of their own," the statute included a preemption provision prohibiting the states from enforcing any law "relating to rates, routes, or services, of any air carrier." 49 U.S.C. App. § 1305(a)(1).

Two years later, Congress extended ADA deregulation to the motor freight carrier industry, adopting the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Like the ADA, the 1980 Motor Carrier Act "detariffed" interstate motor carriage, and freed carri-

ers to negotiate contract rates, and to serve whatever routes and markets they wished.

Congress "completed the deregulation . . . in 1994, by expressly preempting state trucking regulation" in the statute at issue here, the FAAAA, applicable to interstate motor freight carriers. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256 (2013). Congress plainly declared its findings and the purpose of FAAAA's express preemption provisions, as follows:

> (1) the regulation of intrastate transportation of property by the States has–
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers; and
>
> (2) certain aspects of the State regulatory process should be preempted.

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1605; *cited in Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002). Congress also expressly recognized that the "sheer diversity of [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677, at 87 (1994).

In reference to the preemption (and exception) provisions at issue here, congressional conferees expressed concern that regulation by the states under the exceptions may amount to disguised regulation of motor carrier rates, routes, *or services*, and clarified

that Congress did not intend the exceptions to be so applied:

> The conferees do not intend the regulatory authority which the States may continue to exercise partially identified in [the express preemption and exception provisions] to be used as a guise for continued economic regulation as it relates to prices, routes ***or services***. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes ***and services***, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. ***The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.***

Id. at 85 (emphases added).

The following year, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 83 ("ICTA"), Congress completed the cycle, abolishing entirely the ICC. As pertinent to the instant petition, the ICTA recodified the FAAAA's preemption provision as 49 U.S.C. § 14501(c), preserving "existing [FAAAA] prohibitions against intrastate regulation," but also extending them explicitly to "the rates, routes, or services of freight forwarders and transportation brokers." H.R. Conf. Rep. No. 104-422, at 218 (1995).

II. Industry Background: Freight Brokers' Services

In order to appreciate the importance of FAAAA preemption to freight forwarders and brokers, a basic understanding of the service they provide is required. Generally, freight brokers arrange transportation of goods on behalf of shippers, according to the specific needs of the shipper. These services may involve use of more than one transportation mode, such as air, rail, truck, and ocean, but they typically involve movements across multiple states, and sometimes multiple nations. Brokers typically have minutes per transaction to choreograph these often-complex arrangements, and many process large numbers of movements in a single day. Brokers' networks typically include many independent carriers of all types, and carriers are added and removed from those networks constantly. That the carrier has current federal interstate operating authority and meets applicable federal insurance requirements, its service record, and price are the primary factors brokers consider in selecting and discarding carriers. Brokers generally do not own or control the trucks, vessels, trains, and aircraft that move their customers' goods. They do not maintain the vehicles or hire the drivers, and usually have no contractual or legal right to control or dictate the carriers' operational, business or hiring practices.

The industry is highly competitive. Freight brokers make money by contracting for carriage with independent carriers for less than the shipper is willing to pay for the movement, so profit margins are generally relatively thin and inelastic. Brokers benefit shippers by finding the fastest and most cost-effective way to transport their goods reliably. They benefit carriers

by ensuring that their vehicles are as full as possible on every movement. Certainty and as much standardization as possible in a broker's workflow and business practices are necessary to perform its services competitively.

III. Common Law Standards Applied in Negligent Carrier Selection Cases Effectively Dictate Specific Broker Carrier Selection Practices

In this case, despite the fact that the carrier was qualified and authorized by the Federal Motor Carrier Safety Administration ("FMCSA") to operate on the nation's highways, the Respondent contended that the broker Petitioner's inquiries should have been sufficient to alert the broker to "red flags" about the carrier suggesting its incompetence, including that it had:

> a history of safety violations; over 40% of [its] trucks have been deemed illegal to be on the road when stopped for random inspections; [it has] been cited numerous times for hours of service violations and false log books; and their percentage of out of service violations is twice that of the national average.

Appendix A to C.H. Robinson Petition for a Writ of Certiorari ("Pet. App.") at 4a.

Similarly, plaintiffs in other negligent selection cases applying state law have urged courts and juries to find brokers liable based on so-called "red flags" and brokers' failure to take a variety of specific steps and to rely on specific information that brokers, left to the discipline of the free market, would not necessarily rely upon in the carrier selection process. The following cases are illustrative.

In *L.B. Foster Co. v. Hurnblad*, 418 F.2d 727, 730 (9th Cir. 1969), the Ninth Circuit court of appeals affirmed the district court's holding that the broker should have investigated the carrier's competence and discovered that carrier was in existence for only a short time, had only a telephone number and post office box, was not well known in trucking circles, did not have an ICC certificate to operate interstate, and had engaged in illegal rate cutting on prior occasions.

In *Schramm v. Foster*, 341 F. Supp. 2d 536, 552 (D. Md. 2004), the court held that, because the carrier had no FMCSA safety rating, the broker had a heightened duty of inquiry, requiring it to check FMCSA "SafeStat" safety statistics and maintain internal records sufficient to assure that carriers were not "manipulating" their safety scores.

In *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008), the court concluded that the jury must decide a negligent selection claim where: the broker provided "third party logistics" services which involved it more directly in the transportation process; the carrier had a "conditional" but not "unsatisfactory" FMCSA safety rating and "marginal" SafeStat scores.

Likewise, in *Riley v. A.K. Logistics, Inc.*, No. 1:15-cv-00069-JAR, 2017 WL 2501138 (E.D. Mo. June 9, 2017), the court held that the jury must decide a negligent selection claim against the broker where the parties disputed the reliability of FMCSA safety scores as predictive of carrier competence, and whether broker should have inquired into reasons for carrier's declining scores.

Similarly, in *Mann v. C.H. Robinson Worldwide, Inc.*, No. 7:16-cv-00102, 00104 & 00140, 2017 WL

3191516 (W.D. Va. July 27, 2017), the court held that a negligent selection claim was a jury question where: broker had received past complaints about carrier; carrier borrowed against freight charges owed it on loads it carried for the broker; carrier provided incorrect names to broker, broker selected a carrier with no FMCSA safety rating, and failed to check FMCSA safety scores, even though the agency warned that users "should not draw conclusions about carrier's overall safety condition based on the data displayed on this system."

In contrast, in *McLaine v. McLeod*, 661 S.E.2d 695, 701 (Ga. Ct. App. 2008), the court concluded that the broker was not liable on a negligent hiring claim, because the carrier was an independent contractor who warranted that its drivers were competent and properly licensed, and the broker had used the carrier without incident for over a year. In *Smith v. Spring Hill Integrated Logistics Mgmt., Inc.*, No. 1:04 CV 13, 2005 WL 2469689 (N.D. Ohio Oct. 6, 2005), the court dismissed a negligent selection claim against a broker, noting that the carrier was duly licensed, certified, and had a satisfactory FMCSA safety fitness determination.

IV. State Court Decisions Dictate That Brokers Rely on FMCSA Data that Congress and the Industry Consider Unreliable

In the *Schramm, Riley, Mann and Jones* cases, the courts were not dissuaded by the inherent unreliability and unsuitability of SafeStat and other FMCSA scores as a broker carrier selection tool. For example, while the *Schramm* court acknowledged that FMCSA made SafeStat data available to the public under an express warning that ***"use of SafeStat for purposes***

other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses," it rejected that as a valid reason for the broker's failure to use the data for purposes other than FMCSA intended. 341 F. Supp. 2d at 552 & n.4 (emphasis added); *see also Jones*, 558 F. Supp. 2d at 646–48 (rejecting broker's argument that SafeStat was subject to FMCSA disclaimer and unsuitable for use in carrier selection).

SMS (the successor to SafeStat) is also unreliable and unsuited for use as a broker carrier selection tool. FMCSA itself currently describes SMS as its "workload prioritization tool" used to "identify carriers with potential safety problems for [agency] interventions."[3] SMS uses information collected during roadside inspections and from reported crashes to calculate "Behavior Analysis and Safety Improvement" (BASIC) scores across seven categories that quantify a carrier's safety performance relative to other carriers. GAO, *Federal Motor Carrier Safety* (Feb. 2014) (GAO-14-114), *supra*, at 6–8 (explaining BASIC scores and methodology). But, just as with the predecessor SafeStat scores, the brokerage industry does not regard SMS BASIC scores as reliable predictors of carrier safety, and TIA discourages use of them for carrier selection purposes.

The General Accountability Office ("GAO") and Congress itself share this view. They have concluded that SMS data is deeply flawed, and that BASIC

---

[3] FMCSA, *Safety Measurement System Methodology: Behavior Analysis and Safety Improvement (BASIC) Prioritization Status*, Version 3.10 (2019), *available at* https://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf.

scores may overstate a carrier's relative safety risk. *Id*. at "What GAO Found" ("FMCSA identified many carriers as high risk that were not later involved in a crash").[4] Indeed, in 2014, due to growing controversy over the utility of BASIC data for purposes (including carrier selection), other than those intended by FMCSA, at the direction of the Senate Appropriations Committee, GAO studied the effectiveness of SMS data in assessing motor carrier safety risk. *See Mann*, 2017 WL 3191516, at *8. GAO concluded that SMS often overstated a carrier's safety risk, and that the agency was confusing the public in making the SMS BASIC score data publicly available for uses other than agency and law enforcement prioritization without disclosing its inherent limitations. In December 2015, President Obama signed into law the Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015). In the FAST Act, Congress expressly directed FMCSA to remove BASIC percentile scores and alerts from the FMCSA website until the agency addressed the deficiencies identified in the 2014 GAO Report. *Id*. §§ 5221, 129 Stat. 1538 & 5223(a), 129 Stat. 1541.

Despite these widely-recognized fundamental flaws, and Congressional action in the FAST Act to prevent their misuse, BASIC scores continue to figure prominently in negligent carrier selection decisions. *See, e.g.*, *Mann*, 2017 WL 3191516, at *7–13; *Riley*, 2017 WL 2501138, at *8 (acknowledging issues regarding reliability of BASIC scores as predictive of carrier competence, but allowing jury to rely on them). The utility of these scores as a broker carrier selection tool

[4] A complete discussion may be found at GAO Report No. GAO-14-114, *supra*, at 24–27.

remains dubious, and TIA's members are well aware of its limitations.

Yet *Mann* and *Riley* (just as *Schramm* and *Jones* did with SafeStat scores) effectively mandate brokers' use of BASIC scores the industry and Congress presently reject as unreliable (for good reason), unless the broker wants to face the risk of a jury verdict in a negligent carrier selection case applying Virginia or Missouri law. These cases serve as examples of how particular carrier selection methods are injected by judicial fiat into common law rules dictating the details of the broker's services, even though they may be contrary to brokers' marketplace practices.

V. Freight Brokers Are Subject to Varying, Inconsistent Common Law Standards in Performing Carrier Selection Services

As the foregoing cases illustrate, absent preemption, freight brokers in performing their core service of selecting carriers for interstate shipments are subject to a variety of common law standards among the states. A typical interstate shipment moves across multiple states, potentially implicating common law selection standards of several states on the same movement. The information a broker selecting a carrier should have collected and examined, and whether it will be liable for injuries caused by the carriers it selects, depend on the common law of the state in which the accident occurred. This makes it nearly impossible for a broker to conduct a standard way of doing business. Market-driven carrier selection standards are thus replaced by the varied commands of state common law rules. *See Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 961 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019) (citing *Dan's City Used Cars*, 569 U.S. at 260) (FAAAA intended to prevent states

"from replacing market forces with their own, varied commands"). Petitioner's survey of recent broker carrier selection decisions from jurisdictions applying the Safety Exception expansively to defeat preemption, and those from others upholding FAAAA preemption, underscore the brokers' dilemma. *See* Petition of C.H. Robinson at 21-22 & n.2 (citing cases).

Such a variable patchwork of common law selection standards, effectively mandating the details of a broker's carrier selection service state-by-state, is precisely the sort of interference with interstate freight brokerage services Congress intended to prevent in adopting the preemptive provisions of the FAAAA. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014). Such disparate state common law standards, including those dictating brokers' use of flawed FMCSA data for purposes other than the agency intended, defeat Congress' purpose, and also interfere with the regulatory approaches of the expert federal agency Congress charged with regulating motor carriers.

VI. The Majority Panel's Expansive Interpretation of the Safety Exception Is Inconsistent with the Plain Meaning of the Statute, Thwarts FAAAA's Preemptive Purposes, and Exacerbates the Current Confused State of the Law Regarding its Scope

The majority panel of the Ninth Circuit broadened the Safety Exception beyond the limited scope compelled by the plain meaning of its language, to reject the district court's appropriately tailored construction of the exception. It openly indulged a presumption against FAAAA preemption disfavored in this Court's recent express preemption jurispru-

dence. While acknowledging that it could be read narrowly, the panel justified its expansive interpretation of the key language of Safety Exception, as follows:

> [W]hile it is possible to construe 'the safety regulatory authority of a State' more narrowly, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)). Because a narrower construction of this clause would place a large body of state law beyond the reach of the exception, we find it appropriate to interpret the clause broadly.

Pet. App. at 17a-18a.

The majority panel's citation to *CTS* invoked openly a presumption against preemption, a canon formerly widely employed in a variety of preemption cases.[5] But since 2016, in an express preemption case such as this, this Court "do[es] not invoke any presumption against preemption, but instead focuses on the plain

---

[5] *See also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (explaining that the presumption against preemption applies "[i]n all preemption cases"); *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (explaining that the Court "begin[s its] analysis" with a presumption against preemption "[w]hen addressing questions of *express or implied* pre-emption") (emphasis added); *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) ("Even if [the defendant] had offered us a plausible alternative reading of [the relevant preemption clause]—indeed, even if its alternative were just as plausible as our reading of the text—we would nevertheless have a duty to accept the reading that disfavors preemption.")

wording of the clause, ***which necessarily contains the best evidence of Congress' pre-emptive intent***." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (emphasis added). As with the central question of Section (c)(1)'s preemptive reach, the best guide to Congress' intent as to the scope of the (c)(2) exception is the statutory language itself. *Dan's City Used Cars*, 569 U.S. at 260. In an express preemption context, a statute's inclusion of a preemption clause provides sufficient evidence of Congress's intent to preempt state law, so it is unnecessary and perverse to resort to a substantive canon that preordains a result denying preemption to discern that intent. *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 548 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).[6]

---

[6] *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 293 (2012) ("[T]he [presumption against preemption] . . . ought not to be applied to the text of an explicit preemption provision . . . . The reason is obvious: The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word—i.e., giving its words their ordinary, fair meaning."); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123-24 (2010) ("Substantive canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute); Antonin Scalia, A Matter Of Interpretation: Federal Courts And The Law 28-29 (1997)("[W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean more or less than what they fairly say? I doubt it.").

The majority panel's resort to a substantive canon disfavoring pre-emption perpetuates a pernicious, obsolete rule in express preemption cases in the Ninth Circuit; itself a good reason to grant the petition. That the FAAAA pre-empts a "large body" of state law is entirely the point; and hardly a reason to apply the exception beyond the plain meaning of the words: "safety regulatory authority of a State with respect to motor vehicles," especially in a manner that frustrates Congress' pre-emptive purpose. As Judge Fernandez held in the dissenting portion of his separate opinion in this case, the relationship of that service to motor vehicle safety is simply too remote and attenuated to justify the majority panel's unabashed thwarting of Congress' intended preemptive purposes. *See* Pet. App. at 25a.

As Judge Fernandez's dissent also recognized (*id.* at 26a), the tow truck cases from the Ninth, Fifth and Second Circuits upon which the majority panel relied in justifying its expansive reading of the exception[7] are simply inapposite to this case: the state exercises of authority at issue in each of those decisions regulated *the operation or operators of tow trucks*, a service with a far closer relationship to motor vehicle safety than the brokers' services at issue here. Unlike a tow truck operator or driver, a broker engaged in carrier selection does not own, operate, or control the

---

[7] *Cal. Tow Truck Ass'n v. City & County of San Francisco*, 807 F.3d 1008, 1026–27 (9th Cir. 2015) (requiring tow truck driver permit applicants to list all arrests for criminal offenses); *Cole v. City of Dallas*, 314 F.3d 730, 732, 734–35 (5th Cir. 2002) (per curiam) (prohibiting those convicted of certain crimes from receiving tow truck driver permits); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 776 (2d Cir. 1999) (tow truck driver criminal history requirements).

operation of any motor vehicles, or hire or control the hiring of their drivers.

Congress explicitly intended, and cautioned, that state exercises of motor vehicle safety regulatory authority under the Safety Exception not amount to disguised *de facto* regulation of interstate freight brokers' services and markets, demarcating the intended limits of the exception.[8] Fairly read in accordance with its intended purpose, as required by this Court's recent express preemption decisions, the Safety Exception simply does not reach the brokers' services at issue here – arranging transportation of property on behalf of shippers.

CONCLUSION AND PRAYER FOR RELIEF

The Court of Appeals panel decision reflects a grave error. To refuse the petition here would countenance effectively some courts continuing to interpret the Safety Exception to FAAAA preemption as expansively as the Ninth Circuit majority panel did, distorting its plain meaning and defeating Congress' express preemptive purposes, while other courts confronting the same issue give effect to the plain meaning of the FAAAA preemption and exception provisions. There is no consensus in the decisions on the relatively narrow question presented. The time is ripe for the Court to act. Allowing this unsettled state to persist would only exacerbate the continuing confusion and uncertainty over the scope of FAAAA preemption that now exposes TIA's members to potential liability that differs from state to state and from court to court, depending on the states through which its loads pass on an interstate movement. For the

[8] H.R. Conf. Rep. No. 103-677, at 85.

reasons stated here, and in C.H. Robinson's petition, TIA respectfully submits that the petition should be granted, and that a writ of certiorari should issue in this case.

Respectfully submitted,

RICHARD D. GLUCK
Counsel of Record
BENJAMIN J. LAMBIOTTE
FOSTER GARVEY PC
1000 Potomac Street, N.W.
Suite 200
Washington, D.C. 20007
(202) 965-7880
richard.gluck@foster.com

Counsel for Amicus Curiae

May 19, 2021