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 *AMICUS CURIAE* TOKIO MARINE HOUSTON CASUALTY COMPANY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Tokio Marine Houston Casualty Company ("HCC") is a leading global insurer in the business of providing insurance for transportation providers, including freight brokers for interstate transport of freight.

Insurance for interstate freight brokers requires predictable risk and a single nationwide liability standard. Brokers do not control motor carrier operations, or drivers, or the routes carriers take, or the states carriers travel through to arrive at their destination. Without a predictable and uniform legal regime, premiums rise, coverage amounts are reduced, and certain states or routes—or indeed the business as a whole—may lose coverage altogether. HCC has a strong interest in reinstating, and preserving, a logical, uniform risk market for freight brokerage.

Brokers not only require a clear and uniform federal standard to guide their conduct, but they are also entitled to one under the Federal Aviation Administration Authorization Act (the "FAAAA"). The federal government has exclusive authority to determine which motor carriers are authorized to use the national roadways for interstate transport of freight. Any efforts by the states to interfere with this exclusive authority, and to force federally-licensed carriers from the national roadways, are preempted.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission.

This preemption must logically extend to a state that seeks to use its tort system to impose common law liability, such as for "negligent selection," on a broker who refers business to a federally-licensed carrier. Otherwise, states will do indirectly what they are preempted from doing directly, leading to a complex patchwork of legal regimes that may disrupt interstate routes and commerce. Subjecting brokers to over 50 separate standards, based on ad-hoc, after-the-fact determinations by the tort system, is directly contrary to the uniform system Congress envisioned in enacting the FAAAA and its preemption provisions.

Absent preemption, brokers are faced with conflicting, inconsistent, and unpredictable duties when carriers transport cargo across various states, each with a different set of standards and rules. This is not fair to brokers who are ready and willing to follow clear rules. Similarly, it discourages insurers who want to support this essential component of interstate commerce by offering insurance products based on reasonably predictable risks. Insurers are in the business of risk, but they are not in the business of chaos.

HCC therefore appears as *amicus curiae* in support of Respondents.

SUMMARY OF ARGUMENT

Insurance underwriting relies on an insurer's ability to predict and calculate the risks of expected future losses. Ambiguity of expected loss frequency or loss severity leads to premium increases beyond expected costs. Where predictability and uniformity are absent, insurance costs may increase beyond a market's ability to bear them, especially in a market—such as the freight brokerage market—where brokers (and carriers) typically operate at low margins. A nationwide, uniform legal framework is therefore necessary to operate a national (and international) transportation system.

Recognizing this precept, the Constitution established a uniform nationwide body of law for maritime transportation. As new modes of carriage emerged, such as rail, air and motor, the same wisdom has generally prevailed. For example, the United States has entered into treaties such as the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106–45 (2000) (the "Montreal Convention") to create a consistent legal framework for air-carrier liability by, among other things, preempting claims outside its strictures. Similarly, with respect to interstate ground transportation, Congress enacted the Graves Amendment, 49 U.S.C. § 30106, to set nationwide vehicle-rental liability standards, and to preempt common law claims for vicarious liability.

In this same vein, the FAAAA establishes nationwide uniformity in ground transportation. Within its framework, freight brokers serve a well-defined, vital—but limited—role in interstate commerce, matching shippers with carriers. *See* 49 U.S.C. § 13904(d). Freight brokers, by definition, utilize only federally licensed carriers. *See* 49 C.F.R. § 371.2 ("Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier."); 49 C.F.R. § 371.3(a)(2) (requiring brokers to maintain records of carrier registration numbers).

When brokers follow this law, which defines and limits their role, common law tort claims, seeking to impose additional, or different, requirements on them, are—or should be—preempted. *See* 49 U.S.C. § 14501(c)(1).

Allowing states to proceed with common law tort claims such as "negligent selection" against brokers for failing to second-guess the federal government's determination that a given motor carrier is fit to operate on the public roads interferes with Congress's decision to vest the Federal Motor Carrier Safety Administration (the "FMCSA") with exclusive authority over carrier fitness. These claims would allow individual state courts to override federal determinations, and to restrict which licensed carriers may use the national roadways in their individual states, thus interfering in an area Congress reserved for federal regulation.

A negligent selection claim against a broker is essentially a claim that—even though the broker matched a shipper with a carrier who was authorized by federal law to use the nation's roadways—the broker should have done an undefined "more" (beyond its federally-defined role) to vet that carrier, and should have then black-balled that carrier. However, that "more" will vary from state to state, court to court, and jury to jury, always after the fact, setting no clear guideposts for future actors. It will allow states to indirectly undermine the national system of federal carrier licensing, even though they are preempted from doing so directly.

Eliminating preemption for common law claims against brokers will leave plaintiffs and state courts unrestrained by federal guardrails preventing the transfer of risk and responsibility from motor carriers to brokers. This weakens federal and state incentives to increase coverage minimums for carriers, the very entities who are directly responsible for road safety. Furthermore, absent preemption, the "more" a broker does to vet a carrier, seek to assist the carrier in safe operations, or monitor a carrier to ensure safe operation, the more a plaintiff may argue (a) that the broker had a duty to do so, and failed, <u>and/or</u> (b) that the broker stepped beyond its role as a broker, and acted as an unlicensed carrier, principal, or joint venturer, and is thus vicariously liable for the driver's negligence. In either scenario, the intended distinction between brokers and carriers collapses unto itself—and is necessarily untenable under the FAAAA.

Absent preemption, inconsistent and varied state-law regimes lead to increased premiums, decreased coverage limits, and exclusions of certain states and regions which develop a history of unfair verdicts against brokers. Ultimately, brokers and their insurers could be forced from the market, as costs and verdicts become prohibitive, with grave implications for interstate and international transportation and commerce.

The decision of the Seventh Circuit should be affirmed.

ARGUMENT

I. Absent Preemption, Unpredictability of Risk and a Non-Uniform Legal Framework Threaten to Degrade, and Can Eventually Destroy, Insurability in the Freight Brokerage Market

Insurance underwriting relies on an insurer's ability to predict and calculate the risks of expected future losses. When frequency and severity of risk can be reasonably estimated, insurers are able to set premiums to cover expected losses, plus reasonable risk charges. Empirical studies show that "better predictability leads to better pricing" of insurance premiums, which is vital "to achiev[ing] . . . a sustainable business model." *See* Nitin Kumar, White Paper, *Exploring a New Dimension of Predictability in Insurance*, Infosys (2018), https://www.infosys.com/industries/insurance/white-papers/Documents/predictability-insurance.pdf.

But when predictability declines and ambiguity rises (whether due to insufficient data, emerging risks, or volatile environments), insurers charge higher premiums to offset their inability to forecast accurately. *See* Simon Deitz and Oliver Walker, Ambiguity and Insurance, Capital Requirements and Premiums, Journal of Risk and Insurance (2016), at 2, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2012/11/Working-Paper-97-Dietz-and-Walker.pdf ("There is by now a body of evidence to show that, faced with offering a contract under ambiguity, insurers increase their premiums, limit coverage, or are unwilling to provide insurance at all."); Patrick L. Brockett ET AL., *Underwriting & Ambiguity: an Economic Analysis*, J. OF INS. ISSUES, 1999 at 1, https://www.researchgate.net/publication/227651267_Underwriting_and_Ambiguity_An_Economic_Analysis ("*Underwriting & Ambiguity: an Economic Analysis*") (same).

Empirical studies confirm that ambiguity directly correlates with premium escalation, and that insurance premiums for ambiguous risk are higher than premiums with unambiguous risk. *See generally, Underwriting & Ambiguity: an Economic Analysis*. Indeed, ambiguity in either (a) loss frequency or (b) loss severity leads to premium increases beyond expected loss costs. When there is ambiguity in both of these factors, premiums are highest, reflecting combined uncertainty. *Id.* at 10, 19.

No insurance market is large enough to absorb all increases in risk, particularly when the participants operate at low margins, and the increases in risk are so unpredictable as to defy pricing models. When liability and loss exposure in a particular jurisdiction become disproportionate or unstable, insurers respond in predictable ways: premiums rise sharply, coverage narrows, and, ultimately, insurers withdraw. Recent examples of this include California, Florida, Louisiana, Colorado, Iowa, Texas and others—where escalating wildfire and severe-weather claims and losses have driven insurers to raise rates dramatically or withdraw from the market altogether. *See, e.g.,* Congressional Budget Office, *Climate Change, Disaster Risk, and Homeowner's Insurance* (Aug. 2024), https://www.cbo.gov/publication/60674; JPMorgan Chase & Co., *Insurance: Weathering the Storm of Inflation, Climate Change and Market-Distorting*

State Regulation (2025), https://www.jpmorgan.com/content/dam/jpm/cib/documents/Weathering_the_storm.pdf; Breck Dumas, *California Insurance Crisis: Here Are the Carriers That Have Fled or Reduced Coverage in the State*, Fox Business (Jan. 10, 2025), https://www.foxbusiness.com/lifestyle/california-insurance-crisis-here-carriers-have-fled-reduced-coverage-state; Matt Brannon, *Home Insurance Rates to Rise 8% in 2025, After a 20% Increase in the Last Two Years*, INSURIFY (2025), https://insurify.com/homeowners-insurance/report/home-insurance-price-projections. *See also Underwriting & Ambiguity: an Economic Analysis,* at 1 (empirical evidence demonstrates that insurers are reluctant to cover risks when there is ambiguity associated with either loss frequency or loss severity).

The risks in the freight brokerage market, as envisioned by Congress, were designed to be predictable, and thus insurable. However, that predictability is now fractured by the continued erosion of the express statutory preemption under the FAAAA. Unless this Court affirms the decision of the Seventh Circuit, freight brokers and their insurers are facing the very unpredictability which insurance analysts have found to be so damaging to the insurance industry.

Specifically, unless the decision of the Seventh Circuit is affirmed, brokers (and their insurers) are facing unpredictability, and the inconsistencies inherent in being subject to 50 or more separate tort systems, each imposing its own standards, always after the fact. While some states appear to favor this result (and have filed an *amici curiae* brief in favor of

Petitioner), these same states offer little guidance as to how brokers should deal with this unpredictability, apparently content to leave it to their courts and juries to mete out what passes for "guidance" sporadically, haphazardly and after the fact.

The threat posed by unrestrained judicial rulemaking for brokers has already caused a market hardening leading towards not only increased premiums but early signs of a market exit. *See* Kyoung-son Song, *Market Hardens in Non-Owned Auto and Contingent Auto Liability,* INSURANCE INSIDER US (Nov. 26, 2025), https://www.insurance insiderus.com/article/2fn46nwnrs7wyk28mcirk/lines-of-business/commercial-lines/market-hardens-in-non-owned-auto-and-contingent-auto-liability ("*Market Hardens in Non-Owned Auto and Contingent Auto Liability*") (insurance market which services freight brokers has hardened, with rates escalating by 20-30%, and insurers reluctant to provide high coverage limits at any price); *see also,* Glenn Patton, *Insurance, Regulatory Changes for Freight Brokers and Forwarders,* CIFFA (Apr. 4, 2024), https://www.ciffa.com/ffo/insurance-regulatory-changes-for-freight-brokers-and-forwarders/ (In the wake of large verdicts against freight brokers, "the contingent auto liability insurance market has been impacted, limiting availability for freight forwarders and brokers to protect against these types of losses. Many U.S. carriers stopped providing contingent auto liability coverage . . . Insurers in Canada are now re-evaluating hired auto coverage (the equivalent of contingent auto liability), as they could be impacted by cases in the U.S."); *Market Hardens in Non-Owned Auto and Contingent Auto Liability* (predicting that within 12 months, there might not be enough insurance capacity to meet demand). If things worsen, the entire market may become commercially untenable, its risks being uninsurable, with a market withdrawal leading to unknowable—but presumably far-reaching—adverse consequences for the industry and for interstate and international commerce itself.

II. Absent a Clear and Uniform Rule of Preemption, Courts Have Created a Fractured Legal Landscape for Brokers

Congress created a nationwide statutory scheme for interstate motor carriage that recognizes the separate and distinct roles of carriers and brokers, and sets specific requirements for their separate conduct. The FAAAA was enacted to prevent states from interfering in broker "price, route, or service" through a uniform federal regime. *See Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370-71 (2008); *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256 (2013). Allowing the safety exception to swallow broker negligent-selection claims, and pull them outside the scope of FAAAA preemption, as some courts have done and Petitioner urges to become the law of the land, will lead to increased litigation in more jurisdictions, inconsistent standards for broker diligence, stacked liability theories, and higher risk exposure. All of this is directly contrary to the entire purpose of the FAAAA.

Under federal law, the FMCSA is empowered to license carriers, and to determine which carriers are authorized to transport freight in interstate commerce, and which carriers should have their authorization revoked. *See* 49 U.S.C. §§ 113, 13902(a); 49 CFR Part 365; 49 C.F.R. §§ 1.87(a), 385.13. The Secretary is charged with determining "whether an owner or operator is fit to operate safely commercial motor vehicles, utilizing among other things the accident record of an owner or operator operating in interstate commerce and the accident record and safety inspection record of such owner or operator[.]" 49 U.S.C. § 31144(a)(1). This federal authority is exclusive and comprehensive, and therefore states have no authority to bar federally licensed interstate freight carriers from their highways. *Cf. Castle v. Hayes Freight Lines,* 348 U.S. 61, 63 (1954) ("Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce.").

While the FMCSA compiles data on carriers, Congress previously recognized, in the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. 114-95, 129 Stat. 1312 (2015), at § 5223(d), that this data is deficient. Therefore, the FMCSA was required to post the following on its website: "Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier has received an UNSATISFACTORY safety rating under part 385 of title 49, Code of Federal Regulations, or has otherwise been ordered to discontinue operations by the Federal Motor Carrier Safety Administration, *it is authorized to operate on* *the Nation's roadways*." (emphasis added).[2] These disclaimers remain on the FMCSA website.

The Code of Federal Regulations defines a broker as "a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier." 49 C.F.R. § 371.2. Brokers must be licensed by the FMCSA. 49 U.S.C. § 13904. Brokers must follow applicable FMCSA laws and regulations. 49 U.S.C. § 13904(a)(2). Under those laws and regulations, for interstate transport, brokers may only work with carriers authorized by the FMCSA, who carry the amount of liability insurance required by the FMCSA. *See* 49 C.F.R. §§ 371.2, 371.3. Federal law (as properly understood) preempts common law tort claims against freight brokers who fulfill their federally-mandated role, thus creating a stable insurance market for brokers. Imposing a common law, "negligent selection" duty on brokers to second-guess these federal determinations, would directly contradict the deregulatory purposes of the FAAAA, and would allow states to bar carriers from their roads indirectly, although they are forbidden to do so directly.

Carriers are also required, by federal law, to carry liability insurance for bodily injury or death resulting from their negligence. *See* 49 U.S.C. § 13906(a)(1). States are permitted to set higher

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[2] Notably, in this case, Petitioner's negligent selection claim is effectively premised on his argument that Respondents should have relied on data, which Congress stated was unreliable, and used this unreliable data to black-ball a carrier, *see* Pet. Br. 11, even though, under federal law, that carrier was "authorized to operate on the Nation's roadways." *See* Pub. L. 114-95, 129 Stat. 1312 (2015), at § 5223(d).

insurance minimums for carriers. *See* 49 U.S.C. § 14501(c)(2)(A).

However, brokers are not required to carry insurance for bodily harm or death. Under federal law, brokers must carry insurance (or other financial security)—in effect, a bond—only to pay claims arising out of the brokers' failure to pay freight charges under their agreements. *See* 49 U.S.C. § 13906(b). This reflects a policy which even predates deregulation and the FAAAA:

> The business [of brokers] does not require operation of vehicles nor the transporting or otherwise handling of cargo . . . . Thus, brokers are not exposed to bodily injury, property damage or cargo loss and damage liability as are motor carriers. Brokers merely act as intermediaries . . . . Because their exposure is so different, there is no need, nor do we deem it appropriate or workable, to implement a self insurance program similar to that in place for motor carriers.

See 4 I.C.C. 358; 1988 I.C.C. LEXIS 255, **20-21 (1988); *cf. also* 49 U.S.C. § 311(c) (1946) (now abrogated).

Nevertheless, brokers desire liability insurance that extends to personal injury claims arising out of their business, if it is available and affordable. Such insurance is generally intended to be utilized only in rare instances where a broker erroneously stepped outside its federally prescribed role and entered an area where common law tort claims might not be preempted. In accidents where alleged damages will not reach federal insurance limits and are thus covered by typical motor carrier insurance, brokers are generally left out of the fray. But when there are serious injuries, or death, and claims exceed the motor carrier insurance limits mandated by law, prudent brokers, who managed to purchase third party liability insurance despite having no legal obligation to do so, become the target. Meanwhile smaller brokers who cannot afford coverage will face bankruptcy with every claim or simply shut their doors.

Transferring liability to brokers on the premise that there will always be ample additional insurance coverage presumes that such insurance is, and will remain, available or is an off-the-shelf product. The availability of such insurance may vary or could be limited in nature, such that there are exorbitant deductibles or self-retention limits. In other words, even if a broker could obtain additional insurance, that insurance may come with significant strictures and costs—or be altogether unavailable to cover certain risks. Introducing further unpredictability by moving away from FAAAA preemption and increasing the likelihood of inconsistent and variable tort liability could result in a circumstance where third-party liability becomes altogether uninsurable for brokers, even as the need for it becomes most dire. *See*, *supra*, § I.

Thus, the insurance that does exist (even in limited form) is now at risk, as this case and similar cases seek to stretch common law tort liability well beyond its intended bounds. While doing so may help a small number of plaintiffs in the short term, it will ultimately have the effect of raising premiums, and lowering coverage amounts, thus leading to increased transportation costs and higher prices nationwide. It may also drive insurers (and brokers) from the market, which will ultimately benefit neither injured motorists, nor interstate commerce. *See*, *supra*, § I.

Certain *amici* filing in favor of Petitioner nevertheless argue that "negligent selection" claims are necessary because the federal system of (a) licensing and regulating motor carriers, and (b) working with states to assign the primary risk of unsafe driving to motor carriers (where it belongs), is broken.

For example, the current federal insurance limit of $750,000 per incident for motor carriers has not changed in more than 30 years, while the size of claims, settlements, and awards/judgments has increased many times over. *See* Br. of the Institute for Safer Trucking as Amicus Curiae in Support of Petitioner ("IST Br.") 12-14; Br. of Amicus Curiae American Truckers United in Support of Petitioner ("ATU Br.") 9-11. However, if these amounts are inadequate after decades of inflation, then Congress or individual states may raise those limits. What they may not—and should not—do is seek to transfer this excess liability to brokers.

Likewise, *amici* for Petitioner complain that the system envisioned by Congress, under which the FMCSA inspects and oversees carriers, is also broken. *See* IST Br. 7-11; ATU Br. 9-11. They complain that the FMCSA is understaffed, and that unsafe carriers have found numerous ways to avoid an "Unsatisfactory" rating, removal by the FMCSA, and other consequences by, among other things, reconstituting themselves. *See* ATU Br. 10-11; IST

Br. 10-12. Indeed, the FMCSA itself recognizes that the data on its system might be unreliable, and is required by law to caution users not to draw conclusions from its published carrier-safety data, other than from an "Unsatisfactory" rating. *See*, *supra*, at 11-12.

However, *amici*'s proposed solution—to in effect force brokers to act as the unappointed regulators of interstate transport—is unworkable and contrary to law. Brokers have no governmental powers, are not involved in every motor carriage, and have no rulebook to follow. In any event, Congress assigned this regulatory power exclusively to the Department of Transportation. If the very agency that licenses carriers cannot maintain and publish a reliable database that the public can rely upon when considering carriers, how can brokers be expected to do so? And even if that were not already an impossible task, how could they do so in a way that meets as many as 50 different state standards, which will emanate, if at all, from rulings in tort litigation since states are not permitted to issue their own rules and standards for forcing federally licensed carriers off the national roadways? *See Castle,* 348 U.S. at 61.

"Negligent selection" claims are not the only claims being brought against brokers, in violation of Congress's express preemption. Thus, while this case involves an allegation that a broker was negligent in selecting a carrier, other cases allege that a broker vetted drivers and carriers, and/or imposed safety requirements, beyond the FMCSA requirements, and thus acted as a carrier, not as a broker. *See, e.g., Rockne v. J.B. Hunt Transport,* *Inc.*, No. 24-CV-00065-H-BU, 2025 WL 2181707, at *6-7 (N.D. Tex. July 17, 2025); *Ciotola v. Star Transportation & Trucking, LLC*, 481 F.Supp.3d 375, 392-93 (M.D. Pa. 2020). Likewise, a broker that takes steps to encourage a carrier to take safety measures faces allegations of vicarious liability for supposedly "controlling" that carrier. *See, e.g., Ortiz v. Ben Strong Trucking, Inc.*, 624 F. Supp. 3d 567, 582 (2022) ("A broker is not vicariously liable for the negligence of its motor carrier's driver unless [the broker] had control over [the driver's] driving time and the condition in which he drove[.]") (internal citations and quotations omitted); *Sperl v. C.H. Robinson*, 408 Ill.App.3d 1051, 1053-55, 1058 (2011). *See also, Market Hardens in Non-Owned Auto and Contingent Auto Liability* (while negligent selection claims against brokers are more frequent, the largest "nuclear verdicts" against brokers have generally occurred in cases where they were accused of exercising too much control).

Should this Court conclude that the so-called "safety exception" allows for common law torts such as broker negligent-selection claims against brokers who comply with federal law, the result would be ratification of sweeping expansion of state tort authority into the core of broker services. Such an interpretation would effectively dismantle the FAAAA's preemptive shield for brokers, exposing them and their insurers to a patchwork of state negligence regimes. The practical consequences are already being felt in jurisdictions that have adopted this interpretation. These consequences have major implications for insurers—and would be insurers—in underwriting and pricing their policies, in deciding acceptable policy limits, and, ultimately, in whether to continue to issue policies at all.

Absent a clear rule of law, insurers underwriting broker policies will confront an increasingly fractured and unpredictable landscape. A single interstate shipment often traverses multiple states, exposing brokers—and by extension their insurers—to varying liability standards. *Cf. Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 951 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019) (citing *Dan's City Used Cars*, 569 U.S. at 260) (The FAAAA intended to prevent states "from replacing market forces with their own, varied commands."). Thus, brokers selecting carriers for multi-state shipments will face disparate state common-law standards for carrier screening.

This variability on what information to collect, how to evaluate safety data, and when to reject carriers undermines Congress's goal of uniformity in the transportation industry. *See*, *e.g., Krauss v. Iris USA, Inc.*, No. 17-778, 2018 WL 2063839, at *6 (E.D. Pa. May 3, 2018). Moreover,

> To avoid negligence liability, a broker like Defendant would need to inspect each motor carrier's background and the ways in which the motor carrier investigates, hires, and trains its own drivers, and "such additional inspection would result in state law being used to, at the least indirectly, regulate the provision of broker services by creating a standard of best practices, and ultimately contravening Congress's deregulatory objectives in enacting the FAAAA."

Gillum v. High Standard, LLC, No. SA-19-CV-1378-XR, 2020 WL 444371, at *6 (W.D. Tex. Jan. 27, 2020). *Accord Ye v. Global Sunrise, Inc.*, 2020 18-CV-019621, 2020 WL 1042047, at *3 (N.D. Ill. Mar. 4, 2020) ("[T]o avoid liability for a negligent hiring claim like plaintiff's, brokers would need to examine each prospective motor carrier's safety history and determine whether any prior issues or violations would be permissible under the common law of one or more states.").

Numerous decisions underscore the uncertainty brokers and their insurers face, including what information must be gathered, how safety data must be evaluated, and when a carrier must be rejected.[3] Moreover, some state courts have relied on FMCSA data as "evidence" of broker negligence, even though the FMCSA explicitly cautions that the results are enforcement tools and that readers "should not draw conclusions" about safety. *See, e.g., Mann*, 2017 WL 3191516, at *3, *Schramm,* 341 F. Supp. 2d at 542, n. 4.

Furthermore, in the absence of clear preemption rules, plaintiffs continue to assert vicarious liability or agency claims alongside negligent-selection claims to maximize broker liability. Some courts have recognized agency-based broker liability, while other jurisdictions reject them. For example, in *Sperl v.*

[3] *Compare Schramm v. Foster*, 341 F. Supp. 2d 536, 552; *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F.Supp.2d 630, 646-48 (W.D. Va. 2008); *Mann v. C.H. Robinson Worldwide, Inc.*, No. 16-cv-00102, 16-cv-00104, 16-cv-00140, 2017 WL 3191516, at *8 (W.D. Va. July 27, 2017) with *McLaine v. McLeod*, 661 S.E.2d 695, 701 (Ga. Ct. App. 2008); *Smith v. Spring Hill Integrated Logistics Mgmt., Inc.*, No. 1:04 CV 13, 2005 WL 2469689, at *5 (N.D. Ohio Oct. 6, 2005).

C.H. Robinson, 408 Ill.App.3d 1051 (2011), a court found sufficient broker control over the carrier to impose agency liability. Conversely, in *Montgomery v. Caribe Transp. II, LLC*, 124 F.4th 1053, 1055-1058 (7th Cir. 2025), cert granted 222 L.Ed 2d 1241 (Oct. 3, 2025), the court found that the broker did not have an agency relationship with the carrier. Where these arguments are permitted, the broker that carefully and, without a hint of negligence, vets and refers business to a motor carrier is then argued to have exercised control such that it is vicariously liable for that carrier and its driver. This is nothing but a trap, with no sound policy basis for it, and, as discussed in § IV, *infra*, one that can only serve to make the roads less safe over time.

As liability schemes within the various states begin to deviate from each other, forum shopping will continue to be a concern. Because courts have proven unwilling to grant jurisdictional motions brought by brokers, notwithstanding that brokers have little control over routing,[4] prudent carriers,

[4] *See Nyswaner v. C.H. Robinson Worldwide Incorporated*, 353 F.Supp.3d 892 (D. Ariz. 2019); *Gilley v. C.H. Robinson Worldwide, Inc.*, Civ. No. 18-00536, 2019 WL 1410902 (S.D. W. Va. March 28, 2019); *Wardingley v. Ecovyst Catalyst Technologies, LLC*, No. 22–CV-115-PPS-JEM, 2022 WL 16714139 (N.D. Ind. Nov. 4, 2022); *Estate of Wray v. Kennedy Brothers Logis., Inc.*, No. 22-CV-70-FL, 2022 WL 16550315 (E.D. N.C. Oct. 31, 2022); *Carter v. Khayrullaev*, No. 20-cv-00670-AGF, 2022 WL 9922419 (E.D. Mo. Oct. 17, 2022); *White v. Scotty's Contracting & Stone, LLC*, No. 21-CV-00161-GNS, 2022 WL 4588417 (W.D. Ky. Sept. 29, 2022); *Ortiz*, 624 F. Supp. 3d 567; *Mata v. Allupick, Inc.*, No. 21-cv-00865-ACA, 2022 WL 1541294 (N.D. Ala. May 16, 2022); *Dixon v. Stone Truck Line, Inc.*, 19-CV-000945-JCH-GJF, 2021 WL 5493076 (D.N.M. Nov. 23, 2021); *Taylor v. Sethmar Transp.*, No. 19-cv-00770, 2021 WL 4751419 (S.D. W.Va. Oct. 12, 2021);

brokers, and their insurers will seek ways to avoid high-liability states altogether—even when other considerations such as traffic congestion or seasonally adverse weather might favor them. A decision denying preemption thus could result in operational decisions being made based on potential legal exposures rather than operational considerations such as road conditions and fuel efficiency.

Not only is all of this undesirable, unworkable, and prohibited by express preemption, but it is also ultimately self-defeating. The business model of brokers and carriers (which operate on narrow margins), and of the trucking industry generally, is not designed to make brokers the excess insurers of motor carriers. As noted in § I, *supra*, the inevitable result of an unpredictable, non-uniform, and ever-changing liability scheme, which is necessarily based on data that is admittedly unreliable, is that insurers must raise premium prices, and lower insurance limits. Insurers may leave the market, or black-out portions of the country. Insurers and brokers may be forced out of the market. All of this leads inevitably to higher shipping costs and higher consumer prices, the exact result Congress intended to forestall when it enacted the FAAAA.

III. Uniformity of Liability Rules Should Be the Standard in Interstate and International Transportation

Federal preemption over state law ensures that freight brokers are subject to a uniform, predictable

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Gerred v. FedEx Ground Packaging Sys., Inc., No. 21-cv-1026-P, 2021 WL 4398033 (N.D. Tex. Sept. 23, 2021).

legal framework and set of duties governing their involvement in interstate and international carriage of goods.[5] "With the passage of the [FAAAA] in 1994, Congress turned its attention to the trucking industry 'upon finding that state governance of intrastate transportation of property had become "unreasonably burden[some]" to "free trade, interstate commerce, and American consumers."'" *Ye v. GlobalTranz Enters., Inc.*, 74 F.4th 453, 457 (7th Cir. 2023). Ensuring that the FAAAA applies to the exclusion of state law tort claims fosters predictability of risk and stability of legal obligations in interstate transportation systems, which in turn spurs commercial benefits for businesses and consumers alike by "barring such burdensome state regulations." *Id.* (citing 49 U.S.C. § 14501(a)(1), (b)(1), (c)(1)).

The special importance of uniformity in connection with interstate and international transportation has been recognized since the founding of the Republic. As this Court again recognized recently in *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 69 (2024), there are areas of law where national uniformity is critical:

> Under the Constitution, federal courts possess authority to create and apply maritime law. Article III of the

[5] Although motor carriage is generally thought of as a domestic issue, it also greatly affects foreign commerce, since motor carriers can operate across both the Northern and Southern borders of the United States. Canada and Mexico together represent approximately 30% of U.S. foreign trade (with approximately 60% of that trade moving by truck), thereby impacting some 20% of the total foreign commerce of the United States.

> Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction." That grant of jurisdiction contemplates a system of maritime law " 'coextensive with, and operating uniformly in, the whole country.' " The purposes of that uniform system include promoting "the great interests of navigation and commerce" and maintaining the United States' "diplomatic relations."

(citations omitted).

As new modes of carriage with interstate and international reach have emerged, Congress has continued to recognize the importance of uniformity. For example, there is already closely analogous precedent for uniformity and preemption of vicarious fault for equipment providers for interstate carriage. The Graves Amendment, 49 U.S.C. § 30106, is a federal tort reform statute that shields rental companies from vicariously liability claims, providing that:

> (a) [] An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if--

> **(1)** the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> **(2)** there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

This statute was prompted by sound policy favoring uniformity in interstate transportation. *See generally*, *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008). As a result, the Graves Amendment preempts tort claims "within the Amendment's preemption clause and not within its savings clause." *Id.* at 1245.[6] It has now been in effect for two decades and evidences the generally salutatory effects of a clear, uniform national standard in interstate transportation.

The benefits of uniformity are recognized in air transportation as well. International aviation depends upon a consistent legal framework setting out uniform air carrier liability through a

[6] *See also Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 456–57 (8th Cir. 2010) (finding that the Graves Amendment would preempt state law in the area of vicarious liability); *Rein v. Cab East LLC*, No. 08 Civ. 2899(PAC), 2009 U.S. Dist. LEXIS 52617, at *7, 2009 WL 1748905 (S.D.N.Y. Jun. 22, 2009) (similar); *Green v. Toyota Motor CreditCorp*, 605 F.Supp.2d 430, 434 (E.D.N.Y. 2009) (similar); *Flagler v. Budget Rent a Car Sys.*, 538 F.Supp.2d 557, 558 (E.D.N.Y. 2008) ("[T]he Graves Amendment preempts state laws that impose vicarious liability on businesses that rent or lease motor vehicles."); *Layton v. Russell*, No. 13-CV-325, 2014 WL 2949370, at *3 (W.D. Mich. June 30, 2014) ("[T]he Graves Amendment preempts all state vicarious liability schemes imposing liability on lessors of motor vehicles where the vehicle was involved in an accident through no fault of the lessor."); *Hagen v. U-Haul Co. of Tennessee*, 613 F. Supp. 2d 986, 1000 (W.D. Tenn. 2009) (same).

comprehensive multilateral treaty—the Montreal Convention. The Montreal Convention replaced the earlier Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014, T.S. No. 876 (the "Warsaw Convention"). Indeed, signifying the importance of uniformity, "[t]he Montreal Convention is the product of an effort . . . . to reform the Warsaw Convention so as to 'harmonize the hodgepodge of supplementary amendments and intercarrier agreements' of which the Warsaw Convention system of liability consists." *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 371 n. 4 (2d Cir. 2004).[7] The Montreal Convention entered into force on November 4, 2003, and has significant global participation, with 143 parties, including the United States.[8]

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[7] The Warsaw Convention also had uniformity as its foundation. As this Court opined:

> The cardinal purpose of the Warsaw Convention, we have observed, is to "achiev[e] uniformity of rules governing claims arising from international air transportation." The Convention signatories, in the treaty's preamble, specifically "recognized the advantage of regulating in a uniform manner the conditions of ... the liability of the carrier" . . . Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.

El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 169 (1999).

[8] Montreal Convention, available at https://www.icao.int/sites/default/files/secretariat/legal/CurrentListofParties/Mtl99_EN.pdf.

Various U.S. courts have affirmed that the Montreal Convention "preempts state law actions falling within its scope." *Eli Lilly Co. v. Air Exp. Int'l USA, Inc.*, 615 F.3d 1305, 1313 n. 4 (11th Cir. 2010). *See also Badar v. Swissport USA, Inc.*, 53 F.4th 739, 744 (2d Cir. 2022) ("To achieve a uniform liability regime, the Montreal Convention, like the Warsaw Convention before it, preempts 'all state law claims that fall within [its] scope.'"); *Dagi v. Delta Airlines*, Inc., 961 F.3d 22, 27–28 (1st Cir. 2020) ("If an action for damages falls within one of the Convention's damages provisions, then the treaty provides the sole avenue for relief -- that is, the Montreal Convention preempts all local claims that fall within its scope, even if the claims are not cognizable (i.e., even if they do not satisfy the conditions for liability) under the Convention."); *Lindsey v. Am. Airline, Inc.,* No. 24-CV-01440-RS, 2024 WL 3471197, at *2 (N.D. Cal. July 18, 2024) ("The Warsaw and Montreal Conventions were designed to curb airline exposure to unlimited liability by creating uniform laws and procedures for damages sustained on international flights. Allowing plaintiffs recourse through domestic law, even if no remedy is available under the Montreal Convention, would undermine this intention. Therefore, the Montreal Convention preempts state and federal claims that fall within its substantive scope.") (citations omitted).

Moreover, the uniformity governing maritime and aviation reflects a much-needed standardization of legal regimes for the smooth operation of international commerce. Similarly, this uniformity should be extended to and reaffirmed for interstate transportation because motor carriers may themselves be transporting goods across borders or may be providing the first or last leg of a multi-modal transportation of goods in international commerce.

In line with this widespread principle that interstate and international transportation is best governed by a uniform legal framework, this Court should reinforce this uniformity by affirming the decision of the Seventh Circuit. A uniform national legal standard, applicable to a business regulated by the federal government, will provide a stable risk environment conducive to participation by insurers, which enables them to set premiums, limits, and deductibles, and for the market to develop policy wordings with a clear understanding of what risks are, and are not, being undertaken.

IV. Failure to Enforce Preemption Discourages Broker Initiative and Innovation, Increases Risks, and Erodes Safety

The current uncertainty regarding FAAAA preemption has created a disjointed system that subjects brokers to disparate state law claims. Furthermore, it subjects brokers to a "damned if you do; damned if you don't" regime, where brokers who limit themselves to the federal rules are potentially subject to "negligent selection" claims, while brokers who do more are then charged with vicarious liability based on additional steps taken, even if they are the very steps that plaintiffs have demanded elsewhere. Rather than promoting safety, the lack of clear standards actually imperils safety.

Removing preemption, and thus allowing states to force freight brokers to act as excess insurers for the shipping industry, removes any incentive for states to use the most effective tool Congress gave them to improve both safety and compensation for injured victims, namely to require carriers using their roadways to maintain increased insurance policy limits for personal injury. 49 U.S.C. § 14501(c)(2)(A). States can use the historic data of their own roadway incidents to determine whether carriers need to carry increased coverage, and if so, what the appropriate limits should be. Furthermore, if carriers are required to obtain higher coverage amounts, their insurers will likely create incentives for safer carriers, increase rates for unsafe carriers with negative histories, and create programs where improved safety leads to lower premiums. Forcing brokers (and their insurers) who have no real control over carriers to step into this role will remove all these incentives, which will not only decrease safety and compensation to victims in the long run, but is also contrary to Congressional intentions.

Allowing states to transfer financial risk from the operators of motor vehicles, who have the federal duty to operate safely, to market intermediaries, such as brokers, who have a different role, creates an obvious "moral hazard." Put another way, allowing states to do this would irrationally transfer liability and financial exposure from parties actually able to control motor carrier and driver safety (*e.g.*, motor carriers, federal and state regulators, licensing agencies, and police) to brokers and their insurers, neither of which have such control.

While Petitioner in this case argues that brokers must do an undefined "more" than their federally-mandated role or risk "negligent selection" claims, doing "more" will subject brokers to other forms of unfair liability, absent preemption. To wit, the more steps a broker takes to vet carriers, to encourage carriers to vet drivers, to include contractual incentives for safety, to leverage technology to track shipments, speed and hours-of-service compliance, and generally to impose any sort of safety obligations, the greater the risk that a plaintiff will allege that the broker is a *de facto* carrier, principal, or joint-venturer and is liable as such. *See*, *supra*, § II, at 16-17.

The *status quo* seen in many states of posturing cases for policy limits perversely incentivizes insureds (including brokers, especially smaller brokers) to seek lower levels of insurance, or causes them to be priced out at higher levels. Further, higher levels of insurance become unavailable, even if brokers want such coverage. *See Market Hardens in Non-Owned Auto and Contingent Auto Liability*, *supra*, at 9 (noting that increased coverage is becoming harder to find). In catastrophic cases, the threat of undifferentiated nuclear verdicts may allow the extraction of settlements far in excess of any rational fault analysis, to avoid the potential of excess exposure to insureds. While this may help out a few injured parties, the long-term impact is to lead to less—not more—insurance, and to deter proactive and creative efforts by both brokers and their insurers to mitigate loss and therefore risk. And again, the ostensible onus on brokers to cover this risk by getting more insurance presumes (perhaps erroneously) that such insurance is sufficient or will continue to exist —or that the circumstances absent preemption will not eliminate the insurance market for this type of liability altogether.

Absent preemption, broker conduct—even if supportive of driver safety—is used by courts as a basis to establish a duty of care and to hold brokers vicariously liable for motor carriers. This is untenable and counterproductive. Affirming FAAAA preemption promotes safety because it creates the right incentives for businesses through clarity of a uniform legal regime.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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