No. 20-1425

In the Supreme Court of the United States

C.H. ROBINSON WORLDWIDE, INC., PETITIONER

v.

ALLEN MILLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

MICHAEL E. SULLIVAN
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503

DANIEL F. POLSENBERG
ABRAHAM G. SMITH
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169

KANNON K. SHANMUGAM
Counsel of Record
AIMEE W. BROWN
MARIA E. ELIOT
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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In response to the Court's invitation, the government recommends denying the petition and awaiting a circuit-level conflict on the preemptive effect of 49 U.S.C. 14501(c) on common-law claims against freight brokers. But the government cannot dispute the substantiality of the legal question (as evidenced by the deep disagreement among district courts) or the importance of the issue to the industry (as evidenced by the many amicus briefs). Nor has the government identified any legitimate obstacles to the Court's review. Rather, the government fixates

on its view of the merits, regurgitating the court of appeals' flawed analysis and embracing a remarkably narrow view of the relevant federal agency's role in regulating motor-carrier safety.

The Court should not adopt either the government's recommendation as to certiorari or its analysis as to the merits. The Court should not await review by other courts of appeals where, as here, there are unusual incentives deterring such appeals. Indeed, in light of the Solicitor General's unwillingness to recommend certiorari in other recent cases involving preemption—even where it acknowledges a circuit conflict, see U.S. Br. at 10, *California Trucking Association, Inc.* v. *Bonta* (No. 21-194)—it is hard to chalk up the government's recommendation to anything other than its newfound hostility toward preemption. See also, *e.g.*, U.S. Br. at 17-22, *Virgin America, Inc.* v. *Bernstein* (No. 21-260); U.S. Br. at 7-16, *Monsanto Co.* v. *Hardeman* (No. 21-241). The government is not being an honest broker here, and its views on the merits can appropriately be taken into account at the merits stage. The Court should grant review and reverse the court of appeals' erroneous decision.

A. The Decision Below Is Erroneous

Under a plain-text analysis, a common-law tort claim against a freight broker, brought by a private party in reliance on judge-made standards of care, is not an exercise of the "safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). In arguing to the contrary (Br. 7-18), the government repeats respondent's flawed arguments without improving on them.

1. The government cannot show that the exception for the exercise of the "safety regulatory authority of a State" includes common-law claims applying judge-made standards of care.

a. The government begins not with the statute's text, but with this Court's description of common-law damages actions as "regulation." See Br. 8-9. As petitioner has explained (Reply Br. 3-4), however, those decisions simply recognize that the common law regulates behavior in some sense. They do not interpret statutory language, much less divine the meaning of the phrase "regulatory authority of a State."

In citing those cases, moreover, the government blows past the recognized difference between "direct state regulation," on the one hand, and the "incidental regulatory effects" of common-law damages actions, on the other. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 185 (1988). Compared to positive enactments, tort law does not mandate a particular course of action, making its "regulatory effect" less clearly defined and allowing the defendant some choice in determining its effect on future conduct. Because of that difference, the Court has recognized, Congress might reasonably choose to preempt one and not the other. See *ibid.*

Congress did just that in Section 14501(c). As the Court explained in evaluating identical language found in the Airline Deregulation Act, the statute preempts common-law rules as "other provision[s] having the force and effect of law." *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 281-282 (2014) (quoting 49 U.S.C. 41713(b)(1)). In narrowing the scope of preemption through the safety exception, however, Congress referred to "safety regulatory authority," not to "provisions" affecting safety. Congress's use of different language should not be disregarded. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The government's contention (Br. 10) that petitioner somehow concedes its position by asserting that respondent's claim is subject to preemption in the first place is thus plainly incorrect.

This Court's decision in City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002), is not to the contrary. The government contends (Br. 12-13) that the Court rejected similar reliance on Russello to limit the safety exception's scope to States and not political subdivisions. There, the Court recognized that the exclusion of political subdivisions from the safety exception "support[ed] an argument of some force" that a narrower reading was appropriate, 536 U.S. at 434, but it rejected that argument based on the "interpretive conundrum" it would introduce: "preserv[ing] States' power to enact safety rules and, at the same time, bar[ring] the ordinary method by which States enforce such rules—through their local instrumentalities," id. at 436. Here, by contrast, it is the government's interpretation that would create a conundrum. As petitioner has pointed out (Reply Br. 5), under a contrary interpretation, the safety exception would completely negate the statute's preemptive effect for freight broker services. The government offers no response.

Far from supporting the government's interpretation, *Ours Garage* confirms that Congress intended the exception to preserve the "traditional state police power over safety." 536 U.S. at 439. The government contends that a State "may exercise" such power through the application of common law. Br. 10-11. But as commonly understood, the State's police power refers to its ability "to enact [laws, statutes, and ordinances] for the public good." *Bond* v. *United States*, 572 U.S. 844, 854 (2014). That power inherently lies with the State's legislature and agencies, not with courts.

b. The government's contextual arguments add nothing to respondent's.

The government cites language from the FAAAA's preamble stating that "certain aspects of the State's *regulatory* process" should be preempted. Br. 9 (quoting FAAAA § 601(a)(2), 108 Stat. 1605 (1994) (emphasis added)). But as petitioner has explained (Reply Br. 5-6), "regulatory process" is not equivalent to "regulatory authority," and a preamble is not equivalent to operative text.

The government disputes the relevance of the other exceptions within Section 14501(c)(2)(A), claiming that those exceptions concern "different types of state authority." Br. 13. But the exceptions all share a critical characteristic: they involve positive enactments by legislatures and agencies, not judge-made common law. The exceptions thus support reading the exception for "safety regulatory authority" similarly. See Reply Br. 4-5.

The government quibbles (Br. 12) with the other statutory provisions petitioner cites to demonstrate that Congress's use of the phrase "regulatory authority" refers to positive-law rules enforced by government officials. Tellingly, however, the government does not cite any statute in which Congress has used the phrase consistent with its interpretation—and petitioner is not aware of any.

c. In a final attempt to cloud the correct interpretation of the statute, the government claims that petitioner's reading would lead to "bizarre results": specifically, that the preemption of tort claims would depend on whether States codify their common law and preemption would extend to tort actions against motor carriers themselves. Br. 14-15. But neither result is the necessary outcome of petitioner's position. The Court could readily conclude that the safety exception is implicated only where the state regulatory authority actually defines the safety principle—*i.e.*, the standard of care—through a positive enactment. Under that interpretation, the codification of

a common-law regime would not make the difference for preemption if judge-made law determines the standard of care. And where a motor carrier violates a codified standard of care—for example, one of the many regulations States adopt in coordination with the FMCSA, see Reply Br. 10-11; NAM Br. 11-12—that may provide the basis for a non-preempted state-law negligence claim. Regardless of the correct outcome in those marginal cases, the ordinary common-law tort claim at issue here does not involve a state-enacted standard of care and is thus preempted.

2. Even if the safety exception could be interpreted to cover some common-law claims, the government cannot show that claims such as respondent's operate "with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The government's interpretation of that language is out of step with this Court's precedents and with the FAAAA's structure.

In support of its position, the government focuses on the breadth of "with respect to" while ignoring the import of "motor vehicles." That is contrary to this Court's guidance in *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251 (2013). There, the Court determined when a law operates "with respect to the transportation of property," by looking to the statutory definition of "transportation," which referred to the "movement" of property. *Id.* at 261-262 (citation omitted). The Court therefore concluded that the exception did not cover laws regulating property once movement had ended. See *ibid.* Similarly, a "motor vehicle" is defined as a "vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation." 49 U.S.C. 13102(16). Regulating the broker's selection of a motor carrier does not touch on the vehicle itself or its "use[] on a highway."

Statutory context also supports petitioner's interpretation of Section 14501(c). In the immediately preceding paragraph, Section 14501(b) prevents States from enforcing laws "relating to" the intrastate rates, routes, or services "of any freight forwarder or broker." That provision differs from Section 14501(c) in that it applies only to freight forwarders and brokers; concerns only intrastate laws; and does not include any exception for the "safety regulatory authority of a state with respect to motor vehicles." In other words, where a provision does not apply to motor carriers, Congress saw no need for an exception for laws for safety regulations that operate "with respect to motor vehicles." That strongly suggests that Section 14501(c)'s safety exception concerns the regulation of motor carriers operating such vehicles, and not freight forwarders or brokers. To adopt the government's interpretation would ascribe to Congress a peculiar intent to preempt *intrastate* regulation of freight forwarders and brokers to a greater degree than *interstate* regulation of those groups. Nothing in the statute supports that outcome.

Petitioner's interpretation is also consistent with Congress's different insurance requirements for brokers and motor carriers. Motor carriers must obtain insurance for claims related to "bodily injury" resulting from operation of "motor vehicles." 49 U.S.C. 13906(a)(1). Brokers, on the other hand, must secure themselves only against claims for "failure to pay freight charges under its contracts, agreements, or arrangements for transportation." 49 U.S.C. 13906(b)(2)(A). That is further evidence that Congress did not intend for brokers to face liability for the negligence of motor carriers.

3. The government toys with adopting respondent's argument (rejected by the court of appeals) that a common-law negligent-hiring claim is not "related to" a

freight broker's "services" and thus is not subject to the FAAAA's preemption provision at all. See Br. 7-8 n.1. But the government wisely stops short of actually embracing that position. Respondent's claim is clearly "related to" a broker's "service": petitioner's core service is the "selection of motor carriers," Pet. App. 10a, and respondent seeks to hold petitioner liable for how it offered that service, see *id.* at 3a-4a. The government's quasi-position is emblematic of the confusion surrounding the interpretation of the preemption provision, and it underscores the need for this Court's guidance.

In sum, the statutory text and context do not support the government's seemingly narrow interpretation of the preemption provision, or its unduly broad interpretation of the safety exception. The case against the court of appeals' decision is overwhelming, and it warrants the Court's review.

B. The Decision Below Implicates An Important Question Of Federal Law That Warrants This Court's Review

The government cannot seriously contest that the question presented is important. The numerous cases raising the question in courts throughout the country provide concrete proof that the question is recurring, and petitioner's amici explain its significance to multiple industries. The government contends only that the Court should "allow other courts of appeals to consider the question." Br. 18. But given the exceptional importance of the question, the incentives weighing strongly against appeal, and the sheer number of district-court decisions that have already fully aired the relevant arguments on both sides, there is no good reason for delay. The Court should take the opportunity to review the question presented now, rather than taking the chance that a question that has rarely

percolated up from the district courts will come back to the Court later.

1. The government recognizes that district courts across the country are deeply divided on the question presented. See Br. 18, 20 & n.5. It nevertheless claims that review is not warranted because the Ninth Circuit is the first court of appeals to consider the question. But as petitioner has explained (Reply Br. 8-9), that is a feature of the unusual litigation pressures posed in cases raising the question. In the last decade alone, dozens of district courts in almost every circuit have addressed whether the FAAAA preempts negligent-hiring claims. But only this case has ever resulted in a court of appeals decision, never mind a petition before this Court. Meanwhile, district courts have resolved those cases in diametrically opposed ways, generating enormous uncertainty for freight brokers. Compare, *e.g.*, *Scott* v. *Milosevic*, 372 F. Supp. 3d 758, 769-880 (N.D. Iowa 2019), with *Grant* v. *Lowe's Home Center*, Civ. No. 20-2278, 2021 WL 288372, at *3-*4 (D.S.C. Jan. 28, 2021).

If uncorrected, the court of appeals' erroneous decision will continue to exert a powerful gravitational pull on subsequent litigation. That decision has already been cited in *thirteen cases* addressing whether the FAAAA preempts negligent-hiring claims in personal-injury suits.[1] All have been outside the Ninth Circuit, and only

[1] See *Gauthier* v. *Hard to Stop LLC*, Civ. No. 20-93, 2022 WL 344557, at *7, *10 (S.D. Ga. Feb. 4, 2022), appeal pending, No. 22-10774 (11th Cir.); *Taylor* v. *Sethmar Transportation, Inc.*, Civ. No. 19-770, 2021 WL 4751419, at *12 (S.D.W. Va. Oct. 12, 2021); *Crouch* v. *Taylor Logistics Co.*, 563 F. Supp. 3d 868, 876 (S.D. Ill. 2021), appeal pending, No. 22-1260 (7th Cir.); *Gerred* v. *FedEx Ground Packaging System, Inc.*, Civ. No. 21-1026, 2021 WL 4398033, at *2-*3 (N.D. Tex. Sept. 23, 2021); *Montgomery* v. *Caribe Transport II, LLC*, Civ. No.

one has reached a different result from that court.[2] Review is thus necessary to prevent the Ninth Circuit's faulty reasoning from infecting cases across the country, in a context in which settlement pressures and jurisdictional limitations make appeals demonstrably rare.

2. The government's assurance that the decision below will not produce "significant adverse consequences" (Br. 20) is belied by what is happening in courtrooms around the country, and it provides cold comfort to the numerous industry groups supporting review. Decisions denying preemption for claims against brokers also harm carriers, manufacturers, retailers, and consumers (NAM Br. 21-23), while providing no appreciable safety benefit because brokers cannot accurately screen carriers for safety (TIA Br. 14-17; NAM Br. 14-20). Instead, brokers default to using more established and larger carriers, disadvantaging new entrants and small businesses—a particularly perverse result when the country is facing unprecedented supply-chain challenges. See, *e.g.*, Madeleine Ngo & Ana Swanson, *The Biggest Kink in America's Supply Chain: Not Enough Truckers*, N.Y. Times (Nov. 9, 2021) <tinyurl.com/truckersshortage>.

19-1300, 2021 WL 4129327, at *2-*3 (S.D. Ill. Sept. 9, 2021); *Gilley* v. *C.H. Robinson Worldwide, Inc.*, Civ. No. 18-536, 2021 WL 3824686, at *2 (S.D.W. Va. Aug. 26, 2021); *Bertram* v. *Progressive Southeastern Insurance Co.*, Civ. No. 19-1478, 2021 WL 2955740, at *2-*6 (W.D. La. July 14, 2021); *Reyes* v. *Martinez*, Civ. No. 21-69, 2021 WL 2177252, at *3-*4 (W.D. Tex. May 28, 2021); *Dixon* v. *Stone Truck Line, Inc.*, Civ. No. 19-945, 2021 WL 5493076, at *10-*14 (D.N.M. Nov. 23, 2021); *Popal* v. *Reliable Cargo Delivery*, Civ. No. 20-39, 2021 WL 1100097, at *3-*4 (W.D. Tex. Mar. 10, 2021); *Morrison* v. *JSK Transport, Ltd.*, Civ. No. 20-1053, 2021 WL 857343, at *3-*4 (S.D. Ill. Mar. 8, 2021); *Grant*, 2021 WL 288372, at *3; *Mendoza* v. *BSB Transport, Inc.*, Civ. No. 20-270, 2020 WL 6270743, at *4 (E.D. Mo. Oct. 26, 2020).

[2] See *Gauthier*, 2022 WL 344557, at *10.

Perhaps most troubling of all, the government significantly minimizes its own role in regulating motor-carrier safety, emphasizing that it provides only "minimum" standards that states may exceed. See Br. 20-21 (citation omitted). But the government's modesty is misleading. The federal government is obligated to ensure that "commercial motor vehicles are maintained, equipped, loaded, and operated safely." 49 U.S.C. 31136(a)(1).

Consistent with that charge, FMCSA has repeatedly touted its responsibility for regulating motor carrier safety and "identify[ing] unfit motor carriers" when it makes its safety ratings. See, *e.g.*, 81 Fed. Reg. 3562, 3563 (Jan. 21, 2016). FMCSA gathers data from roadside inspections and crash reports (much of which is not publicly available), identifies carriers with safety problems, and employs various intervention tools to remedy ongoing concerns. See FMCSA, *Compliance, Safety, Accountability* <csa.fmcsa.dot.gov/about> (last visited June 7, 2022). Given FMCSA's superior access to information and its obligation to remove unfit carriers from the road, brokers should be permitted rely on the agency's determinations, rather than using their own (inferior) information in an attempt to comply with whatever standard a jury sees fit to apply. In light of its regulatory responsibilities, the government's contrary position on preemption is simply inexplicable.

Finally, the government asserts (Br. 21-22) that review is unwarranted because the court of appeals did not determine whether state regulation may be impliedly preempted. But the government conspicuously stops short of advocating that implied preemption would be available, and courts are understandably hesitant to recognize implied preemption when they have concluded that an express-preemption provision does not apply. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-288

(1995). And determining the reach of Section 14501(c) would potentially render unnecessary any case-specific inquiry into implied preemption.

* * * * *

The government's brief confirms that this case presents a substantial legal question. Petitioner's amici confirm that this case is of vital importance to numerous industries. And neither the government nor respondent has identified any valid reason to delay resolution of the question presented. The Court should grant certiorari and make clear that the FAAAA preempts claims such as respondent's.

Respectfully submitted.

MICHAEL E. SULLIVAN
ROBISON, SHARP,
SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503

DANIEL F. POLSENBERG
ABRAHAM G. SMITH
LEWIS ROCA ROTHGERBER
CHRISTIE, LLP
3993 Howard Hughes
Parkway, Suite 600
Las Vegas, NV 89169

KANNON K. SHANMUGAM
AIMEE W. BROWN
MARIA E. ELIOT
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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