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 OF PROFESSORS KEITH HYLTON, MICHAEL GREVE, AND RICHARD EPSTEIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach and write on the topics of preemption, tort law, competition law, and other subjects related to this case. Keith N. Hylton is the William Fairfield Warren Distinguished Professor of Boston University, and a Professor of Law at Boston University School of Law. He is a leading scholar in law and economics who has published on the economic effects of preemption provisions.[2] Michael S. Greve is a Professor of Law at Antonin Scalia Law School, George Mason University. He specializes in constitutional law, courts, and business regulation. Richard A. Epstein is the inaugural Laurence A. Tisch Professor of Law at NYU School of Law, where he serves as Director of the Classical Liberal Institute. Amici join this brief solely in their individual capacities, and the views expressed here should not be attributed to their institutions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner advances an interpretation of the Federal Aviation Administration Authorization Act (FAAAA) that would allow state-law broker-negligence claims to proceed despite the broad scope of the statute's preemption provision. As respondents ably explain, that interpretation should be rejected. Amici

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in any part, and that no person or entity other than amici or their counsel made a monetary contribution to fund its preparation and submission.

[2] Professor Hylton acknowledges with appreciation the assistance of Noah Goldstein, a third-year student at Boston University School of Law.

submit this brief to provide an economic perspective to guide this Court's analysis.

An analysis of the costs and benefits of the competing interpretations of the FAAAA point strongly toward concluding that broker-negligence claims are preempted. When Congress enacts an express preemption provision, as it did in the FAAAA, courts should not apply the presumption that Congress did not intend to preempt state law. The application of a presumption is especially unwarranted when courts interpret a statute, like the FAAAA, that promotes distinctly federal interests. Rather than applying the presumption, the Court should examine the foreseeable consequences resulting from the various interpretations. Doing so here, the Court should read Section 14501(c) to preempt negligent hiring claims against brokers for the basic reason that shifting accident costs to brokers by allowing suits to proceed would reduce carriers' safety incentives and pressure brokers to take less effective, costlier precautions. Carriers, not brokers, are best situated to ensure that their motor vehicles operate safely. Imposing that duty on brokers would increase their costs, decrease competition, and reduce consumption despite the FAAAA's purposes to the contrary.

Petitioner's amici argue that if this Court adopts the rationale of the decision below and concludes that the FAAAA preempts broker-negligence claims, that would necessarily lead to the preemption of any number of other state laws. See Preemption Scholars Br. 12. That is incorrect. The test adopted by the decision below is supported by basic economic principles and, when applied reasonably, would not lead to the sweeping preemption of state laws predicted by petitioner's amici.

ARGUMENT

THE FAAAA PREEMPTS BROKER-NEGLIGENCE CLAIMS

When Congress makes the choice to enact an express preemption provision, a court should not apply the presumption that Congress did not intend to preempt state law. Instead, unless foreclosed by statutory text, a court should examine the costs and benefits of the foreseeable consequences resulting from the parties' competing interpretations. See *infra* Part A. Under that framework, Section 14501(c) preempts negligent hiring claims against brokers because shifting accident costs to brokers reduces carriers' safety incentives and pressures brokers to take less effective, costlier precautions. See *infra* Part B. Although petitioner's amici contend that a finding of preemption here would also sweep in a huge swath of state laws, that view is based on a hyper-literalist, economically unreasonable interpretation of the test adopted by the decision below. See *infra* Part C.

A. The Presumption Against Preemption Does Not Apply

1. The Presumption Against Preemption Should Play No Role in Courts' Interpretations of Express Preemption Provisions

The FAAAA broadly and expressly preempts States from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier

* * * or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The statute provides that the express preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). The question before this Court is whether these provisions preempt a state common law claim against a broker for negligently selecting a motor carrier.

To answer that question, the Court should not apply a presumption against preemption. As this Court stated in *Commonwealth of Puerto Rico* v. *Franklin California Tax-free Tr.*, where a statute "contains an express pre-emption clause," a court "do[es] not invoke any presumption against pre-emption but instead focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." 579 U.S. 115, 125 (2016) (citation modified); see also, *e.g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 232 (2011). Consistent with that principle, several courts of appeals have held that "[w]hen a statute contains an express preemption clause, we look only to the text without any presumptive thumb on the scale for or against preemption." *Assurance Wireless USA, L.P.* v. *Reynolds*, 100 F.4th 1024, 1032 (9th Cir. 2024) (citation modified); see, *e.g.*, *Nw. Selecta, Inc.* v. *Gonzalez-Beiro*, 145 F.4th 9, 15 (1st Cir. 2025). But some opinions of this Court decided before *Franklin California*, and other court of appeals decisions, point in the opposite direction. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Miller* v. *C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1021 (9th Cir. 2020) (relying on the presumption against preemption when evaluating the FAAAA's express preemption provision); but see *R.J. Reynolds Tobacco Co.* v. *Cnty. of Los Angeles*, 29 F.4th 542, 553 n.6 (9th Cir. 2022) (noting that the parties in *Miller* did not address this Court's decision in *Franklin California*).

When interpreting the FAAAA's preemption provision, the Court should reaffirm and clarify that the presumption against preemption—whatever force it has in implied preemption cases—plays no role when Congress enacts an *express* preemption provision. The Court appears not to have applied the presumption in express preemption cases until its decision in *Cipollone*. See 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part) (labeling the Court's application of the presumption in this context as "unprecedented"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 153 n.211 (2010) ("Early cases confronting preemption analyzed the issue without discussing any special interpretive rule."). The presumption should not have been applied in *Cipollone*, where doing so ignored the "conclusive evidence of intent to pre-empt in the express words of the statute itself," and "the only remaining question [was] what the *scope* of that pre-emption is meant to be." *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part); see *Bates*, 544 U.S. at 457 (Thomas, J., concurring in the judgment in part and dissenting in part) ("That presumption does not apply * * * when Congress has included within a statute an express preemption provision."); Barrett, *supra*, at 123-124 ("Substantive canons are in significant tension with textualism * * * insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute."). When "Congress has explicitly set forth its desire" in an express preemption provision, there is "no justification for not taking Congress at its word—i.e., giving its words their ordinary, fair meaning" with no thumb on the scale. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 293 (2012).

Declining to apply a presumption against preemption where there is an express preemption provision accords with ordinary principles of statutory interpretation and aligns with this Court's focus on the costs and benefits of competing interpretations of statutes. Time and time again, this Court has recognized the critical importance of examining foreseeable economic effects when choosing among competing interpretations of a statute, to minimize the expected costs of any errors. In *Utility Air Regulatory Group* v. *EPA*, for example, the Court stated that "[t]he fact that EPA's greenhouse-gas-inclusive interpretation" of a statute "would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it." 573 U.S. 302, 323-324 (2014). And in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, the Court explained that it "must weigh a realistic assessment of * * * costs" when deciding whether a complaint alleging breach of an incumbent local telephone company's duty under the Telecommunications Act to share its network with competitors stated a claim under Section 2 of the Sherman Act. 540 U.S. 398, 414 (2004); see also, *e.g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-227 (1993); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927). These cases reflect an "error-cost" approach that examines whether an interpretation of a statute is economically reasonable, taking into account factors such as "injury, compliance, administrative, and risk costs" as well as effects on the "level of consumer welfare." Keith N. Hylton, *An Economic Perspective on Preemption*, 53 B.C. L. Rev. 203, 208 (2012); see also, *e.g.*, Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* xiii-xvi (2003); Keith N. Hylton, *The Economics of Labor Law* 2-6 (2024); Mario J. Rizzo & Frank S. Arnold, *An Economic Framework for Statutory Interpretation*, 50 L. & Contemp. Probs. 165, 168-169 (1987).

This Court's preemption jurisprudence likewise balances the consequences of alternative interpretations of preemption provisions when deciding which interpretation is correct. See Hylton, *An Economic Perspective on Preemption*, *supra*, at 218-223. For example, in *Medtronic, Inc.* v. *Lohr*, the Court found that defective design claims brought against the maker of a medical device were not preempted. 518 U.S. 470 (1996). In doing so, it examined whether Congress would have plausibly enacted a provision "hav[ing] the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation." *Id.* at 487. By contrast, in *Riegel* v. *Medtronic, Inc.*, the Court read the same provision as preempting the plaintiff's common law design defect claim. 552 U.S. 312 (2008). Unlike the medical device at issue in *Lohr*, the device challenged in *Riegel* had been approved through a rigorous premarket approval process established by statute where the agency thoroughly examined the risk-utility tradeoffs associated with a proposed medical device and "determined that the approved form provides a reasonable assurance of safety and effectiveness." *Id.* at 323. As the different results of *Lohr* and *Riegel* show, this Court will examine the costs and benefits of competing determinations when deciding the text and scope of preemption provisions, just as it does with other types of statutes.

When Congress has already provided "conclusive evidence of intent to pre-empt in the express words of the statute itself," *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part), putting a thumb on the scale against preemption would distort the cost-benefit analysis. For example, even if the foreseeable costs of ruling that a state law is preempted are significantly less than the foreseeable benefits when compared to a ruling that a state law is not preempted, a court may reject a preemption determination on the ground that—regardless of those consequences—the statute does not "clear[ly] and manifest[ly]" overcome the presumption. *Cipollone*, 505 U.S. at 516. Such a conclusion would undermine Congress's decision to enact an express preemption provision by tipping the scales of a court's otherwise straightforward, neutral consideration of costs and benefits.

2. Even if the Presumption Against Preemption Applies to Some Express Preemption Provisions, It Should Not Apply to Provisions, Like Section 14501(c), That Promote a Distinctly Federal Interest

Alternatively, even if the Court applies the presumption in some cases involving express preemption provisions, it should make clear that the presumption plays no role when a preemption statute seeks to promote a distinctly federal interest. In *Rice* v. *Santa Fe Elevator Corp.*—which is the first case to expressly adopt the presumption—the Court stated that when Congress legislates in a "field which the States have traditionally occupied," courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. 218, 230 (1947); see Preemption Scholars Br. 27, 28 ("The *Rice* presumption has long been understood as grounded in our Constitution's federal structure," and protects "federalism values"). But where, as here, a statute *also* addresses a plainly national interest, any plausible justification for applying the presumption dissipates.

That is because preemption is a question of congressional intent. Where distinct and identifiable state and federal interests are both at stake, there is no reason to assume that Congress favored States. For example, assume that Congress is choosing among three alternative express preemption provisions. "Clause A would preempt relatively little state law, Clause B would preempt more, and Clause C would preempt the most." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 301 (2000). "Taking account both of state interests and of federal purposes, members of Congress decide to adopt Clause B." *Ibid.* "The fact that members of Congress are supposed to take account of state interests does not give courts any particular reason to read Clause B 'narrowly'; members of Congress took those interests into account when they chose Clause B over Clause C." *Ibid.*; see also Stephen F. Williams, *Preemption: First Principles*, 103 Nw. U. L.

Rev. 323, 327 (2009) (describing interstate collective action problems that could lead to Congress "protect[ing] the interstate market from the sort of balkanization that would flow from standards developed at the state level"); Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 Notre Dame L. Rev. 1681, 1709 n.194 (2008). As this example illustrates, an express preemption provision provides a strong signal that Congress has *already* balanced competing state and federal interests when it chose to enact an express preemption provision in the first place. Imposing a requirement that those federal interests should be ignored or minimized because of a presumption against preemption would disturb Congress's choice. Instead, a court's "task is simply to ascertain the fair meaning" of the express preemption provision. *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 224 (1992).

That conclusion draws support from broader constitutional principles. Although the Constitution protects local interests, it likewise prevents States from encroaching on the federal domain. For example, States have limited ability to burden interstate commerce under the Dormant Commerce Clause. See *South Dakota* v. *Wayfair, Inc.*, 585 U.S. 162, 173 (2018). And the Constitution prohibits States from imposing tariffs on commerce from other States or Nations. U.S. Const. art. I, § 10, cl. 2. Even if state liability rules are not tariffs or taxes, they can have a similar effect: If a state were to adopt a strict liability rule with penalties based on the revenue of the offending enterprise, the liability rule would be indistinguishable from a revenue tax. As these principles guarding federal interests reflect, the Constitution protects interstate commerce from overreach by States. See Michael S. Greve, *Federal Preemption: James Madison, Call Your Office*, 33 Pepp. L. Rev. 1, 86 (2005) ("[O]ne has to tie preemption presumptions to the original constitutional logic."). The point is not that these provisions should be used by the Court to intrude into the tort systems of individual States, but rather that in understanding the context in which express preemption provisions should be interpreted, the Court should do so in a context informed not only by federalism principles but also by the Constitution's other protections against excessive incursions by States that harm interstate commerce. A presumption against preemption informed only by federalism interests gives insufficient respect to the Constitution's promotion of distinctly federal interests.

Because of the critical federal interests at stake, the presumption against preemption should have no bearing on this case even if the Court does not categorically reject the application of the presumption in every case involving express preemption provisions. The purpose of the FAAAA was to extend the model of airline deregulation to the interstate trucking market. See, *e.g.*, *Rowe* v. *N.H. Motor Transport Ass'n*, 552 U.S. 364, 371 (2008) (framing Congress's objectives in enacting the FAAAA as "deregulatory and pre-emption-related"); T.J. England, *The Federal Aviation Administration Authorization Act: The Scope of Federal Preemption of State Motor Carrier Regulation*, 77 J. Transp. L. Logistics & Pol'y 115, 116-118 (2010) (recounting the enactment of the FAAAA and Congress's desire to remove burdensome regulations). The central components of airline deregulation were to remove barriers to entry and increase competition in air travel. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The trucking market was largely deregulated in the same way by the Motor Carrier Act of 1980, see *Rowe*, 552 U.S. at 368, but States continued to regulate trucking at the state level. Congress responded with the FAAAA in 1994 to prevent States from undermining federal deregulation of interstate trucking through a "patchwork of state service-determining laws, rules, and regulations," *id.* at 373, particularly state regulations that would erect "barriers to entry," *Cal. Trucking Ass'n* v. *Su*, 903 F.3d 953, 960-961 (9th Cir. 2018).

The purpose of deregulation in both the airline and trucking industries was thus to expand markets in interstate commerce, promoting consumption and competition. Increased entry of competitors and price competition would have the same effect observed in most markets subject to such forces: an expansion of output and a reduction in price levels on a nationwide basis. Applying a presumption against preemption rooted in federalism—leading to *more* state regulation and *more* state common-law suits as market participants navigate the patchwork of state-law requirements—would be inconsistent with the federal interests of promoting competition, reducing prices, and not burdening interstate commerce. And it would be irreconcilable with this Court's focus on considering the consequences of competing interpretations of preemption provisions by distorting that analysis in favor of a nonpreemption finding regardless of costs and benefits.

B. Economic Theory Supports Interpreting the FAAAA To Preempt Negligent Hiring Claims Against Brokers

Neither the FAAAA's preemption provision, 49 U.S.C. § 14501(c)(1), nor its safety clause, *id.* § 14501(c)(2)(A), expressly permits negligent hiring claims against brokers. As described above, the Court should therefore examine the costs and benefits of the parties' competing interpretations to decide whether Section 14501(c) preempts negligent hiring claims against brokers. That analysis supports a finding of preemption because shifting accident costs to brokers reduces carriers' safety incentives and pressures brokers to take less effective, costlier precautions.

Several hypotheticals illustrate that point. Assume three firms: Carrier, Broker, and Shipper. The value of the item shipped is \$100. The cost of shipping is \$20. The expected liability from traffic accidents in shipping is \$5. If the Carrier bears all accident costs, the true cost of shipping is \$25. The Carrier charges \$25 to the Shipper and the buyer pays \$125 to the Shipper for the item. The Broker simply matches Shipper with Carrier.

Suppose instead that all accident costs are borne by the Broker. Now the cost to the Shipper is \$20. The cost to the Broker is \$5. The total charge to the Shipper is again \$25, which the Shipper recovers by charging the customer \$125. This illustrates the logic of the Coase Theorem, that in the absence of transaction costs or informational disparities, the allocation of liability is immaterial. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 6-8 (1960).

Now suppose there are two types of Carriers in equal numbers: Safe and Dangerous. Safe Carriers experience an expected accident cost of $1. Dangerous Carriers experience an expected accident cost of $9. If Safe and Dangerous Carriers are randomly available to Shippers, the average accident cost remains $5. Where accident liability is assigned to Carriers, the Safe Carriers, in a competitive environment, charge $21 to transport while Dangerous Carriers charge $29. If Brokers can distinguish Safe from Dangerous Carriers, Shippers (often with the help of Brokers) choose only the Safe Carriers, and Shipper charges the customer $121. If accident liability is assigned instead to Brokers, Brokers will likewise choose only the Safe Carriers who charge less than Dangerous Carriers. The assignment of liability does not affect the market outcome.

Now tweak the hypothetical because, in practice, brokers lack information about which carriers are safe ex-ante, so they would be expected to pass along anticipated liability costs relatively evenly across safe and unsafe carriers. This subsidizes dangerous carriers and puts safe ones at a competitive disadvantage, potentially driving them out of the market. For example, suppose Brokers cannot distinguish Safe from Dangerous Carriers. If accident liability is assigned to Carriers but Brokers can observe how much Carriers charge, Brokers will choose only Safe Carriers, because they are the lowest-cost carriers. The Shipper will charge the buyer $121. But if accident liability is assigned to Brokers who do not know which carriers are safe or unsafe, they will have incentive to charge $9. Now all Shippers charge $129, which reduces the size of the goods market. In this scenario, altering the assignment of liability reduces interstate commerce and society's wealth and generates more accidents on the roads.

Suppose, because of competition, Brokers charge only $125 to the Shipper, reflecting the average liability under the assumption that the market is equally saturated with Safe and Dangerous Carriers. On average, Brokers would break even, losing $4 on the Dangerous Carriers and profiting $4 on the Safe Carriers. But suppose, as seems highly plausible, that Dangerous Carriers are unsafe because they cut corners on safety measures. If so, the Dangerous Carriers may offer artificially low prices compared to the Safe Carriers under this average pricing equilibrium. Dangerous Carriers would therefore enter the market and expand, generating an adverse selection spiral.

This case of unfortunate consequences supports Judge Guido Calabresi's suggestion that liability be assigned, generally, to the "Cheapest Cost Avoider." See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 143-144 (1970); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 70, 84 (1975) (defining the "cheapest cost avoider" as the market actor "who can best decide whether avoidance is cheaper than bearing th[e] costs [of injury]"). Carriers are by far the most efficient avoider of road accidents because they operate the safe or unsafe motor vehicle. Brokers are not. Shifting liability to Brokers violates the "Cheapest Cost Avoider" principle.

A reasonable interpretation of the FAAAA's preemption provision and safety clause would, taking these economic realities into account, conclude that broker negligence claims are preempted. Such an interpretation would attempt to minimize the "error costs" of interpretive mistakes. Error costs necessarily include the real costs imposed by mistaken interpretations on the national economy. See Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 Sup. Ct. Econ. Rev. 205, 212-213 (2008); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357, 359, 372 (1984).

Preemption, operating in effect as a limited liability shield for brokers, would minimize error costs by allowing brokers to plan and predict their own costs. This ability to predict future costs enables brokers to offer moderate prices for their services to shippers, which tends to result in the expansion of commerce. Brokers can focus on their task of efficiently matching carriers with shippers, rather than investigating carriers and state legal regimes. Liability remains on carriers for their accidents, which incentivizes them to take care on the roads and in hiring drivers, or be forced from the market.

Holding that broker negligence claims are permissible, by contrast, "would impose in the name of state law a new and clear duty of care on brokers." *Ye* v. *GlobalTranz Enters., Inc.*, 74 F.4th 453, 459 (7th Cir. 2023). But brokers are unlikely to have sufficient information to foresee the likelihood of accidents associated with every individual carrier. "To avoid * * * costly damages payouts," brokers "would change how they conduct their services—for instance, by incurring new costs to evaluate motor carriers." *Ibid.* "Then, by changing their hiring processes, brokers would likely hire different motor carriers than they would have otherwise hired without the state negligence standards." *Ibid.* Moreover, brokers are unlikely to have sufficient information to determine the precise liability standards under which each carrier is likely to operate, given the interstate nature of long-haul transportation. To extend liability based on state-level negligent-hiring theories to brokers would compel brokers to expend costs to become knowledgeable as to the safety characteristics of individual carriers, the tort law of States in which the carriers operate, and the routes that would place carriers into these disparate legal regimes.

As this discussion illustrates, if broker-negligence claims are preempted under the FAAAA, market pressure will impede the ability of undercapitalized and dangerous carriers to operate on the Nation's roads. Nor is market pressure the only tool against unsafe carriers. Even if brokers fall within the scope of Section 14501(c), state criminal laws against carriers may serve as another way to remove dangerous vehicles from the road. See *English* v. *General Electric Co.*, 496 U.S. 72, 83-84 (1990) (observing that state criminal law may address conduct when state tort claims are federally preempted). Where appropriate, courts may also pierce a dangerous carrier's corporate veil, holding owners of such firms responsible. And federal licensing requirements can reduce the likelihood of dangerous and undercapitalized carriers operating. See 49 U.S.C. § 13902(a) (providing that the Secretary of Transportation shall register motor carriers that are "willing and able to comply" with safety regulations). Each of these alternatives to tort liability provides additional pressure to minimize the chance that carriers operate unsafely. Broker liability, by contrast, is a comparatively weak and counterproductive safety tool, which is likely to impose costs that thwart the commerce-expanding aim of the FAAAA.

C. The Preemption Scholars' Amicus Brief Overstates the Costs and Understates the Benefits of Interpreting the FAAAA To Preempt Negligent Hiring Claims Against Brokers

The Preemption Scholars' brief offers a series of examples in an effort to show that, if the Court adopts the reasoning of the decision below and declines to allow negligent hiring claims against brokers, various state laws would also be preempted because they have "a significant economic effect" on "rates, routes, or services." Preemption Scholars Br. 5 (quoting *Ye*, 74 F.4th at 458); see 49 U.S.C. § 14501(c)(1). But amici's parade of horribles is overstated or nonexistent because their examples are based on an economically unreasonable application of the test adopted by the Seventh Circuit in this case.

When determining whether state laws have "a significant economic effect" on "rates, routes, or services," a court's preemption analysis should be guided by the principle that state laws that burden interstate commerce for the special or asymmetrical benefit of a single State meaningfully differ from state laws that do not. Although "state-imposed rules, such as tort obligations and remedies for their breach, may be orthogonal to the need to coordinate an increasingly national market for goods and services and to police outlier states," the economic justification for preemption is far weaker for state laws that do not produce "externalities and spillover effects" harming the national market. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. Rev. 1353, 1359, 1390 (2006). Only state laws with significant economic effects that harm interstate commerce while conferring a benefit on a single State would be subject to preemption under a fair reading of the test adopted by the decision below.

That conclusion refutes the Preemption Scholars' hyper-literalist interpretation of "significant economic effect." For example, the Preemption Scholars (Br. 12) claim that a State's decision to impose a gasoline tax may be preempted as having a significant economic effect on rates, routes, or services. But a gasoline tax imposed within a State burdens drivers within the State just as much as drivers from other States who traverse it. If anything, the gasoline tax burdens state residents more than non-state residents. State residents cannot avoid paying the gasoline tax. Non-state residents, however, can often choose whether to subject themselves to such a tax. Although the state gasoline tax could burden interstate commerce, that effect is merely incidental to the state's own self-regulatory preferences. An economically reasonable interpretation of the FAAAA's preemption clause should not sweep within it the State's enactment of a gasoline tax that confers no special or asymmetrical benefit to a single State to the detriment of interstate commerce.

By contrast, a diesel tax might introduce a different set of issues because diesel is the primary fuel of interstate trucking. A diesel tax would burden interstate commerce to a far greater degree than would a gasoline tax, allowing a State to gain an asymmetrical benefit from the tax while imposing the burden mostly on the rest of the Nation. Depending on how a state-imposed tax on diesel fuel would operate in practice, an economically reasonable interpretation of the scope of the FAAAA's preemption clause might preclude that type of tax.

The Preemption Scholars likewise miss the mark (Br. 12) by suggesting that a "30-hour work week for all firms doing business" in the State must be preempted if the law applies to the trucking industry. If a 30-hour limit on the work week imposed on businesses in a particular State affected only trucking businesses domiciled in that State, those businesses have already assented to state laws remaining in the State. Such a law could increase the costs of those businesses, making them less competitive relative to trucking firms domiciled elsewhere. It is unlikely, however, that such a law would threaten to impose a significant economic effect on motor vehicle services nationwide—precisely because trucking firms domiciled in that State would find their services curtailed by the existence of more competitive out-of-state rivals. The imposition of a 30-hour work week within any State, assuming it did not conflict with federal law, is an example of a local law that reflects self-regulatory preferences rather than an attempt to take advantage of interstate commerce for an asymmetrical gain. Such a law may harm businesses within the State and make those businesses less competitive relative to other States, especially in a sector like trucking, but States have discretion to adopt some laws that harm their own economies.

Nor are the Preemption Scholars correct (Br. 12) that the enforcement of state civil rights laws could be preempted under the Seventh Circuit's interpretation. This example is similar to the previous example of a 30-hour work-week limit. If those state laws did not conflict with federal law, it is unlikely that such enforcement efforts could significantly affect the national motor services market, given the ability of firms operating in a national market to shift their business outside of any particular State. And no asymmetrical gain would accrue to the enforcing State.

Under an economically reasonable view of the FAAAA's preemption provision, the Preemption Scholars' examples likely would not be preempted. State laws addressing hours limits or civil rights—provided that those laws do not conflict with federal law—are unlikely to have such a significant economic effect on broker services that would harm interstate commerce. And all three examples would not burden interstate commerce for the purpose of deriving an asymmetrical gain. Such an imbalance between burden and benefit is unlikely to arise in the case of a gasoline tax, for example, though a diesel tax might operate differently. The key point is that, in examining whether state laws have a significant economic effect, laws that burden interstate commerce for the special or asymmetrical benefit of a single State operate differently from laws that burden the State in the same manner as everyone else in the Nation.

CONCLUSION

The Seventh Circuit's judgment should be affirmed.

Respectfully submitted,

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