No. 22-1006

IN THE
Supreme Court of the United States

PRIME INSURANCE COMPANY,
Petitioner,
v.
DARNELL WRIGHT,
Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE TRUCKING INDUSTRY DEFENSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE

On May 17, 2023, the Trucking Industry Defense Association ("TIDA") filed its Brief as *Amicus Curiae* in Support of Petition for a Writ of Certiorari ("*Amicus* Brief") in this matter. On June 28, 2023, a Clerk of this Court, contacted counsel of record for TIDA, advising that the ten (10) day notice requirement of Rule 37.2 was not complied with, and that TIDA would need to resubmit its *Amicus* Brief, with this Motion for Leave.

For the reasons discussed below, it was counsel's good faith belief that they had complied with Rule 37.2, because the 10-day notice deadline was May 7, 2023, which fell on a Sunday; thus, pursuant to Rule 30, the deadline extended to the following Monday, May 8, 2023, on which date counsel provided the Parties notice. Accordingly, it is TIDA's position that it either complied with the Rules, or that it relied in good faith on a reasonable interpretation of the Rules, in providing notice of intent to file the *Amicus* Brief on Monday, May 8, 2023. TIDA therefore respectfully requests that the Court accept this *Amicus* Brief.

In support of this Motion, TIDA states that Petitioner submitted its Petition for Writ of Certiorari (the "Petition") to this Court on April 13, 2023. Upon receipt of the Petition, the Court ordered that Respondent's response was due on May 17, 2023. Pursuant to Rule 37.2, an "*amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." R. 37.2. Rule 37.2 also requires that an "*amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus*

curiae brief." *Id.* Pursuant to Rule 37.2, TIDA's 10-day notice of intent to file its *Amicus* Brief was May 7, 2023, which was a Sunday.

Rule 30 of the Court governs the standard for computation of time and deadlines of this Court's Rules, and provides, in pertinent part, as follows:

Rule 30. Computation and Extension of Time

> 1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, *unless it is a Saturday, Sunday,* federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, *in which event the period shall extend until the end of the next day that is not a Saturday, Sunday,* federal legal holiday, or day on which the Court building is closed.

R. 30 (emphasis added).

It was TIDA's counsel's good faith belief that the Rule 30 computation of deadlines applied to the Rule 37.2 10-day notice requirement, and that because the 10-day notice deadline of May 7, 2023, fell on a Sunday, then the period to provide notice extended to the following Monday, May 8, 2023. Accordingly, as noted in footnote 1 of the *Amicus* Brief, on May 8, 2023, counsel provided the Parties notice of TIDA's intent to file this *Amicus* Brief by email. In response, by email dated May 8, 2023, counsel for Appellant consented; by email dated May 9, 2023, counsel for Respondent withheld consent, stating that they did

not believe that counsel had complied with the Rule 37.2 10-day notice requirement. However, counsel for TIDA disagreed with Respondent's position, based upon their interpretation of Rule 30, and submitted this *Amicus* Brief on May 17, 2023. Counsel for TIDA did not contemporaneously file a motion for leave to submit this *Amicus* Brief on May 17, 2023, based upon the belief that it was being submitted in accordance with the Court's Rules.

As noted above, a Clerk of this Court contacted TIDA counsel on June 28, 2023, advising that the *Amicus* Brief needed to be resubmitted with this Motion for Leave, based upon the purported failure to comply with Rule 37.2's 10-day notice requirement. Counsel conferred with the Clerk about the Sunday deadline, and counsel was advised that it was the Clerk's belief that the notice deadline would then have dated back to the preceding Friday, May 5, 2023, which would have been twelve (12) days before the May 17, 2023, deadline.

TIDA respectfully requests that this Motion for Leave be granted, in the first instance, because notice was timely provided under Rule 37.2. Rule 30 states that, in computing deadlines, the last day of the deadline shall be included, unless that deadline is, in pertinent part, a Sunday, in which case that deadline "shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed." Rule 30 applies equally to "computation of any period of time prescribed or allowed by these Rules," and there is no exception to Rule 37.2, notwithstanding that the computation of time is backward. Thus, it is TIDA's position that, because the 10-day notice deadline under Rule 37.2 fell on a Sunday, Rule 30 applied to extend the

deadline until the next non-excluded day, which was Monday, May 8, 2023. This interpretation and application of the intersection of Rules 30 and 37.2 is fair and reasonable.

TIDA's counsel notified the parties of record on Monday, May 8, 2023, of their intent to file the *Amicus* Brief. Accordingly, based on the intersection of Rules 30 and 37.2, notice was timely provided, and should be considered submitted in compliance with the Court's Rules.

In the alternative, should this Court determine that the Rule 30 extension of the deadline to the following Monday does not apply as discussed above, and that TIDA's notice was untimely, then TIDA respectfully requests that this Motion for Leave be granted because counsel's notice was based upon a reasonable and good faith interpretation and application of Rule 30. Notice was not provided on May 8, 2023, based on any neglect, intent to cause undue delay or prejudice to the Parties, or any perceived unreasonable failure to comply with the Court's Rules. Counsels' calculation of Rule 37.2's 10-day notice deadline considered the application of Rule 30, and therefore operated in good faith on the belief that the deadline extended to Monday, May 8, 2023.

For these reasons, TIDA respectfully requests that the Court accept this *Amicus* Brief as timely submitted and in compliance with the Rules, including the Rule 37.2 notice requirements. In the alternative, should the Court determine that TIDA did not comply with the notice requirements of Rule 37.2, TIDA respectfully requests that the Court find that such error was based upon a reasonable and good faith interpretation

and application of Rule 30, and thus was excusable and harmless, and accept this *Amicus* Brief for consideration.

Respectfully submitted,

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INTERESTS OF *AMICUS CURIAE*[1]

The Trucking Industry Defense Association ("TIDA") is an international organization that includes over 1,900 members comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and legal counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets. The insurance company members provide transportation liability insurance for the trucking industry. One of TIDA's missions is to provide training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, cargo damage and loss, and insurance coverage.

TIDA participates as an *amicus curiae* in cases that raise issues of vital concern to its membership, which is the case here. TIDA's members have a significant interest in this Court clarifying and eliminating a division of authority among various state and federal jurisdictions regarding the reach and scope of the MCS-90 surety in relation to purely intrastate motor carrier travel. As it stands, at least three federal courts of appeals and three state high courts addressed this issue, with each court arriving at different answers, for different reasons. This lack of consistency and clarity on the issue of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute were given notice of the filing of this brief by counsel on May 8, 2023. Counsel for petitioner consented; counsel for respondent did not consent. Emails of consent are on file with counsel of record for *amicus curiae*.

MCS-90 exposure for intrastate transportation disrupts the functioning, risk management, and resolution of claims within the trucking industry. In particular, this issue bears on the ability of motor carriers and their insurers to project under what circumstances the MCS-90 surety will apply, which significantly impacts premium pricing and increases the cost to motor carriers and, by extension, consumers and businesses. These inconsistencies also drive up the costs of claims administration and legal expenses that often must be incurred to determine how or if the MCS-90 should apply.

It is TIDA's position that the Seventh Circuit's creation of a new "standard" for interpreting and applying the MCS-90 surety not only exacerbates the conflict, but also incorrectly interprets and applies federal law, and improperly expands the scope of federal financial responsibility law. The expansion of the MCS-90 surety by the Seventh Circuit here not only deviates from the letter of the law, but it also imposes on the rights of each State, as acknowledged by federal motor carrier regulations, to govern motor carrier transportation within its borders.

In sum, the legal, economic, and practical import of the issue presented here is relevant not only to the motor carrier industry, but also to consumers and the public at large. It is for these reasons that TIDA, as *amicus curiae,* submits this brief.

STATEMENT OF THE CASE

The Federal Motor Carrier Act requires motor carriers to maintain minimum levels of financial responsibility to satisfy liability "for the transportation of property by motor carrier. . .in the United States between a place in a State and. . .a place in another State." The trucking industry, including trucking companies and

insurance carriers, have historically understood this mandate to apply to a motor carrier engaged in interstate travel—not in intrastate travel. The Seventh Circuit decision in *Prime Ins. Co. v. Wright,* 57 F.4th 597 (7th Cir. 2023), upon which this petition is based, deviates from that interpretation, creating further division among federal and state jurisdictions regarding the application of financial responsibility regulations.

SUMMARY OF ARGUMENT

The Court should grant the petition and provide clarity and consistency in the interpretation and application of the federal financial responsibility rules for motor carriers engaged in interstate travel. The current division among the jurisdictions, and the incorrect application of the Seventh Circuit, create confusion, inconsistency, and uncertainty. The Seventh Circuit's expansion of the regulations to include what can only be described as intrastate travel by a motor carrier not only deviates from the plain language of the federal regulations, but it also imposes on the rights of States to regulate motor carriers engaged in intrastate transportation. The need for clarification and certainty in the financial responsibility obligations is necessary to avoid increased risk and cost for the trucking industry, particularly for motor carriers and their insurers.

ARGUMENT

I. The MCS-90 Endorsement is a Financial Surety Governed by Federal Law and Must Be Applied Consistently

The Federal Motor Carrier Act requires certain motor carriers to maintain "minimum levels of financial responsibility sufficient to satisfy liability amounts" of $750,000.00. 49 U.S.C. 31139(b). Compliance with this financial responsibility may be accomplished in

one of three ways: through public liability insurance (Form MCS-90); through a surety bond (Form MCS-82); or through qualification as a self-insured. 49 C.F.R. 387.7(d). The Form MCS-90 that concerns this case is an endorsement to an underlying policy of insurance that requires an insurer to pay for injuries for which the motor carrier may be liable, but the endorsement is only enforced where the underlying insurance does not cover the liability itself. *Canal Ins. v. Coleman,* 625 F.3d 244, 247 (5th Cir. 2010). In this way, the MCS-90 creates a suretyship that is separate and distinct from the underlying insurance coverage, and also imposes a broader payment obligation than the policy itself. *Auto-Owners Ins. Co. v. Monroe,* 614 F.3d 322, 327 (7th Cir. 2010).

While policies of insurance are generally creatures of state law, because the MCS-90 is mandated by federal law, then interpretation and application of the MCS-90 is also governed by federal law. *Carolina Cas. Ins. Co. v. E.C. Trucking,* 396 F.3d 837, 841 (7th Cir. 2005). Indeed, the MCS-90 form explicitly states that its purpose is to "assure compliance" with federal law, and requires that, in return for a premium paid, the insurer agrees to pay for public liability that is subject to federal law.

In order for motor carriers and insurance companies to comply with the mandates of the MCS-90 as a matter of federal law, consistent interpretation and application of the endorsement is imperative to avoid confusion, inconsistent outcomes, and uncertainty in the handling of claims. There are at least three divergent standards governing whether MCS-90 mandates apply in a manner not dictated by the federal statute, and the decision of the Seventh Circuit has created

even further inconsistency in the application of this statute.

II. The Circuit Courts Are Split Three Ways Over Deciding When The MCS-90 Applies

As it stands, the application of the federally mandated MCS-90 to an accident depends on which federal circuit court hears the case. The Fifth Circuit favors the "trip-specific" approach, while the Second and Eighth Circuits favor the "fixed intent" approach. The Seventh Circuit rejected both approaches and created its own. The other federal circuit courts could adopt one of these three approaches or create eight more. The MCS-90 is a creature of federal law, and a decision from this Court will settle the conflict and ensure that the MCS-90 is applied consistently and correctly.

A. The Fifth Circuit Applies The "Trip-Specific" Approach.

In *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 249 (5th Cir. 2010), the Fifth Circuit studied Section 31139(b) and concluded that the MCS-90 "covers vehicle only when they are presently engaged in the transportation of property in interstate commerce." The Fifth Circuit explained that the MCS-90's text "compels" the trip-specific approach:

> [T]he MCS–90 applies to vehicles subject to § 30 of the Motor Carrier Act. Section 30 requires minimum levels of financial responsibility, which must be sufficient to "satisfy liability . . . for the transportation of property in interstate commerce." Thus, the MCS–90 is a way of conforming with statutory minimum-financial-responsibility requirements. And because those requirements exist to "satisfy

> liability . . . for the transportation of property," it follows that the MCS–90 must cover liabilities "for the transportation of property." Nothing in the MCS–90's text indicates that it covers *other* kinds of liabilities, i.e., liabilities incurred outside of the transportation of property.

Id. at 249.

"In sum," the Fifth Circuit stated, "the weight of authority from this Circuit and beyond supports our conclusion that the MCS-90 does not cover vehicles when they are not presently transporting property in interstate commerce." *Id*. at 251.

B. The Second and Eighth Circuits Apply The "Fixed Intent" Approach.

Other federal circuit courts have adopted the "fixed intent" approach for determining whether the MCS-90 applies. Like the "trip-specific" approach, the "fixed intent" approach focuses on the time of the accident but looks more broadly at the "essential character" of the shipment from the shipper's subjective intent. The Eighth Circuit has adopted the "fixed intent" approach to the MCS-90. In *Century Indem. Co. v. Carlson*, 133 F.3d 591, 593 (8th Cir. 1998), a corn farmer in Minnesota paid a trucking company to haul and sell his corn at three terminals in Minnesota along the Minnesota river. Although the accident happened along that intrastate route, the Eight Circuit held that the MCS-90 applied because the farmer "had the 'fixed and persistent intent' to send his grain to an interstate terminal where he knew it would be shipped to points beyond the State of Minnesota." *Id*. at 599.

Similarly, the Second Circuit adopted the "fixed intent" approach in *Lyons v. Lancer Ins. Co*., 681 F.3d

50 (2d Cir. 2012). In *Lyons*, a bus company that operated both intrastate and interstate routes was sued after one of its buses caused an accident. *Id.* at 51. The bus company had assigned the driver to transport a group of transport passengers on an interstate trip, but the driver missed the dispatch for that trip, so he drove his usual route, which was wholly intrastate. *Id*. at 52-55. The accident happened on that intrastate route. *Id*. Those injured in the accident obtained a judgment against the bus company for negligence and then sued the bus company's insurer to recover under the MCS-90B, which is like the MCS-90 but applies to the transportation of passengers rather than property. *Id*. at 53. The Second Circuit, however, held that the MCS-90 did not apply because even though the bus company originally intended for the bus to travel an interstate route, the route that the bus was traveling at the time of the accident was entirely intrastate. *Id*. at 58-60.

C. District Courts In The Ninth And Tenth Circuits Apply A "Public Policy" Approach, Which Two State Courts Of Last Resort Have Rejected.

The Ninth Circuit and Tenth Circuit have not directly addressed when the MCS-90 applies to an accident, but they have supported the "fixed intent" approach for addressing other aspects of federal law related to motor carriers. *See, Klitzke v. Steiner Corp.,* 110 F.3d 1465, 1469 (9th Cir. 1997) (overtime-pay exemption for motor carriers under FLSA); *Foxworthy v. Hiland Dairy Co.,* 997 F.2d 670, 672 (10th Cir. 1993) (same). Inversely, lower courts in these circuits have addressed when the MCS-90 applies to an accident, but they have rejected the "fixed intent" approach in favor of a broad "public policy" approach that requires

the MCS-90 to be applied to every accident caused by an interstate motor carrier, no matter whether the carrier was transporting property for compensation. *See, Canal Ins. Co. v. YMV Transp., Inc.*, 867 F. Supp. 2d 1099, 1108 (W.D. Wash. 2011); *Royal Indem. Co. v. Jacobsen*, 863 F. Supp. 1537, 1542 (D. Utah 1994). The "public policy" approach, however, has not been well received among other courts. Last year the Indiana Supreme Court "agree[d] with the weight of authority that rejects the public-policy approach because it ignores the unambiguous language of the MCS-90 endorsement and section 30 of the Motor Carrier Act." *Progressive Southeastern Ins. Co. v. Brown*, 182 N.E.3d 197, 202 (Ind. 2022). Similarly, the Connecticut Supreme Court rejected the "public policy" approach in favor of "[t]he trip specific approach used by the Second Circuit in *Lyons* [and] by the solid majority of courts that have spoken to this issue[.]" *Martinez v. Empire Fire & Marine Ins. Co.*, 139 A.3d 611, 618 (Conn. 2016) (collecting cases).

D. The Seventh Circuit Creates A Third Approach.

The Seventh Circuit in *Prime Ins. Co. v. Wright,* 57 F.4th 597 (7th Cir. 2023), has now added to the conflict over the MCS-90 by departing from the approaches taken by the Second, Fifth, and Eighth Circuits. The Seventh Circuit has now created a third approach by patching together statutory provisions and conflating motor carriers with brokers.

In rejecting the previously established tests, the Seventh Circuit first found that Section 31139(b)(1) "offers a bit of support" for the "trip-specific" approach adopted by the Fifth Circuit, as the statute includes the phrase "transportation of property." *Prime Ins.,* 57 F.4th at 599. However, the Seventh Circuit rejected

the "trip-specific" approach because Section 31139(b)(1) "does not include the qualifier 'at the time of the accident' or anything similar." *Id.* Acknowledging that the term "transportation" is essential to the statutory application, the Seventh Circuit turned to Section 13102(23)(B) because it defines "transportation" to include not only the movement of property, passengers, or both, but also "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property." *Id.* Based upon only this definition of "transportation," the Seventh Circuit concluded that Darnell Wright was engaged in interstate travel because his activities while traveling with an empty truck from one point in Indiana to another could be "described as movement arranging for the interchange of property." *Id.*

Besides adding to the conflict and confusion over the MCS-90, the Seventh Circuit misinterpreted the MCS-90 and Section 31139(b)(1). The definition of "transportation" in Section 13102(23)(B) does not control when the MCS-90 applies. Section 13102(23)(B) supplies a general definition of "transportation" for Part B, which is titled "Motor Carriers, Water Carriers, Brokers, and Freight Forwarders." *See*, 49 U.S.C. 13102. The Seventh Circuit overlooked the imperative fact that the "arranging for the interchange of property" language included in the broad definition of "transportation" is meant to cover brokers, not motor carriers. Section 13102(2) defines a "broker" as a "person, other than a motor carrier. . .[that] holds itself out. . .as selling, providing, or arranging for, transportation by motor carrier." 49 U.S.C. 13102(2). A "motor carrier," on the other hand, is "a person providing motor vehicle transportation for compensation." 49 U.S.C. 13102(14).

These definitions dispel the Seventh Circuit's assertion that the MCS-90 applies to "movement arranging for the interchange of property." There is no such thing applicable to a motor carrier. Brokers "arrange for" the transportation of property, but they do not transport the property. In asserting otherwise, the Seventh Circuit conflated motor carriers with brokers despite the fact that brokers are not subject to the same financial responsibility rules as motor carriers. This is important to understanding why the expansion of the MCS-90 endorsement by the Seventh Circuit under these circumstances is not only significant, but also incorrect.

III. The Uncertainty of MCS-90 Application for Intrastate Transportation Increases the Costs to Motor Carriers and Consumers

The trucking industry is an integral segment of the United States economy, and trucking is the primary mode of freight transportation within the United States. According to data from the U.S. Bureau of Labor Statistics, as of 2022 there were approximately 1.98 million heavy and tractor-trailer truck drivers[2] in the United States, 1.06 million light truck or delivery services drivers[3], and 490,000 driver/sales workers.[4] According to the U.S. Bureau of Transportation Statistics, the number of trucks on the roadways increased from 10,770,054 in 2010 to 13,479,382

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[2] U.S. BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages, May 2022, 53-3032 Heavy and Tractor-Trailer Truck Drivers*, https://www.bls.gov/oes/current/oes533032.htm.

[3] *Id.*, 53-3033 *Light Truck Drivers*, https://www.bls.gov/oes/current/oes533033.htm.

[4] *Id.*, 53-3031 *Driver/Sales Workers*, https://www.bls.gov/oes/current/oes533031.htm.

in 2020—a 25% increase over that period. U.S. DEPARTMENT OF TRANSPORTATION, *Pocket Guide to Transportation, Table 1-3 (2023 ed.)* https://www.bts.gov/pocketguide (the "*2023 Pocket Guide*"). In 2020—even amidst a global pandemic—trucks were estimated to have hauled over $13.1 billion worth of total freight, constituting 73% percent of the total freight (by value) transported within the United States. *2023 Pocket Guide*, Table 3-1. By 2050, it is projected that trucks will account for $26.0 Trillion of a total $36.3 Trillion in shipments. *Id.* In 2020, for-hire transportation services accounted for an estimated 2.85 percent of U.S. gross domestic product, with truck transportation accounting for 28.25 percent of that amount. U.S. DEPARTMENT OF TRANSPORTATION *National Transportation Statistics 2021, Table 3-1*, p. 181 https://www.bts.dot.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf.

By contrast, AM Best reports that the Property & Casualty insurance sector saw a $4.1 billion net underwriting loss in 2021, with the commercial auto insurance sector consistently experiencing a 104 percent loss ratio for the trucking industry over the past 43 years. Katie Baker, *US P&C industry records $4.1bn net underwriting loss in 2021: AM Best,* REINSURANCE NEWS (March 25, 2022), https://www.reinsurancene.ws/us-pc-industry-records-4-1bn-net-underwriting-loss-in-2021-am-best/; Dean Croke, *Insurance costs continue to rise for truckers,* DAT FREIGHT & ANALYTICS, (July 6, 2022) https://www.dat.com/blog/insurance-costs-continue-to-rise-for-truckers. According to the American Transportation Research Institute, insurance premium costs per mile have increased overall by 47% over the past 10 years. *The Impact of Rising Insurance Costs on the Trucking Industry*, AMERICAN TRANSPORTATION RESEARCH INSTITUTE (Feb. 2022) https://trucking

research.org/wp-content/uploads/2022/06/ATRI-Rising-Insurance-Costs-02-2022.pdf.

While the rising cost of insurance, particularly for the trucking industry, is the byproduct of numerous economic factors, the expansion of federally mandated suretyship under the MCS-90 will only serve to further increase those costs. The trucking and insurance industries have long-operated under the presumption that the MCS-90, as the endorsement and the federal statute are written, applies to interstate travel alone—not intrastate travel. The proliferation of uncertainty and inconsistency of MCS-90 exposure to intrastate travel does nothing more than create increased risk, which results in insurers charging higher premiums to motor carriers. In turn, motor carriers will inevitably pass these costs on to consumers and the public at large in the form of higher prices on consumer goods.

The increased risk imposed by the MCS-90 suretyship for intrastate travel is not insignificant. As of 2010, six of the top ten most valuable national trade corridors were solely intrastate. Adie Tomer and Joseph Kane, *Mapping Freight: The Highly Concentrated Nature of Goods Trade in the United States,* BROOKINGS INSTITUTION, 2014, table 3 items 2-7 (https://www.brookings.edu/wp-content/uploads/2016/06/Srvy_GCIFreightNetworks_Oct24.pdf). These six trade corridors alone represented $221.6 Billion in trade. *Id.*; *see also* U.S. BUREAU OF TRANSPORTATION STATISTICS, *Figure 15 - Interstate and Intrastate Flows as Share of Outbound Shipment Values by State: 2002* https://www.bts.gov/archive/publications/freight_in_america/figure_15. In 2015, an average of 47.1 percent of shipments by value traveled only intrastate, and twenty-three states shipped over 40 percent of goods by value within their own borders. U.S. DEPARTMENT

OF TRANSPORTATION, *Freight Facts and Figures 2017*, https://www.bts.dot.gov/sites/bts.dot.gov/files/docs/FFF_2017.pdf.

IV. The States Have the Right to Adopt Federal Motor Carrier and Financial Responsibility Rules for Intrastate Truckers

In light of the significance of intrastate motor carrier transportation, many States, such as Indiana, have adopted legislation to mirror the Federal Motor Carrier Act to specifically apply to intrastate motor carriers. Under Ind. Code 8-2.1-24-18, the Indiana legislature specifically adopted and incorporated into Indiana law by reference multiple portions of the Federal Motor Carrier Act's federal motor carrier safety regulations, including certain insurance and financial responsibility requirements. That statute specifically requires compliance "by an interstate *and intrastate motor carrier* of persons or property throughout Indiana." IC 8-2.1-24-18(a) (emphasis added). The statute, by its very language, was adopted to apply many of these federal regulations to "apply equally to interstate and intrastate motor carriers." IC 8-2.1-24-18(a)(2); IC 8-2.1-24-18(b) (requiring each and every referenced carrier to "comply with federal regulations incorporated under this subsection, *whether engaged in interstate or intrastate commerce*") (emphasis added). Other States (though not all) have adopted similar legislation, specifically to account for the gap in the federal regulations for intrastate motor carrier transportation, including Colorado (42-4-235 C.R.S., *et seq.*), Illinois (625 ILCS 5), and Virginia (19 VAC 30-20, *et seq.*), to name a few.

The right of the States to govern intrastate motor carrier transportation is specifically contemplated by

the federal motor carrier regulations.[5] 49 C.F.R. 355 was enacted to "promote adoption and enforcement of State laws and regulations pertaining to commercial motor vehicle safety that are compatible with appropriate parts of the Federal Motor Carrier Safety Regulations." 49 C.F.R. 355.1(a) The regulation defines "compatible" to mean:

> . . .that State laws and regulations applicable to interstate commerce and to **intrastate movement of hazardous materials** are identical to the FMCSRs and the HMRs or have the same effect as the FMCSRs; and that **State laws applicable to intrastate commerce are either identical to, or have the same effect as, the FMCSRs** or fall within the established limited variances under §§ 350.341, 350.343, and 350.345 of this subchapter.

49 C.F.R. 355.5 (emphasis added).

Further, the regulations generally prohibit "any State law or regulation pertaining to commercial motor vehicle safety in *interstate* commerce which the Administrator finds to be incompatible with the provisions of the Federal Motor Carrier Safety Regulations." 49 C.F.R. 355.25(a). The rules then create a system for regulatory review of State rules for compliance with the federal regulations, but such review is for the purpose of determining whether they "appl[y] to *interstate commerce*." 49 C.F.R. 355.21(c)(ii) (emphasis added).

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[5] Despite the MCS-90's limitations under the federal law, states "remain free to create their own regulations governing insurance requirements for motor carrier transportation within their state borders." *Martinez*, 139 A. 3d at 620.

It is clear from the above rules that the regulation of intrastate motor carrier transportation was intended to be left to the States (except in limited circumstances, such as for the transport of hazardous materials). The expansion of the financial responsibility rules to intrastate travel would improperly impose on the rights of the States. And although the States may choose to adopt varying regulations for intrastate travel, insurers can more accurately contemplate the existence of such inconsistencies, by State, based on the specific regulations adopted by that State. Just as the regulation of the insurance industry is delegated to the individual States, insurance companies can contemplate such variances based on an understanding of that State's own rules and regulations. As it stands, the current inconsistent and unsupported application of MCS-90 surety in some States, but not others, does not promote such certainty.

CONCLUSION

For the foregoing reasons, *amicus curiae* Trucking Industry Defense Association respectfully requests the Court grant Prime Insurance Company's petition for writ of certiorari to resolve the inconsistent interpretation and application of the MCS-90 and federal financial responsibility regulations.

Respectfully submitted,

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