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 OF *AMICI CURIAE* ON BEHALF OF LEADING INDUSTRY FREIGHT BROKERS (ARMSTRONG TRANSPORT GROUP, LLC, CHOPTANK TRANSPORT, INC., COYOTE LOGISTICS, LLC, ECHO GLOBAL LOGISTICS, INC., ENGLAND LOGISTICS, INC., GLOBALTRANZ ENTERPRISES, LLC, MODE GLOBAL, LLC, TOTAL QUALITY LOGISTICS, LLC, TRANSPLACE TEXAS, LP, AND UBER FREIGHT LLC) IN SUPPORT OF PETITION FOR REVERSAL

JASON ORLEANS
Counsel of Record
BRADLEY A. BERTKAU
SPENCER D. GRIFFIN
ORLEANS CANTY NOVY, LLC
65 East Wacker Place, Suite 1220
Chicago, Illinois 60601
(847) 625-8200
jorleans@ocnlaw.com

Counsel for Amici Curiae

304180

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Page

Cited Authorities

Page

INTERESTS OF THE *AMICI CURIAE*

The Amici, Leading Industry Freight Brokers, (Armstrong Transport Group, LLC, Choptank Transport, Inc., Coyote Logistics, LLC, Echo Global Logistics, Inc., England Logistics, Inc., GlobalTranz Enterprises, LLC, MODE Global, LLC, Total Quality Logistics, LLC, Transplace Texas, LP, and Uber Freight LLC), are some of the largest freight brokers in the United States.[1] Freight brokers, by federally defined terms, arrange for the transportation of freight by motor carrier for compensation. 49 U.S.C. § 13102(2). Freight brokers are not motor carriers. Rather, they act as intermediaries between shippers and motor carriers. The appeal of the liability claims against the Petitioner, C.H. Robinson Worldwide, Inc. ("CHR"), in *Miller*, stems from a misapplication of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), and directly affects the freight brokerage services performed by the Amici.[2]

So-called, "broker liability" cases, such as *Miller*, premised in negligent selection and other State common law theories, as a result of tractor-trailer accidents, are

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution to its preparation or submission. The parties were given proper notice and have consented to the filing of this brief.

2. In interpreting the 1994 Federal Act, the Supreme Court follows *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), in which it interpreted similar language in the preemption provision of the Airline Deregulation Act of 1978. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008).

of critical and obvious interest to the Amici. Misdirected claims of liability on the part of the Amici for tractor-trailer accidents profoundly impacts the core business functions of the Amici, the brokering of freight to motor carriers, and, more generally, affect brokers' integral role in the supply chain. Accordingly, the Amici have a paramount interest in the Petition for Writ of Certiorari filed by CHR.

Counsel for CHR provided blanket consent for *amicus* briefs. Counsel of record for the Respondent provided written consent with respect to this individual *amicus* brief.

SUMMARY OF ARGUMENT

The Amici are central to the efficient operation of supply chains as they broker freight transported throughout the United States. Freight brokers are intermediaries which, by definition, arrange for the transportation of property by motor carrier. 49 U.S.C. § 13102(2); 49 C.F.R. 371.2(a). Freight brokers do not own or operate tractor-trailers, inspect tractor-trailers, train drivers, or handle freight. Freight brokers perform a distinct and separate function from the motor carriers by arranging to transport freight.

The plain text of the FAAAA, 49 U.S.C. § 14501, aptly preempts common law tort claims against freight brokers arising from a tractor-trailer accident involving an independently contracted motor carrier. The Ninth Circuit correctly held that the core service of freight brokers - arranging for transportation of property by motor carriers - falls squarely within the plain meaning

of the text of the FAAAA. *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d. 1016, 1024 (9th Cir. 2020). However, the Ninth Circuit erroneously applied the narrow so-called "safety exception" of the Statute where: 1) the section of the FAAAA pertaining to "[f]reight forwarders and brokers" does not contain a "safety exception"; and 2) the "safety exception," as it applies to "motor carriers of property" provides narrow "State regulatory authority" relative only to motor vehicles and motor carriers. 49 U.S.C. § 14501(b)-(c).

As the "safety exception" was erroneously extended, and has been confused for years by many other courts, the *Miller* case must be reviewed. The FAAAA does not offer any textual support allowing for the survival of state common law tort claims against freight brokers arising from a tractor-trailer accident. The FAAAA has a broad preemptive power over State laws, regulations, or other provisions "having the force and effect of law related to a price, route or service," of freight brokers, and this precludes common law tort claims against freight brokers arising from a tractor-trailer accident. The incorrect application of the narrow "safety exception" in section (c) of the Statute, entitled "Motor Carriers of Property," to freight brokers violates the plain text of the FAAAA. Misapplication of the plain text of the Statute warrants consideration by this Court because application of the FAAAA to the services of freight brokers should be dictated by Congress, rather than legislated in the courtroom.

The plain text of the Statute provides no basis in the FAAAA for application of the limited "safety exception" to freight broker services. Its misapplication has resulted in

inconsistent governance over freight brokers, in the form of divergent District Court and State Court decisions, arising from the imaginative legal theories of plaintiffs' counsels. This affects how freight brokers perform their statutorily defined service, leads to inefficiencies in the supply chain, creates barriers to the entry into and growth of the freight brokerage industry, stifles competition, and increases costs to consumers and other end-users. Unsupported negligence claims against freight brokers for tractor-trailer accidents challenge the Federal Motor Carrier Safety Administration's ("FMCSA") regulation of motor carriers, and leads to a diversion of resources toward guarding against spurious liability claims as opposed to investing in logistics operations and innovation.

Freight brokers of all sizes develop and invest heavily in technologies to arrange for the efficient and cost-effective transportation of essential freight by motor carriers throughout the nation. The critical role of freight brokers in the supply chain has been visible during the pandemic. Freight brokers' unique abilities to efficiently match motor carriers with freight, including essential medical supplies, are an indispensable part of vaccine distribution across the country.[3] It has been projected that if the supply chain faltered during the pandemic, hospitals, clinics, and pharmacies would run out of medical supplies "within 36 hours."[4] Freight brokers played a

3. James Jaillet, *COVID Vaccines, Even at -70 Celsius, Will Need to Be Trucked Around the Country – Here's What that Entails*, Com. Carrier J. (November 18, 2020) https://www.ccjdigital.com/business/article/1490111/heres-how-covid-vaccines-might-be-trucked-to-location.

4. Lily Shen, *US Small Trucking Companies Need Federal Support: Transfix*, J. of Com. (June 17, 2020) https://www.joc.com/

crucial role in keeping products on the shelves and moving into secondary markets, such as food banks, during these unprecedented times.[5] Freight brokers are integral to the efficient flow of goods and services.

The question of potential responsibility of freight brokers for personal injury lawsuits arising from a motor vehicle accident, has confused and divided State and Federal Courts over the issue, and also, has disrupted the freight brokerage industry. After years of sewing an uncertain patchwork of inconsistent "broker liability" cases throughout the nation, the issue presented in *Miller* is ripe for decision by the Supreme Court.

ARGUMENT

1. The plain language of the FAAAA does not permit a broker liability tort claim arising from a tractor-trailer accident.

Review of the Ninth Circuit's application of the so-called "safety exception" is necessary to rectify a distortion of the plain text of the FAAAA. The Ninth Circuit was obliged to look at the Statutory text itself in determining and applying its meaning, but failed to properly do so. Courts review statutory language through analysis of the statute's "ordinary meaning" and must

---

trucking-logistics/us-small-trucking-companies-need-federal-support-transfix_20200617.html.

5. Jennifer Smith, *C.H. Robinson's Bob Biesterfeld on Recovery from 'Huge Supply-Chain Dislocation'*, Wall St. J. (July 16, 2020) https://www.wsj.com/articles/c-h-robinsons-bob-biesterfeld-on-recovery-from-dislocation-11594933394.

enforce "plain and unambiguous language according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). The text of the FAAAA demonstrates that a tort claim for bodily injury arising from a tractor-trailer accident against a freight broker is not preserved by a so-called "safety exception."

No such "safety exception" relevant to a freight broker is contained in the Statute. Specifically, there are four distinct sections of the Statute: (a) "Motor carrier of passengers;" (b) "Freight forwarders and brokers;" (c) "Motor carriers of property;" and (d) "Pre-arranged ground transportation." 49 U.S.C. § 14501(a)-(d). Each discrete section contains an express preemption provision. The "safety exception" at issue in *Miller* is found in sections (a) and (c), which both specifically relate to motor vehicles and motor carriers. To begin with, a similar exception is not provided in section (b), distinctly designated for freight forwarders and brokers.

This makes sense because the exception expressly applies to "the safety regulatory authority of a State with respect to **motor vehicles**, the authority of a State to impose highway route controls or limitations based on the size or weight of the **motor vehicle** or the hazardous nature of the cargo, or the authority of a State to regulate **motor carriers** with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." *Id.* at § 140501(c)(2)(A) (emphasis added). If Congress intended to preserve certain regulatory powers of the States over *freight brokers*, it could have. It did not.

Moreover, the section of the Statute relative to motor carriers of property, section (c), is expressly broad, but its exception is narrowly tailored. This section preempts "a law, regulation, other provision having the force and effect of law related to a price, route, or service of any motor carrier…or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." *Id.* at § 140501(c)(1). However, it only carves out from preemption "the regulatory authority of a State with respect to **motor vehicles**…route controls…size or weight…hazardous nature of the cargo…or [to] **regulate motor carriers** with regard to…financial responsibility." *Id.* at § 140501(c)(2)(A) (emphasis added). In other words, the exception only applies to motor carriers and motor vehicles on a limited basis. It does not apply to freight brokers.

Allowing courts to read an exemption into the Statute that does not exist contravenes the express intent of Congress and perpetuates improper tort claims against freight brokers. The *Miller* case presents this Court with a clear opportunity to correct this error and avoid further patchwork governance over brokerage services.

2. A mixture of lower Court decisions, some endorsing "broker liability" and others not, has been sewn together due to the ill-conceived notion of a "safety exception" to the FAAAA.

A misapplication of the plain language of the "safety exception" to the FAAAA has allowed some nebulous negligence claims against freight brokers to proceed,

while others have been properly preempted.[6] Congress intended to eliminate this indiscriminate patchwork of State-specific tort liability. The mistreatment of the plain text of the Statute undermines the purpose of the FAAAA. Decisions relative to broker liability have been improperly tainted by a result-oriented approach as opposed to a plain application of the law.

---

6. The following represents a survey of cases in which the courts held that the FAAAA "safety exception" cannot be applied to permit a negligence claim arising from a tractor-trailer accident against the freight broker. *Gillum v. High Std., LLC*, 2020 U.S. Dist. LEXIS 14820, 12-13, 2020 WL 444371 (W.D. Tex. 2020); *Ying Ye v. Global Sunrise, Inc.*, 2020 U.S. Dist. LEXIS 37142, 8-10, 2020 WL 1042047 (N.D. Ill. 2020); *Loyd v. Salazar*, 416 F. Supp. 3d 1290, 1298-1300 (W.D. Okla. 2019); *Creagan v. Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808, 813-14 (N.D. Ohio 2018); and*Volkova v. C.H. Robinson Co.*, 2018 U.S. Dist. LEXIS 19877, 11-12, 2018 WL 741441 (N.D. Ill. 2018).

In other instances, the "safety exception" has been improperly applied to allow negligence claims against freight brokers. *See Miller v. C. H. Robinson Worldwide, Inc.*, 976 F. 3d 1016, 1025-29 (9th Cir. 2020); *Morrison v. JSK Transp., Ltd.*, 2021 U.S. Dist. LEXIS 43094, 8-10, 2021 WL 857343 (S.D. Ill. 2021); *Popal v. Reliable Cargo Delivery, Inc.*, 2021 U.S. Dist. LEXIS 57212, 11 (W.D. Tex. 2021); *Lopez v. Amazon Logistics, Inc.*, 458 F. Supp. 3d 505, 514-16 (N. D. Tex. 2020); *Uhrhan v. B&B Cargo*, 2020 U.S. Dist. LEXIS 139572, 12-15, 2020 WL 4501104 (E.D. Mo. 2020); *Gilley v. C.H. Robinson Worldwide, Inc.*, 2019 U.S. Dist. LEXIS 52549, 15, 2019 WL 1410902 (S.D. W. Va. 2019); *Huffman v. Evans Transp. Servs.*, 2019 U.S. Dist. LEXIS 149045, 12, 2019 WL 4143896 (S.D. Tex. 2019); *Finley v. Dyer*, 2018 U.S. Dist. LEXIS 182482, 16, 2018 WL 5284616 (N.D. Miss. 2018); *Mann v. C. H. Robinson Worldwide, Inc.*, 2017 U.S. Dist. LEXIS 117503, 23, 2017 WL 319151 (W.D. Va. 2017); *Morales v. Redco Transp., Ltd.*, 2015 U.S. Dist. LEXIS 169801, 7, 2015 WL 9274068 (S.D. Tex. 2015); and *Owens v. Anthony*, 2011 U.S. Dist. LEXIS 139961, 11, 2011 WL 6056409 (M.D. Tenn. 2011).

Plaintiffs' attorneys have fashioned faulty claims sounding in negligent selection of a motor carrier by a freight broker. These claims are largely premised in imposing an imaginative "duty of further inquiry" upon a freight broker to investigate the safety of a motor carrier where there is a so-called "red flag" regarding the motor carrier's safety record. *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004). This is the same amorphous "duty" sought to be imposed on CHR in *Miller* and epitomizes the problem with so-called "broker liability" cases.

Schramm emerged as a landmark decision that opened the door to a patchwork of uncertain common law regarding "broker liability" for tort claims arising from a tractor-trailer accident, even though such liability misaligns with the limited role of freight brokers in arranging for transportation. This allowed an unsustainable dilemma in which any single load of cargo arranged by a freight broker could give rise to legal liability and a potential runaway verdict should an accident occur on the roadway. *See e.g., Hoffman v. Crane*, 2014 IL App (1st) 122793-U (affirming total jury award of $27,672,152.20 against all defendants, including freight broker and shipper); *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E.2d 463 (3rd Dist. 2011) (affirming a jury award of $23,775,000 against the driver, motor carrier, and CHR). However, a court may properly apply the FAAAA to prevent improper liability as many Courts have. *See e.g., Creagan v. Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808 (N.D. Ohio 2018); *Volkova v. C.H. Robinson Co.*, 2018 U.S. Dist. LEXIS 19877, 2018 WL 741441 (N.D. Ill. 2018). The uncertainty of not knowing whether a court will apply preemption or allow "broker liability" provides the critical need for this matter to be heard by this Court.

However, as a threshold matter, the FAAAA preempts tort claims against freight brokers, without exception. Therefore, the present issue is that some Courts, through judicial activism, or misapprehension of the FAAAA, have allowed "broker liability" cases to proceed, while others have not. This has created unrest and uncertainty, necessitating review of the FAAAA and a correct application of the Statute, which precludes common law claims against freight brokers.

Recently, the District Court for the Northern District of Ohio correctly grasped the problem of distorting the FAAAA to allow for "broker liability" and applied the plain language of the FAAAA to stop it in its tracks. The District Court, in a catastrophic tractor-trailer accident case that named the freight broker *and* shipper as defendants observed that the "…negligent hiring claim [against the broker] 'relates to' the 'service' of a broker and must be preempted accordingly" (just as the Ninth Circuit held in *Miller*). *Creagan*, 354 F. Supp. 3d 808, 813 (N.D. Ohio 2018). The District Court further held that:

> [W]hile the FAAAA provides no definition of "services," it defines transportation to include "services related to th[e] movement [of passengers or property], including arranging for" the transportation of passengers or property. 49 U.S.C. § 13102(2)(B). A broker does just that – "arrange for" the transportation of a shipment by a motor carrier. *See* 49 U.S.C. § 13102(2). Regardless of whether the broker's alleged negligence in its choice of motor carrier results in property damage or personal injury, the service remains the same. As such,

> Plaintiffs' allegation that all personal injury suits are exempt from FAAAA preemption is without merit. Further, because the negligent hiring claim seeks to enforce a duty of care related to how Kirsch (the broker) arranged for a motor carrier to transport the shipment (the service), the claim falls squarely within the preemption of the FAAAA.

Id. at 813-15 (preempting and dismissing claims against the freight broker).[7] However, the District Court astutely recognized that the plain language of the FAAAA does not include a "safety exception" applicable to freight brokers. Indeed, the District Court pointed to the absurdity of the notion that a "safety exception" allows negligence claims against freight brokers arising from a tractor-trailer accident, observing that applying the "safety exception" to a tort claim against a freight broker because it concerns the transportation of property would mean that "[a]ll preempted claims would then be 'saved' by the exception." *Id.* at 814.

---

7. Preemption of state law claims arising from transportation services is not unusual, as the FAAAA has been widely held to preempt State common law claims for property damage allegedly caused by motor carriers. *See Tokio Marine America Insurance v. Jan Packaging*, 2020 U.S. Dist. LEXIS 240798, 16-17 (D.N.J. Dec. 18, 2020); *Zamorano v. Zyna, LLC*, 2020 U.S. Dist. LEXIS 82289, 15, 2020 WL 2316061 (W.D. Tex. 2020); and *Luccio v. UPS, Co.*, 2017 U.S. Dist. LEXIS 13069, 5, 2017 WL 412126 (S.D. Fla. 2017). Further, the FAAAA preempts cargo damage claims against freight brokers as well. *See Chatelaine, Inc. v. Twin Modal*, 737 F. Supp. 2d 638 (N.D. Tex. 2010); *Ameriswiss Tech, LLC v. Midway Line of Illinois, Inc.* 888 F. Supp. 2d 197 (D.N.H. 2012); and *Delta Stone Products v. Xpertfreight*, 304 F. Supp. 3d 1119 (Utah 2018).

A plaintiff's recourse for a tort claim lies with the offending driver and motor carrier for causing a tractor-trailer accident. It is the motor carrier that is mandated to register as such with the FMCSA and carry "liability insurance in an amount sufficient to pay...for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property..., or both." *Id.*; 49 U.S.C. § 13906(a)(1). However, "the FAAAA does not impose the same requirement on brokers," which, as the *Creagan* Court emphasized, "affirmatively establish[es] that a motor carrier may be liable for these types of negligence actions, but also the omission of the same language with respect to the broker evinces Congressional intent that brokers not be liable for this conduct." *Id.* The decision in *Creagan* is on all fours with the legislative history of federal regulation concerning freight brokers culminating in the FAAAA. It is crucial that after years of judicial tumult the Supreme Court consider redirecting courts to the plain language and correct application of FAAAA preemption.

3. The origin of regulation of freight brokers and the legislative history of the FAAAA demonstrate that freight brokers are not intended to be subject to personal injury suits arising from tractor-trailer accidents.

Freight brokers were never intended to have financial responsibility and liability for tractor-trailer accidents because freight brokers are intermediaries, with no part in the operation of motor vehicles. The Ninth Circuit, and other courts of similar view, confuse the historical role

of freight brokers and the intent of Congress to preserve only State regulatory authority with respect to motor vehicles and motor carriers by wrongfully attempting to extend the so-called "safety exception" to allow common law causes of action asserted by private parties.

Congress undertook to regulate freight brokers for the first time in 1935.[8] The intent of Congress was to guard against unscrupulous or undercapitalized brokers that risked depriving motor carriers from being paid a fair freight rate, or at all.[9] The aim of subsequent regulation over freight brokers has been limited to ensuring the financial ability to cover freight charge claims by motor carriers. Indeed, the regulations have never imposed any duty on freight brokers to ensure, or insure against, motor carrier safety.[10]

---

8. Motor Carrier Act of 1935, Pub. L. 74-255 (codified as 49 U.S.C. §§ 1-27).

9. H. Rep. No. 74-89, 61-62 (1935). Additionally, the Interstate Commerce Commission ("ICC") was given the authority to license and ensure the financial responsibility of freight brokers. Motor Carrier Act of 1935 § 221(c).

10. For instance, in 1936 the ICC imposed a requirement that brokers post a $5,000 surety bond, later required brokers to tender freight only to licensed motor carriers, and prohibited brokers from collecting rebates. Subsequent deregulation over the transportation industry spawned from the Airline Deregulation Act of 1978 widened the reach of transportation services, expanding access to goods and services across the country. This effort culminated in the Motor Carrier Act of 1980. With respect to freight brokers, during the period of deregulation, changes with respect to the rules governing freight brokers was limited to ensuring that freight brokers had adequate security with reputable financial institutions to respond to claims for unpaid freight charges. The surety requirement was raised to $10,000 and the ICC adopted rules authorizing freight

In the years directly leading up to the FAAAA, the ICC rejected any notion that freight brokers bear responsibility for tractor-trailer accidents. The ICC observed that:

> **Brokers…arrange for transportation of property by authorized motor carriers. The business does not require the operation of vehicles nor the transporting or otherwise handling of cargo under a broker ICC license issued by this Commission. Thus, brokers are not exposed to bodily injury, property damage or cargo loss and damage liability as are motor carriers. Brokers merely act as intermediaries**….Because their exposure is so different, there is no need, nor do we deem it appropriate or workable, to implement a self-insurance program similar to that in place for motor carriers.

See 4 I.C.C. 358; 1988 I.C.C. LEXIS 255, 20-21 (1988) (emphasis added).

Therefore, by the 1990s, the seeds of the FAAAA were planted. Nothing in the legislative climate from which it was born demonstrates any intent to author a statute with a "safety exception" that permits tort claims against freight brokers for tractor-trailer liability accidents. Likewise, absent from the legislative intent of the FAAAA is any notion that there could be an exception from federal preemption for tort claims against freight brokers arising from a motor carrier accident.

---

brokers to establish trust funds as an alternate to surety bonds. *See* 4 I.C.C. 358; 1988 I.C.C. LEXIS 255, 6-7 (1988).

Legislative intent is key to understanding the meaning of Congressional Acts. This is also the case with understanding the purpose and scope of the FAAAA. *Ace Auto Body & Towing, Ltd. v. New York*, 171 F.3d 765, 771 (2d Cir. 1999). The United States House of Representatives "Conference Report" relative to the FAAAA of 1994, "Background and Statement of Purpose," expresses that the purpose of the FAAAA was to combat inequity in the motor carrier transportation industry caused by inconsistent state laws and regulations regarding motor carrier rates and routes that created barriers to entry and which stifled competition and efficiency. H.R. Rep No. 103-677, 86-89 (1994). The House Conferees stated the FAAAA's purpose best, declaring that:

> ...[T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails expansion of markets. According to Department of Transportation estimates, preemption of State economic regulation could eventually yield $3-8 billion per year in savings. Other estimates put the savings as high as $5-12 billion. The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business. In hearings held on this issue, numerous examples have been cited in which rates for shipments within a state exceed rates for

> comparable distances across state lines… **Lifting of these antiquated controls will permit transportation companies to freely compete more efficiently and provide quality service to their customers**. Service options will be dictated by the marketplace; and not by artificial regulatory structure.

Id. (emphasis added). The Conferees observed that forty-one states regulated "in varying degrees, intrastate prices, routes and services of motor carriers" and thus sought to alleviate these burdens on the transportation industry. *Id.*

Further, the Conferees addressed what would become Section 14501(c)(2)(A), the "safety exception" to preemption relative to "motor carriers of property" head-on, observing that areas regulated by the States over matters which are not "prices, rates, or services" are not involved. *Id.* The Conferees specified that State regulation over such matters of "vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters" would remain unchanged. *Id.*

Indeed, Congress Members, Ford, Pressler, Danforth, Hollings Mineta, and Petri, while promoting the benefits of deregulation, were careful to emphasize that the preemption provision would not impact State authority to regulate local matters, such as truck size and weight restrictions, hazardous materials, and State-specific insurance requirements.[11]

---

11. 140 Cong. Rec. 12477-80 (1994) (statements of Congress Members Ford and Pressler); 140 Cong. Rec. 20252-55 (1994)

The plain language of the resultant FAAAA illustrates Congress's good judgment in ensuring that any "safety exception" would be narrowly limited to matters of interest to local regulatory authority with respect to motor vehicles and motor carriers. There is simply no basis in the Statute from which to extrapolate a so-called "safety exception" to permit a tort claim against a freight broker arising from a tractor-trailer accident.

4. Obfuscating, or simply disregarding, the FAAAA blurs the definitions and responsibilities of freight brokers and motor carriers.

Freight brokers are not motor carriers and are not viewed as such by governing law and regulation. Federal law and regulation over motor carriers and freight brokers, as well as additional regulatory guidance, places motor carriers and freight brokers in separate boxes. Each is recognized as having distinct roles, risks, and responsibilities.

The United States Code defines a freight broker as "persons other than motor carriers, who arrange for transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). The Code of Federal Regulations similarly defines a broker as "a person who, for compensation, arranges or offers to arrange for the transportation of property by an authorized carrier." 49 C.F.R. § 371.2(a). Further guidance with respect to the limited role of a freight broker is provided by FMCSA

(statements of Congress Members Mineta and Petri); 140 Cong. Rec. 20207-09 (1994) (statements of Congress Members Pressler, Hollings, and Danforth).

publications, stating that "[a]s a broker, you work with for hire and/or household goods motor carriers, depending on your authority…[and] you are required to arrange transportation using authorized carriers… [and further]… you may not arrange transportation with a motor carrier that does not have the appropriate operating authority granted by FMCSA."[12] Of course, the motor carriers "provide motor vehicle transportation for compensation." 49 U.S.C. § 13102(14).

It is self-evident that freight brokers are not in control of how motor carrier drivers operate tractor-trailers. This is the role of the motor carrier. Freight brokers are not intended to *ensure* motor carrier safety on the roads, nor are they *insurers* against motor carrier liability.

The FMCSA's insurance requirements and liability provisions illustrate the intentional distinction between the responsibilities of motor carriers and freight brokers. The minimum level of financial responsibility for public liability for interstate motor carriers is $750,000 per occurrence. 49 CFR §§ 387.7, 387.9. Conversely, a freight broker is only required to have a surety bond or trust fund in the amount of $75,000. 49 U.S.C § 13906(b)(1)(3). The distinction of a limited surety bond or trust fund, as opposed to a substantial third-party liability policy of insurance is meaningful. Additional regulations echo this distinction. *See e.g.*, 49 U.S.C. §§ 13901-13906.

---

12. *See* Fed. Motor Carrier Safety Admin., *Small Entity Compliance Guide for Broker Operations* (Jan. 31, 2012) https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/small-entity-comp-guide-broker operations-508.pdf.

Distinctively, by regulation, motor carriers that lease on tractor-trailers and drivers are "exclusively" responsible for the operation of the tractor-trailer driven pursuant to the lease and must maintain liability insurance. *See* 49 C.F.R. § 376.12(c)(1), (j)(1). Thus, "broker liability" cases are patently inconsistent with the motor carriers' "exclusive" responsibility over the operation of tractor-trailers under motor carriers' federal authority. This reinforces the need to correctly apply the FAAAA without improper exception relative to freight brokers.[13]

Moreover, transportation industry statistics provide a glimpse at the challenge a modern-day freight broker faces in guarding against the chance that any single arrangement of transportation by a motor carrier could result in harm. According to recent FMCSA statistics, there are approximately 542,375 active motor carriers in the United States operating over 4 million power units (tractors) on the roads and more than 3 million persons holding commercial driver licenses.[14] There are approximately 19,443 registered property brokers.[15]

---

13. The mandate the motor carriers are "exclusively" responsible for the operation of tractor-trailers operating under the motor carriers' federal authority is expressly consistent with federal preemption as "exclusive" responsibility means that freight brokers, which are not motor carriers, are not responsible for the operation of motor vehicles.

14. U.S. Dep. of Trans., *2019 Pocket Guide to Large Truck and Bus Statistics* (Jan. 1, 2020) at 12 https://rosap.ntl.bts.gov/view/dot/43602.

15. *Id*. at 10.

Accordingly, the FMCSA appreciates that freight brokers rely upon the regulatory authority of the FMCSA over motor carriers to license, rate for safety, and present a motor carrier as qualified, without taking on an arbitrary risk of liability. The FMCSA instructs that:

> Brokers are unique to the transportation industry. They do not operate trucks or employ drivers. Brokers engaged in interstate commerce are regulated by FMCSA and are subject to several Federal statutes and regulations, in particular 49 C.F.R. § 371. Brokers are required to register with FMCSA, maintain process agents to accept legal service, and establish and maintain appropriate coverage for financial liability. Brokers also have administrative and financial recordkeeping requirements. Brokers are prohibited from misrepresenting themselves as motor carriers or as anything other than providers of brokerage services registered with FMCSA.[16]

Nowhere does the FMCSA describe brokers as having oversight with respect to motor carrier safety.

Freight brokers are supposed to operate without the inappropriate risk of tort liability arising from a tractor-trailer accident in the same way an online third-party airline booking agent arranges for passenger travel between multiple destinations without fear of liability should an airline and plane deemed fit by the Federal

16. *Small Entity Compliance Guide for Broker Operations.*

Aviation Administration suffer a tragic accident. As publicized by the FMCSA itself, its "primary mission" is to "reduce crashes, injuries, and fatalities involving large trucks and busses [and] in carrying out its safety mandate, FMCSA develops and enforces data-driven regulations that balance motor carrier safety with efficiency."[17] The FMCSA oversees motor carrier safety performance through its Motor Carrier Management Information System ("MCMIS"), which includes crash, census, inspection and investigation data "created to monitor and develop safety standards for commercial motor vehicles…operating in interstate commerce."[18] Notwithstanding its regulatory power, the FMCSA has never imposed *any* requirements upon freight brokers to oversee motor carrier safety.

Moreover, in 2012 Congress updated transportation regulations through the Moving Ahead for Progress in the 21st Century Act ("MAP-21"). Nothing in MAP-21 even hinted at so-called "broker liability" for tort claims. Moving Ahead for Progress in the 21st Century Act. Pub. L. 112-141, 126 Stat. 405 (2012). The need for freight brokers to be confident in their role as intermediaries in the supply chain has never been greater where shippers continue to outsource logistics management because of the advanced technology developed by freight brokers.[19]

---

17. *2019 Pocket Guide to Large Truck and Bus Statistics* at 4.

18. *Id*. at 6.

19. *See* David Trainer, *C.H. Robinson Worldwide: An Undervalued Leader in a Growing Industry*, Forbes (February 12, 2020) https://www.forbes.com/sites/greatspeculations/2020/02/12/ch-robinson-worldwide-an-undervalued-leader-in-a-growing-industry/?sh=504as86359c2; Julie Weed, *The App Age Has Come Far. Look at Long-Haul Trucking*, N.Y. Times (August 29, 2019)

Notwithstanding the federal statutory and regulatory lines drawn between the responsibilities and liabilities of freight brokers and motor carriers, State and Federal Courts have assumed discretion to allow plaintiffs' counsels to purport to legislate highway safety from the courtroom. This undermines the FAAAA and must be abated through consideration of the Ninth Circuit's misstep in *Miller*.

5. Congress established rules and regulations for the transportation industry, which should not be rewritten in the courtroom.

Presently, plaintiffs' counsels boldly see themselves, and the courtroom, as legislatures of transportation safety of the transportation industry, notwithstanding the clear role of Congress and the FMCSA. The sky is the limit with respect to possible recovery against third-parties for the negligence of a tractor-trailer driver. This fits nicely into the plaintiffs' narrative that civil litigation is meant not just to prove negligence, proximate cause, and damages in the case at hand, but to promote "community safety," even if it means overreaching for sources of recovery.[20]

---

https://www.nytimes/2019/08/29/automobiles/trucking-apps-shipping.html.

20. Plaintiffs have gone as far as asserting claims for punitive damages under State tort law against freight brokers where there has been a tractor-trailer accident, which manifests a clear intent to improperly regulate motor carriers from the courtroom and promotes a piecemeal system that the FAAAA is intended to prevent. *See Mann*, 2017 WL 319151 (W.D. Va. 2017) 2017 U.S. Dist. LEXIS 117503 (W.D. Va. 2017)

Indeed, Counsels for *Miller* boast of this through marketing their law firm as "The Law Firm for Truck Safety." *See* https://www.truckaccidents.com/. Counsels make no secret that they will:

> [L]eave 'no stone unturned' in order to ensure that the truck driver, truck company, **broker, shipper** and any other liable party are held fully accountable. Winning a truck accident case comes as a result of knowledge, experience and good old-fashioned hard work. Our focus on truck accident cases over the years has helped us gain the knowledge and experience needed to be successful, and we work tirelessly to see that our clients receive the maximum compensation for their loss.

Id.

The problem is that promoting the courtroom as a place to enforce the safety of the transportation industry (including freight brokers and shippers alike) unnecessarily and illogically departs from a courtroom and jury's focus on adjudicating the facts of an individual accident case. It allows for a slippery slope of legal theories which stray far from the facts of the case, not to mention statutory and regulatory provisions.[21] It leaves regulation to non-expert attorneys and jurors, while the

21. For instance, plaintiffs counsels have embraced "Reptile Theory" in personal injury cases arising from tractor-trailer accidents, which plays on the jury's sense of fear of repeat threats to community safety. *See* Tyler J. Derr, *Recognizing and Defeating the Reptile: A Step-By-Step Guide*, 3 Stetson J. Advoc. & L. 29 at *2-3 (2016).

freight brokerage industry is left without clarity with regard to its role in the supply chain. The patchwork of laws is not sustainable, undermines the FAAAA, and must be reviewed.

CONCLUSION

For the reasons stated, Amicus Curiae, Leading Industry Freight Brokers, respectfully submits that this Court grant C.H. Robinson Worldwide, Inc.'s Petition for Writ of Certiorari.

This 19th day of May, 2021

Respectfully Submitted,

Jason Orleans
Counsel of Record
Bradley A. Bertkau
Spencer D. Griffin
Orleans Canty Novy, LLC
65 East Wacker Place, Suite 1220
Chicago Illinois 60601
(847) 625-8200
jorleans@ocnlaw.com

Counsel for Amici Curiae