**No. 20-1425**

IN THE

# Supreme Court of the United States

C.H. ROBINSON WORLDWIDE, INC.,

*Petitioner,*

v.

ALLEN MILLER,

*Respondent.*

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

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAMES H. BURNLEY, IV
RONALD M. JACOBS
*Counsel of Record*
CHRISTOPHER J. CLIMO
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 344-8215
RMJacobs@venable.com
*Counsel for Amici Curiae*

*Additional Counsel on Inside Cover*

Additional Counsel:

PATRICK HEDREN
ERICA KLENICKI
NATIONAL ASSOCIATION OF MANUFACTURERS
733 Tenth Street, N.W., Suite 700
Washington, D.C. 20001
*Counsel for National Association of Manufacturers*

STEPHANIE A. MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, Suite 1200
Washington, D.C. 20005
*Counsel for National Retail Federation*

TARA S. MORRISSEY
STEPHANIE A. MALONEY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 2006
*Counsel for the Chamber of Commerce of the United States of America*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Other Authorities**

## INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Manufactures ("NAM"), the Chamber of Commerce of the United States of America ("Chamber") and the National Retail Federation ("NRF") represent a range of companies that rely on commercial trucks to transport goods across the country. This includes raw products to be manufactured into final products that are then shipped on to retailers and ultimately consumers. The members of these associations often rely on freight brokers to arrange for that transportation. The *amici* are concerned that the Ninth Circuit's decision imposing tort liability on those brokers would increase prices for business and consumers but have little to no benefit to the safety of America's roads. The Ninth Circuit's decision makes the brokerage of inherently interstate shipments subject to a patchwork of state law.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $23 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. NAM is the voice of the manufacturing community and the leading advocate for a policy

---

[1] No party's counsel authored any part of this brief. No one apart from *amici*, their members, and their counsel contributed money intended to fund the brief's preparation or submission. All parties were notified of *amici*'s intent to submit this brief at least 10 days before it was due. Petitioner filed a notice of blanket consent with the Clerk. Respondent has consented in writing to the filing of this brief.

agenda that helps manufacturers compete in the global economy and create jobs across the United States.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 52 million American workers—and contributing $3.9 trillion to the annual GDP.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts.

All three *amici* frequently submit *amicus* briefs in courts across the country to help courts understand issues of importance to their members.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Although not clear from its name, the Federal Aviation Administration Authorization Act ("FAAAA") has important provisions that regulate shipping by commercial trucks as well as the brokerage services necessary to facilitate that shipping. To that end, the FAAAA preempts certain

state laws, as they apply to brokers, but preserves "the safety regulatory authority of the State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). While this Court has affirmed that the FAAAA does not preempt a negligence suit brought against a trucking company, the Ninth Circuit's holding below would dramatically expand the FAAAA's so-called "safety exemption" to allow negligence suits to continue against a broker.

Petitioner has explained why the Ninth Circuit reached the wrong decision and that negligence actions against brokers plainly do not fit within the safety exemption. Petitioner also explains the harm to brokers that will come from this decision and the lack of countervailing benefit to public policy in exchange.

But the harms go beyond just brokers. By increasing liability risk in the form of inconsistent state common law tort claims against brokers, which brokers have almost no ability to manage or guard against, the Ninth Circuit's decision threatens a huge swath of the nation's economy and offers little or no prospect of improved public safety.

Shipping goods by truck is essential to manufacturers, retailers, and consumers. The vast majority of freight in the U.S. is carried by truck on some or all of its journey. Brokers play a key role in that process, by connecting a shipper (the entity that has goods to transport) with a motor carrier that wants to transport those goods. *About the Industry*, Transp. Intermediaries Ass'n, https://www.tianet.org/about-the-industry/ (last visited May 18, 2021). Thus, brokers play a critical role in the economy by finding the most efficient way to transport goods across the country. The Ninth Circuit's decision

affects a very large portion of the economy because so many goods are transported by truck.

Brokers develop and contract with networks of motor carriers ready to transport the goods that the shippers need to move. *Id.* Those motor carriers—the entities that are directly responsible for safety on the roads—are extensively regulated through a matrix of federal and state laws, which ensures the safety of the nation's roadways. Adding in tort liability, in contravention to principles of preemption and regulatory structure, will upset the balance that Congress created to ensure safety and efficiency, while providing no additional benefit to society.

Implicit in the Ninth Circuit's decision finding that brokers are subject to tort liability for negligently selecting a carrier is the idea that the broker must have a way to evaluate the relative safety of carriers. But this is not possible under the current system. Even if Congress had intended for brokers to assess the safety of motor carriers and their drivers—which it did not, opting instead to leave that task to the Department of Transportation ("DOT") and the Federal Motor Carrier Safety Administration ("FMCSA")—there is no simple, reliable way for brokers to determine whether a particular motor carrier presents safety concerns. Asking a broker to determine whether Carrier A or Carrier B is the "safer" carrier is almost impossible. Although FMCSA has tried to create such a database, it is an imperfect law-enforcement tool, and certainly not appropriate for brokers to assess carriers definitively. Thus, imposing negligence liability on brokers would not make the roads safer, particularly because DOT and FMCSA have already provided for direct and specific mechanisms to ensure carriers and drivers operate

safely on the roads (*e.g.*, safety regulations and insurance requirements to protect against injuries caused by motor carriers and drivers).

Saddled with the risk of tort liability for the actions of selected carriers and drivers, brokers are likely to stop using smaller carriers or new entrants that may lack a long history of safety. This will cut back on an already constrained source of trucks, drive up prices, and slow delivery. Those downstream effects are particularly troublesome given modern supply chains' reliance on just-in-time delivery with low inventories. Consumers expect rapid shipping, and many retailers rely on "drop-shipping" to provide goods without inventories.

The Ninth Circuit's decision conflicts with a plain reading of the FAAAA's preemption and state safety provisions, as interpreted by this Court in a significant number of prior decisions. If allowed to stand, it will have serious negative repercussions on the economy and on consumers who rely on goods to be shipped not just to stores, but more and more directly to their homes. As such, the Court should grant the Petition and return the ability of brokers to connect shippers and carriers without facing the threat of tort liability.

## ARGUMENT

The Ninth Circuit's decision below impermissibly expands the plain text of the FAAAA by holding that a "deep pocket" tort theory is in fact a safety regulation. Petitioner has explained how this interpretation of the safety exemption to the FAAAA's preemption provision fails as a matter of law. This error will have far-reaching effects on the

transportation of goods across the country and therefore on the economy as a whole. The decision will harm manufacturers who rely on that transportation for raw materials; retailers who rely on it to fill their warehouses, distribution centers, and stores with goods or to drop-ship directly to their customers; and ultimately, consumers who will pay more for transportation or for the goods themselves.

For all of these costs, there is very little benefit, because safety is best ensured through the extensive federal-state partnership that already exists to regulate directly carriers in transit. Moreover, there is no system in place that would allow brokers to make adequate safety determinations, as evidenced by findings by regulators, legislators, and even the National Academy of Sciences. Without a way to make safety determinations, and a standard against which to make them, the Ninth Circuit has created a system of liability in which trucking companies may understand and manage their risk, but brokers may not.

This case presents a recurring question of great legal, practical, and economic importance that has not been, but should be, resolved by the Court.

## I. Freight brokers are critical to trucking operations and to the economy.

Brokers like C.H. Robinson facilitate transporting goods for both short and long-range transit by truck. Trucks are the dominant mode of freight transportation in the U.S. Trucks transport 72.5 percent of the country's freight when measured by weight. *Economics & Industry Data*, Am. Trucking Ass'n, https://www.trucking.org/economics-and-

industry-data (last visited May 17, 2021). In 2019, that meant that 80.4 percent of the freight costs in the country were spent on truck shipping in some fashion. *Id.* In 2017, trucks transported 11.5 billion tons of cargo worth $12 trillion. *Freight Shipments by Mode*, Bureau of Transp. Stats., https://www.bts.gov/topics/freight-transportation/freight-shipments-mode (last visited May 15, 2021). Truck shipping includes both short-haul deliveries (within a 150-mile radius) and long-haul or over-the-road trucking (usually more than 250 miles). *Short Haul vs. Long Haul Trucking*, Chron, https://work.chron.com/short-haul-vs-long-haul-trucking-22928.html (last updated Jan. 11, 2021).

There are nearly one million carriers in operation in the U.S. *See Economics & Industry Data*, Am. Trucking Ass'n, https://www.trucking.org/economics-and-industry-data (last visited May 17, 2021). Those million carriers range from large fleets, to small businesses, to single-truck owner-operators, and they are involved in all segments of the supply chain. *Id.* They bring raw materials to manufacturers. They move finished goods to warehouses and retailers. They deliver goods to consumers. Even if other modes of transportation are used to move an item—on a train, plane, or ship—a truck will likely be involved on one end or the other. *See* Stan Mack, *The Importance of the Trucking Industry*, Chron, https://smallbusiness.chron.com/importance-trucking-industry-71922.html; Am. Trucking Ass'n, *When Trucks Stop, America Stops* 3–4 (2015), https://www.trucking.org/sites/ default/files/2019-12/When%20Trucks%20Stop%20America%20Stops.pdf.

While many smaller goods are delivered to consumers by dedicated delivery services like FedEx, UPS, DHL, or the Postal Service, larger items are frequently delivered by other trucking companies. *See* John D. Schulz, *Transportation Trends and Best Practices: The Battle for the Last Mile*, Logistics Mgmt. (May 2, 2017), https://www.logisticsmgmt.com/article/transportation_trends_and_best_practices_the_battle_for_the_last_mile. Retailers often use a drop-shipping model, which is dependent on an efficient freight network. In this model, retailers—either online or in person—do not stock inventory. Rather, customers view the product online or as a display model in a store. When they make a purchase, the retailer transmits the order to a third party—usually a wholesaler or manufacturer. The product is then shipped directly to the customer (sometimes immediately after it is manufactured, other times from inventory). *See* Am. Transp. Rsch. Inst., *E-Commerce Impacts on the Trucking Industry* 19–20 (Feb. 2019), https://truckingresearch.org/wp-content/uploads/2019/02/ATRI-Impacts-of-E-Commerce-on-Trucking-02-2019.pdf.

Given the large number of trucking carriers, many shippers choose to engage freight brokers to help them identify carriers that will be able to transport their goods efficiently and at a reasonable price. Freight brokers essentially function as "matchmakers," connecting shippers with willing and able carriers in their networks based upon the carriers' schedules, routes, qualifications, and prices. *About the Industry*, Transp. Intermediaries Ass'n, https://www.tianet.org/about-the-industry/ (last visited May 18, 2021).

Once the freight broker identifies an appropriate carrier willing to carry the load for an agreed rate, the broker typically stays in communication with the carrier regarding shipment logistics from pick-up to delivery. However, brokers are not privy to specific details of the motor carriers' operations (*e.g.*, specific drivers assigned or other related employment information). By leveraging freight brokers' expertise and experience with trucking carriers, manufacturers can reduce their overhead costs associated with identifying and contracting with carriers to transport their products. Those reduced overhead expenses, of course, are passed onto the American consumer in the form of lower prices.

Given the extraordinary role that shipping by truck plays in the U.S. economy, and the essential role that brokers perform in making the system work, any question about their potential tort liability will have an oversized effect on manufacturers, retailers, and consumers.

## II. Extensive federal and state regulation of carriers, not tort liability of brokers, is the appropriate and only feasible way to protect the nation's roadways.

While brokers are an essential part of the truck shipping industry, they do not themselves physically transport goods. They do not employ the drivers, own the trucks, or pay for the fuel. That is done by the carriers and the operators. Fortunately, there are extensive federal and state safety laws, regulations, and inspection and enforcement regimes that protect the safety of the roads. And, crucially, the administrative entities that oversee those regimes are far better equipped—both in terms of available

information and institutional expertise—to regulate the safety of motor carrier operations than are private plaintiffs and juries of lay persons that would try to evaluate how the broker made its decisions to select a particular carrier for a load.

Although brokers have extensive information about prices, routes, and locations of truck resources and loads, their relations with an operator are at an arm's-length. They do not have access to specific information about the comparative safety of the carriers and drivers with which they work. Absent unusual circumstances, brokers have little or no ability to meaningfully improve the overall safety of the roads by selecting one trucking company over another. Imposing tort liability on brokers for their selection of a carrier is therefore unnecessary, unproductive, and ultimately unfair.

### A. Federal and state law work together to protect the nation's roadways.

The FAAAA is often referred to as "deregulating" the trucking industry. While this is true in the sense of economic rate setting by the government, the FAAAA did nothing to diminish the extensive federal safety laws that govern trucks. *See* Pet. at 7. As evidenced by the safety exemption at issue in this case, the FAAAA also preserved state safety regulations. Given the robust safety system in place, there would be little gained by imposing tort liability on brokers when something does go wrong on the roads.

Recognizing both the crucial role of the trucking and freight system in the country's commercial ecosystem and the need to ensure that trucking

carriers operate safely, Congress crafted a system in which the federal government and state governments work in partnership to ensure that unsafe drivers and carriers are identified and removed from the road.

At the federal level, the Federal Motor Carrier Safety Administration ("FMCSA"), a component of the U.S. Department of Transportation, has primary authority to enact regulations governing the operation of motor carriers. *See* 49 C.F.R. § 1.87. The Federal Motor Carrier Safety Regulations ("FMCSR") span over 700 pages in the Code of Federal Regulations. 49 C.F.R. parts 300-399. These rules govern everything from hours of service for drivers, 49 C.F.R. § 395, to requirements for headlights, *id.* § 393.24, to brake performance, *id.* § 393.52, to window construction, *id.* § 393.60.

Because these rules apply to interstate operations, each state adopts the FMCSRs into their state laws for intrastate operations, making a violation of the federal standard also a violation of a state standard, which makes enforcement straightforward. *Id.* §§ 350.105, 350.303; *see also* 49 U.S.C. § 31102; 49 C.F.R. § 350.201. For example, a truck and its driver going from California into Nevada will have a uniform set of standards that apply. Either a federal FMCSA inspector or a state law-enforcement official (or regulatory official, depending on the state) can enforce these rules and ensure the safe operation of trucks.

There is an additional system created by the Commercial Vehicle Safety Alliance—a nonprofit association made up of local, state, territorial and federal commercial motor vehicle safety officials and industry representatives—that ensures uniform enforcement. *About the Alliance*, Com. Vehicle Safety

All., https://www.cvsa.org/about-cvsa/about-the-alliance/ (last visited May 16, 2021). The "Out of Service Criteria" that it promulgates create specific criteria for when a vehicle or driver must be placed out of service because they present an "imminent hazard" to safety. *CVSA's 2021 Out-of-Service Criteria Now in Effect*, Com. Vehicle Safety All., https://www.cvsa.org/news/2021-oosc/ (last visited May 16, 2021). Through the Out of Service Criteria, inspectors in different states will know exactly when a vehicle or driver presents an imminent hazard and make the same determination.

Taking Nevada as the relevant example, the Nevada Highway Patrol—the state agency with regulatory authority over commercial trucking—has incorporated by reference specific safety provisions set out in the FMCSRs, including rules governing:

- Drug and alcohol testing programs (49 C.F.R. parts 40 and 382);
- Commercial drivers' license standards (49 C.F.R. part 383);
- Safety and fitness determinations and procedures (49 C.F.R. part 385);
- Minimum insurance coverage (49 C.F.R. part 387);
- Equipment safety (including standards related to brakes, lights, windows, fuel systems, and tires) (49 C.F.R. part 393);
- Driving safety (including standards related to speed, use of alcohol, railroad crossings, and use of handheld devices and texting) (49 C.F.R. part 392);

- Hours-of-service limitations (49 C.F.R. part 395);
- Vehicle inspections (49 C.F.R. part 396); and
- Transportation of hazardous materials (49 C.F.R. part 397).

Nevada Admin. Code § 706.2472. While Nevada incorporates the FMCSRs into state regulations, other states accomplish the same thing by using state law. *See, e.g.,* Indiana Code § 8-2.1-24-18(a).

By incorporating these federal standards into state regulations, Nevada law enforcement and regulators can enforce the federal law, conduct inspections for compliance with federal law, and ensure that trucks meet a uniform national standard for safe operation. David Randall Peterman, *Commercial Truck Safety: Overview*, U.S. Congressional Research Service 1 (2017).

In Nevada, the Department of Public Safety works with the Nevada Highway Patrol to enforce state and federal laws to ensure safety. Nevada Highway Patrol, *Commercial Vehicle Safety Plan for the Federal Motor Carrier Safety Administration's Motor Carrier Safety Assistance Program Fiscal Year 2018* 4 (2018), https://nhp.nv.gov/uploadedFiles/nhp2nvgov/Content/Commercial/CVSP2018%20ADA.pdf. As part of the state's commercial vehicle safety plan, the Nevada Highway Patrol conducts roadside inspections to make certain that the drivers and the vehicles comply with state and federal law. *Id.* at 13-17. When conducting those inspections, the inspectors check for compliance with the FMCSRs that have been incorporated into the Nevada regulations.

The Nevada Highway Patrol also enforces safety standards. *Id.* at 20-22. Troopers can pull trucks over for driving violations such as speeding or using a handheld phone, which is illegal under both state law, Nevada Revised Statute § 484B.165, and under the FMCSRs incorporated into Nevada law. 49 C.F.R. § 392.82; *see* Pet. at 7.

These types of state-enforced statutes and regulations are exactly the "safety regulatory authority of a State with respect to motor vehicles" contemplated by the savings clause of the FAAAA. 49 U.S.C. § 14501(c)(2)(A). And they create a framework for safety on the nation's roads, directed primarily at the operation of the vehicles, which makes tort-law claims against brokers unnecessary.

### B. Even if brokers were held to a negligence standard, there are no tools available to them to screen carriers.

While the extensive federal and state regulatory and enforcement system protects the roadways, governmental attempts at creating a database of trucker safety has not been nearly as successful. Thus, there is no way for brokers to evaluate effectively the comparative safety of different carriers or truckers, meaning it would be virtually impossible to impose a standard of care on brokers.

FMCSA utilizes a safety compliance and enforcement program called "Compliance, Safety, Accountability" (CSA). But, it is a law-enforcement tool that helps to determine when a carrier should be placed out of service or subjected to increased scrutiny, not a tool for comparing the safety of different operators. Moreover, there are serious

questions about the accuracy of the data in that system. The Government Accountability Office, third parties, and Congress have all voiced concern. As such, it cannot be used to establish the duty of care in negligence actions against brokers.

### 1. The CSA system is designed for law enforcement, not brokers and shippers.

FMCSA has worked to develop a system to aid law enforcement to identify problematic carriers. That system includes the CSA program, which has three core components:

1. The Safety Measurement System;

2. Interventions; and

3. The Safety Fitness Determination rating system to determine the safety fitness of motor carriers.

The Safety Measurement System (SMS) uses data from roadside inspections, crash reports, and other investigative data to identify high-risk motor carriers for intervention by FMCSA and State partners. The SMS data is organized into seven Behavior Analysis and Safety Improvement Categories (BASICs). An important drawback to this system is that not every carrier will have a rating; ratings are created after an inspection or an investigation. While inspections are common, not every carrier will experience one, especially newly formed carriers.

SMS uses the performance data associated with each of the seven BASICs and assigns carriers a score between zero and 100, where a higher percentile

indicates a higher risk of safety issues. 49 C.F.R. § 385, Appendix B. Based on that score, FMCSA then prioritizes carriers for intervention.

FMCSA has a variety of intervention tools at its disposal, ranging from warning letters, to roadside inspections, to more off-site and on-site investigations, to notifications of fines and penalties, and ultimately, placing an operator out of service.

Following an on-site examination, FMCSA may issue a carrier one of three ratings—"satisfactory," "conditional" or "unsatisfactory." A carrier is identified as "unsatisfactory" when a determination has been made that the carrier is unfit to continue operating. 49 C.F.R. § 385.11. Without improvements, it can be placed out of service, and the operating authority of the owner or operator revoked. 49 C.F.R. § 385.13. A carrier may also be "unrated," meaning that FMCSA does not have enough data on the carrier to assign a safety rating.

Safety ratings may only be assigned following an onsite comprehensive investigation. Typically, such an investigation is done only in response to a BASIC SMS score that suggests there is a safety concern or following a significant safety event like a fatal truck crash. Many carriers operate without a rating assigned to them, and a satisfactory rating does not mean that the carrier is safer than a carrier without a rating. Indeed, FMCSA and its State partners typically conduct reviews on about 3 percent of registered carriers. U.S. Gov't Accountability Off., GAO-11-858, *Motor Carrier Safety: More Assessment and Transparency Could Enhance Benefits of New Oversight Program* (2011). For some carriers, FMCSA's assigned safety rating may reflect an on-site

inspection from many years prior and may not align with the carrier's current safety record.

Thus, the suggestion that only a carrier with a satisfactory safety rating is an acceptable carrier is simply wrong. Even if a shipper or broker were to try to use the Safety Measurement System data and BASIC percentiles, to determine whether a potential carrier presented a low risk, it still could not reliably base a decision on the information in the federal system.

**2. There are flaws with the data making the system unsuitable for comparison purposes.**

In addition to design issues explained above, there is an additional problem with the Safety Measurement System: there are concerns about the nature, scope, and accuracy of the data in the system. Specifically, the Government Accountability Office (GAO), Department of Transportation Inspector General, the National Academy of Sciences, and Congress have all recognized that FMCSA's data tools have limitations that reduce their use in making predictive comparisons. To be clear, an operator with an "unsatisfactory" rating would not be booked to carry a load; but a shipper or broker could not use other ratings to make relative comparisons between carriers without "unsatisfactory" ratings because the information available to the shipper and broker would not be an accurate or a fair basis for excluding drivers and carriers.

The GAO has explained that "for [the Safety Measurement System] to be effective in identifying carriers more likely to crash, the violations that

FMCSA uses to calculate SMS scores should have a strong predictive relationship with crashes." U.S. Gov't Accountability Off., GAO-14-114, *Federal Motor Carrier Safety: Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers* (2014). Unfortunately, GAO has found that "most regulations used to calculate SMS scores are not violated often enough to strongly associate them with crash risk for individual carriers." *Id.* Moreover, GAO has observed that "[t]he relationship between violation of most regulations FMCSA included in the SMS methodology and crash risk is unclear, potentially limiting the effectiveness of SMS in identifying carriers that are likely to crash." *Id.* at 15.

Two years after making those observations, the GAO found: "We recommended that FMCSA revise the SMS methodology to better account for limitations in drawing comparisons of safety performance information across carriers…FMCSA has not implemented our recommendation." U.S. Gov't Accountability Off., GAO-17-132, *Motor Carriers: Establishing System for Self-Reporting Equipment Problems Appears Feasible, But Safety Benefits Questionable and Costs Unknown* 9 (2016).

In 2019, the Department of Transportation Inspector General repeatedly criticized the Compliance, Safety, Accountability program. In one report, the Inspector General said that "FMCSA's Corrective Action Plan Addresses Carrier Safety Interventions, but Lacks Implementation Details for Improving SMS Transparency and Its Assessment of Carrier Safety Rankings." Office of Inspector Gen., U.S. Dep't of Transp., Report No. ST2019084, *FMCSA's Plan Addresses Recommendations on*

*Prioritizing Safety Interventions But Lacks Implementation Details* (2019).

The National Academy of Sciences has found that although the Safety Measurement System "is structured in a reasonable way, and its method of identifying motor carriers for alert status is defensible[,]…much of what is now done is ad hoc and based on subject-matter expertise that has not been sufficiently empirically validated." Nat'l Acad. of Scis., *Improving Motor Carrier Safety Measurement* 3 (2017). The Academy found that these flaws suggest that FMCSA should adopt "a more statistically principled approach that can include the expert opinion that is implicit in SMS in a natural way." *Id.*

In 2015, Congress made changes to the Compliance, Safety, Accountability requirements as part of the Fixing America's Surface Transportation (FAST) Act. Notably, in addition to mandating that FMCSA make substantive changes to the system, Congress required the FMCSA website to provide users with the following warning:

> Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier has received an UNSATISFACTORY safety rating under part 385 of title 49, Code of Federal Regulations, or has otherwise been ordered to discontinue operations by the Federal Motor Carrier Safety Administration, it is authorized to operate on the Nation's roadways.

The FAST Act, Pub. L. 114-94, 129 Stat. 1312 (2015).

This language recognizes the enormity of FMCSA's task in rating all carriers on the roads. FMCSA focuses on identifying when a carrier is unfit to be on the roads, and therefore, instead of looking to those carriers with a satisfactory label, the FAST Act makes clear that the public should only draw a conclusion when they see that FMCSA has found a carrier unsafe to be on the road.

Indeed, FMCSA withdrew its January 21, 2016 notice of proposed rulemaking which proposed a revised methodology for issuance of a safety fitness determination (SFD) for motor carriers due in large part to significant concerns raised by stakeholders. Withdrawal of Notice of Proposed Rulemaking Regarding Carrier Safety Fitness Determination, 82 Fed. Reg. 14,848 (Mar. 23, 2017). The SFD rulemaking—a core component of FMCSA's CSA program—would have integrated a carrier's SMS data into making a safety rating determination. Therefore, even the agency determined its SMS data is not sufficient to determine the safety performance of a carrier.

In sum, using the Safety Measurement System is not a practical way for brokers to evaluate the safety performance of carriers. Instead, the most effective way to ensure safe roadways is to hold the drivers and carriers responsible for safety, which is what federal and state law are designed to do. Those laws allow truly unsafe carriers to be placed out of service, and thus not available to brokers at all.

## III. Allowing the Ninth Circuit's decision to stand would slow the transport of goods, drive up prices, and harm manufacturers, retailers, and consumers.

This case is important for the Court to consider given the oversized role that trucking plays in the U.S. economy. The Ninth Circuit's decision would impose tort liability on a segment of the freight system that does not have the ability to affect the safety of the nation's roads. Because the Ninth Circuit includes so much territory and all of the west-coast ports, there is a large amount of freight subject to its decision. While the rule in the Ninth Circuit would be tort liability in those states, a patchwork of different standards of care would develop state-by-state, and court-by-court, through judicial decisions. If left to stand, the Ninth Circuit's decision would have spillover effects on the movement of freight throughout the country. The decision will thus cause significant harm to the entire freight transportation system and the economy. Not only brokers, but also manufacturers, carriers, retailers, and consumers, would all suffer under the Ninth Circuit's decision.

***Carriers:*** The trucking industry is diverse and comprised of nearly one million carriers, including Fortune 100 companies, privately held businesses, small businesses and owner-operators that are one-person, one-truck operations. *Economics & Industry Data*, Am. Trucking Ass'n, https://www.trucking.org/economics-and-industry-data (last visited May 17, 2021). In fact, small carriers operating six trucks or fewer account for more than 90 percent of for-hire carriers. *Id.* Many smaller carriers already succumbed to the economic pressures of the early days of the pandemic when much manufacturing shut down. *See*

Karl Plume, *Truckers Hit by Coronavirus Pandemic Face Rocky Road to Recovery*, Reuters (May 14, 2020), https://www.reuters.com/article/us-health-coronavirus-trucking/truckers-hit-by-coronavirus-pandemic-face-rocky-road-to-recovery-idUSKBN22Q1J5. Logically, if brokers must start ranking carriers to determine if one is safer than another, it is likely that they will favor larger companies over small, which will lead to more small business failures, less competition, and higher prices. Moreover, larger carriers with many trucks and drivers will be able to average out their safety rankings (meaning there will still be safety risks in those fleets, but they will be averaged out), while smaller operations will not.

***Manufacturers & Retailers:*** Manufacturers rely on brokers to facilitate truck transportation of raw materials and component parts. Retailers rely on brokers to deliver goods to warehouses, move those goods into stores, and ship goods to consumers. Moreover, with the expansion of drop shipping, retailers sell goods before they are manufactured and have them delivered directly to the consumer as soon as they are made. If brokers have fewer trucking companies to choose from, and if they take the logical step of building in a price premium for potential tort liability, then the price of shipping will be higher. This means manufacturers and retailers will make less money, unless they pass those costs on to consumers.

***Consumers:*** As the costs of brokerage and shipping both go up, prices for raw materials, finished goods, and delivery will all increase. At the end of the day, consumers will likely bear the brunt of these increases in the form of higher costs and longer delivery times.

The Ninth Circuit's decision will unleash these harms on any goods that travel through that circuit. With every West Coast port in the Circuit, that will affect significant amount of the nation's goods. If other circuits follow suit, the effects will spread. Even if other circuits do not immediately follow, it will be hard for brokers to have one set of operating guidelines in one circuit and others around the country. In practice, this will mean that brokers will operate as though there is potential liability nationwide. Thus, this Court should take this case so that it can consider the broad implications the Ninth Circuit's decision will have on the entire country.

* * * * *

Truck freight plays an extraordinarily important role in the U.S. economy. While freight brokers are relatively unknown to the general public, their role in matching cargo with carriers is essential. If the Ninth Circuit's decision stands, it will fundamentally alter how brokers do their jobs. This will affect manufacturers, motor carriers, retailers, and consumers. These effects will be felt even though there already are strong federal-state safety systems in place to protect the public on the roads—systems that will not be strengthened or enhanced by broker liability. The costs of the Ninth Circuit's erroneous ruling will unfairly fall upon manufacturers, retailers, and consumers across the economy because brokers do not have reliable mechanisms to determine the relative safety of different carriers.

## CONCLUSION

The Court should grant the Petition and reverse.

Respectfully submitted,

PATRICK HEDREN
ERICA KLENICKI
NATIONAL ASSOCIATION OF MANUFACTURERS
733 Tenth Street, N.W., Suite 700
Washington, D.C. 20001
*Counsel for National Association of Manufacturers*

STEPHANIE A. MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, Suite 1200
Washington, D.C. 20005
*Counsel for National Retail Federation*

JAMES H. BURNLEY, IV
RONALD M. JACOBS
*Counsel of Record*
CHRISTOPHER J. CLIMO
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 344-8215
RMJacobs@venable.com
*Counsel for Amici Curiae*

TARA S. MORRISSEY
STEPHANIE A. MALONEY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 2006
*Counsel for the Chamber of Commerce of the United States of America*

May 2021