No. 24-1238

In the Supreme Court of the United States

SHAWN MONTGOMERY,

Petitioner,

v.

CARIBE TRANSPORT II, LLC, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR OURBUS, INC., AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Most regulation and litigation today relating to brokers for motor carriers involves property brokers. Respondent in this case, C.H. Robinson Worldwide, Inc., is a broker for motor carriers of property. However, brokers for motor carriers of passengers also exist. The legal principles to be decided in this case, involving a property broker, will also affect passenger brokers because the same and related statutes are involved.

[1] No counsel for a party authored this brief in any part, and no one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief.

The sale of passenger transportation by motor carrier has traditionally been dominated by the motor carriers themselves, both as to the sale of transportation over their own lines as well as transportation over the lines of connecting carriers. However, in recent years passenger transportation increasingly has been sold by brokers who arrange and sell transportation provided by motor carriers, but without any transportation being provided by those brokers themselves.[2] Amicus curiae OurBus, Inc., is one such passenger broker that arranges and sells transportation by motor carriers. It arranges for, and sells, passenger transportation for its clients, and routinely engages motor carriers of passengers[3] for the transportation of those clients. In doing so, OurBus, Inc., vets numerous motor carriers, examining the sufficiency of their operating authorities, just as property brokers do in arranging for the transportation of property. OurBus, Inc., then offers for sale to its clients, at various fares, the transportation services of these motor carriers along several routes, again just as property brokers do for their clients. Other large brokers for motor carriers of passengers, all competitors of OurBus, Inc., and all of whom will be affected by this case, include FlixBus, Inc.; Wanderu, Inc.; BusBud USA, Inc.; and Coach USA, Inc.

The underlying legal principles are largely the same for all brokers for motor carriers, yet some regulatory

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[2] Brokers for motor carriers of passengers are commonly known as travel agencies.

[3] Motor carriers of passengers are commonly known as bus companies.

agencies and courts overlook brokers for motor carriers of passengers and their distinct characteristics. The overriding interest of OurBus, Inc., is to ensure that brokers for motor carriers of passengers are do not get hidden by the shadow of the more numerous brokers for motor carriers of property. In particular, OurBus, Inc., has an interest in passenger brokers *not* being treated, and held liable like motor carriers, as providers of transportation. Passenger brokers do not own, operate, lease, or control motor vehicles.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Since it first began regulating transportation by motor vehicle in 1935, the Interstate Commerce Commission ("ICC") has regulated not only the motor carriers providing transportation but also their brokers. No person could perform the functions of a broker—including arrangement and sale of transportation—in the absence of a license issued by the Commission to engage in such transactions. Such requirement applied equally to all brokers for motor carriers, both those for property and for passengers. Motor Carrier Act, 1935, Pub. L. No. 74-255, § 211(a), 49 Stat. 543, 554.

During the subsequent era of federal transportation deregulation that began in the late 1970s, regulation of the bus industry was overhauled with the enactment of the Bus Regulatory Reform Act of 1982, most of its provisions taking effect on November 19, 1982. Among its provisions was the exemption of passenger brokers from licensing regulation entirely, but for a relatively minor regulatory provision relating to requirements for

bonds and/or insurance as might be determined to be necessary to protect passengers and carriers dealing with such brokers. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 14, 96 Stat. 1102, 1114 (codified as amended at 49 U.S.C. 13506(a)(14)).

In the years since enactment of the bus deregulation legislation, only brokers for motor carriers of property have continued being regulated, by the ICC's successor with respect to safety, the Federal Motor Carrier Safety Administration ("FMCSA").[4] Part 371 of the FMCSA regulations, entitled "Brokers of Property," define the term "broker" *for purposes of that part of FMCSA's regulations alone* as a person "who, for compensation, arranges, or offers to arrange, the transportation of property * * * ." 49 C.F.R. 371.2. As of November 19, 1982, the ICC had removed its administrative regulations relating to passenger brokers, see 47 Fed. Reg. 53,259, 53,271 (Nov. 24, 1982) (removing 49 C.F.R. pts. 1045B, 1046), and passenger brokers are no longer mentioned anywhere within FMCSA's regulations. As a consequence, some persons and courts erroneously believe that the term "broker" now refers only to property brokers and not passenger brokers. In fact, however, the statutory definition of "broker" continues to include all brokers for motor carriers, without limitation to either property brokers or passenger brokers. See 49 U.S.C. 13102(2). Indeed, FMCSA continues to possess the right to regulate passenger brokers with respect to requirements for bonds and/or insurance, see 49 U.S.C.

[4] The administrator of the FMCSA was delegated such authority by the Secretary of Transportation. 49 C.F.R. 1.87.

13904(f), even though FMCSA to date has chosen not to exercise this authority.

2. States are statutorily preempted from regulating certain specified aspects of motor carrier and broker operations. These statutory provisions preempt state regulation relating to the transportation of passengers, see 49 U.S.C. 14501(a); the brokering of transportation, see 49 U.S.C. 14501(b); and the transportation of property, see 49 U.S.C. 14501(c). Federal preemption is subject to safety savings clauses, through which states may regulate, but those safety savings clauses apply only to motor carriers. Brokers are not subject to state regulation through the safety savings clauses.

ARGUMENT

I. THE FEDERAL PREEMPTION PROVISIONS APPLICABLE TO BROKERS FOR MOTOR CARRIERS, 49 U.S.C. 14501(b)(1) AND (c)(1), ARE NOT AFFECTED BY SAFETY SAVINGS CLAUSES

The federal preemption provisions relating to transportation by motor carrier that are relevant in this case are divided into three main categories.

The first category, 49 U.S.C. 14501(a), applicable to motor carriers of passengers, preempts state regulation of their scheduling of transportation, their implementation of changes in rates for transportation, and their authority to provide charter bus transportation. It contains a safety savings clause because the persons affected by this category—motor carriers of passengers–

operate motor vehicles, and thus there is reason to allow state regulation of safety with respect to those motor vehicles. This safety savings clause provides that states retain their traditional authority to regulate motor carriers with respect to safety, but do not add any additional authority for states to regulate. It provides that federal preemption

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. 14501(a)(2).

The second category, 49 U.S.C. 14501(b), applicable to brokers and freight forwarders, preempts state regulation of their rates, their routes, and their services. It does not contain any safety savings clause because the persons affected by this category—brokers and freight forwarders—do not operate motor vehicles, and thus there is no reason to allow state regulation of safety with respect to motor vehicles.

The third category, 49 U.S.C. 14501(c), applicable to motor carriers of property, [5] property brokers, and

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[5] Also included are motor private carriers, which are, effectively, motor carriers of property that transport their own property instead

freight forwarders, preempts state regulation of their prices, their routes, and their services. It contains a safety savings clause, 49 U.S.C. 14501(c)(2)(A), that is virtually identical to the safety savings clause in the first category,[6] providing that federal preemption

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization * * * .

49 U.S.C. 14501(c)(2)(A). The safety savings clause included within this category can be applied only to motor carriers of property, and cannot be applied to property brokers and freight forwarders, because neither brokers nor freight forwarders operate motor vehicles.

It is not surprising that the second category has no safety savings clause because neither brokers nor freight

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of transporting the property of others for compensation. See 49 U.S.C. 13102(15).

[6] The only substantive difference between the two safety savings clauses, 49 U.S.C. 14501(a)(2) and 49 U.S.C. 14501(c)(2)(A), is that the latter also permits states to impose route controls or limitations based on the hazardous nature of the cargo being transported, something not applicable to motor carriers of passengers.

forwarders actually provide any transportation themselves. Both brokers and freight forwarders arrange and sell transportation, but neither actually provides transportation through the operation of motor vehicles.[7] See 49 U.S.C. 13102(2), (8). If a purported broker or freight forwarder were to actually provide transportation by motor vehicle, then that person would actually be a motor carrier, not a broker or a freight forwarder. See 49 U.S.C. 13102(14).

Property brokers (but not passenger brokers) and freight forwarders are also included within the third category, which does have a safety savings clause. However, that safety savings clause is illusory with respect to property broker and freight forwarders. The safety savings clause exists "with respect to motor vehicles." As already noted, neither brokers nor freight forwarders actually provide transportation through the operation of motor vehicles. Within the third category, only motor carriers—not brokers or freight forwarders—provide transportation using motor vehicles, and thus only motor carriers can be the subject of state regulation through the safety savings clause.

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[7] While the definition of a broker includes a person who "holds itself out by solicitation, advertisement, or otherwise as * * * providing * * * transportation by motor carrier," see 49 U.S.C. 13102(2), a mere holding out as providing transportation is not equivalent to actually providing transportation through the operation of a motor vehicle. Similarly, the definition of a freight forwarder includes a person "holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property." See 49 U.S.C. 13102(8).

Thus, states may not regulate brokers or freight forwarders through a safety savings clause—which applies only to the provision of transportation through the use of motor vehicles—either through the second category or the third category of federal preemption.

II. THE FEDERAL PREEMPTION PROVISION APPLICABLE TO BROKERS FOR MOTOR CARRIERS, 49 U.S.C. 14501(b)(1), APPLIES EQUALLY TO BOTH PROPERTY BROKERS AND TO PASSENGER BROKERS

On its face the plain text of the broker preemption statute applies to all brokers for motor carriers, be they motor carriers of property or motor carriers of passengers. It reads in relevant part as follows.

> [N]o State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

49 U.S.C. 14501(b). This preemption provision applies to any broker without further qualification. To be certain, a "broker" is statutorily defined, within the confines of 49 U.S.C. subtit. IV, pt. B,[8] as follows.

> The term "broker" means a person, other than a motor carrier or an employee or agent of a motor

[8] This part was originally enacted as the Motor Carrier Act, 1935.

> carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

49 U.S.C. 13102(2). That is, the definition of "broker" is inclusive of both property brokers and passenger brokers.

Some persons have erroneously concluded that the term "broker" refers only to property brokers, not passenger brokers, and at least one state court has denied federal preemption with respect to passenger brokers based on this conclusion. A New York appellate court analyzed the preemptive boundaries of 49 U.S.C. 14501(b)(1). It observed that subsection (a) of 49 U.S.C. 14501 is captioned as "Motor carriers of passengers," and that subsection (b) is captioned as "Freight forwarders and brokers." On the basis of the captions alone for these two subsections, the court held: "We find that 'broker' in subsection (b)(1) [of 49 U.S.C. 14501] refers to a broker for a freight forwarder, not a broker for a motor carrier of passengers." *City of New York v. TransportAzumah LLC*, 101 A.D.3d 465, 466 (1st Dep't 2012), *leave denied*, 20 N.Y.3d 1092 (2013), *cert. denied* 571 U.S. 881 (2013). However, a caption "cannot undo or limit that which the [statute's] text makes plain." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (quoting *Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519, 529 (1947)).[9] The New York court erred by failing to

[9] Although a caption might be used to interpret ambiguous statutory text, *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S.

apply the preemptive effect of 49 U.S.C. 14501(b)(1) to all brokers.

Moreover, while the text of 49 U.S.C. 14501(b)(1) refers to federal preemption of "any * * * broker" without limitation, the text of 49 U.S.C. 14501(c)(1) refers to federal preemption of "any * * * broker" but only "with respect to the transportation of property." The inclusion of limiting language in subsection (c), and the absence of limiting language in subsection (b), leads to the presumption that Congress acted intentionally and purposely in excluding any limitation in subsection (b). See *Russello v. United States*, 464 U.S. 16, 23 (1983).

Accordingly, any conclusions of this Court as to the application of the broker preemption provision, 49 U.S.C. 14501(b)(1), should be applicable to all brokers, both of property and of passengers.

CONCLUSION

The Court should affirm.

183, 189 (1991), the text of 49 U.S.C. 14501(b)(1) is not ambiguous on its face.

Respectfully submitted.

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