No. 20-1425

In the Supreme Court of the United States

C.H. ROBINSON WORLDWIDE, INC.,
Petitioner,
v
ALLEN MILLER,
Respondent.

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

BRIEF OF AMICUS CURIAE–DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

MARY MASSARON
Counsel of Record
JOSEPHINE DELORENZO
PLUNKETT COONEY
38505 Woodward Avenue
Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com
jdelorenzo@plunkettcooney.com

EMILY COUGHLIN
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside
Plaza Suite 1870
Chicago, IL 60606
(312)795-1101
ecoughlin@coughlinbetke.com

Counsel for Amicus Curiae
DRI–The Voice of the Defense Bar

QUESTION PRESENTED

Whether a common-law negligence claim against a freight broker is preempted because it does not constitute an exercise of the "safety regulatory authority of a State with respect to motor vehicles" within the meaning of the Federal Aviation Administration Authorization Act's safety exception?

TABLE OF CONTENTS

Page(s)

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF INTEREST[1]

Amicus curiae DRI–the Voice of the Defense Bar, is a 22,500-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. DRI has long been a voice for a fair and just system of civil litigation, seeking to ensure that it operates to effectively, expeditiously, and economically resolve disputes for litigants. To that end, DRI participates as amicus curiae in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's interest in this case, which arises under the Federal Aviation Administration Authorization Act (FAAAA), stems from its members' need to advise their broker clients on standards for selecting available motor carriers to transport property. DRI members also defend these clients when they face lawsuits. The Ninth Circuit's decision recognizes that a negligent selection claim would otherwise be preempted because it "seeks to interfere at the point at which" a broker arranges for transportation by a motor carrier, and therefore, such a claim is directly connected with broker services. Pet. App. at 10a. The court of appeals nevertheless held that a negligent

---

[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have obtained consent to the filing of amicus briefs pursuant to Rule 37 and Petitioner and Respondent were given timely notice.

selection claim falls within the safety regulatory exception, which provides that the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). The result of the Ninth Circuit's decision is a patchwork of "state-service determining laws and regulations," *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008), subjecting brokers to common law standards of "reasonableness" in all 50 states, contrary to the purpose of the act.

If this decision is allowed to stand, brokers will no longer be able to rely on federal agency standards for choosing a carrier, *i.e.*, they will be required to go beyond choosing a carrier that has been allowed to operate by the Department of Transportation and obtained an adequate safety rating from the Federal Motor Carrier Safety Administration.

The Ninth Circuit's decision creates infinite possibilities with respect to what a jury might consider to be a reasonable effort on the part of a broker and this will result in infinite challenges to DRI members and their broker clients. The process for selecting a carrier will now be subject to 50 different common law negligence standards, any combination of which could apply to any given delivery route. What is considered reasonable conduct on the part of a broker in selecting a carrier in one jurisdiction could subject it to liability in another. In addition, because negligence standards of reasonableness are driven by incremental retrospective rulings, lawyers who represent brokers and their broker clients will be hard-pressed to know in advance what the requirements are at any given

time. As several of the district courts that have considered this issue have recognized, such a regime has a significant economic impact on the core services of brokers, a result Congress intended to prevent through the FAAAA.

While the Ninth Circuit is the first court of appeals to speak on this issue, district courts have issued conflicting holdings. DRI urges this Court to grant certiorari and reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

This Court should grant certiorari and reverse the Ninth Circuit's decision. If allowed to stand, the decision will enable plaintiffs to expand the available universe of defendants in the search for deep pockets, given that motor carriers are typically small businesses. But brokers, who act as middlemen connecting shippers and carriers, have no role in hiring or supervising drivers or determining their routes, and thus are far removed from any ability to prevent an accident. Indeed, Congress intended that motor carriers be subject to liability because they are required to have adequate liability insurance – but there is no such requirement for brokers.

As even the Ninth Circuit recognized, a negligent selection claim against a broker is one that Congress intended to preempt by enacting the FAAAA because it is directly related to a broker's core services. The purpose of the FAAAA is to prevent states from implementing various requirements that result in "a patchwork of state service-determining laws, rules, and regulations," because such a scenario "is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008).

Additionally, the fact that Congress has tasked the Secretary of Transportation with maintaining safety standards for motor carriers counsels against allowing negligent selection claims and imposing a heightened standard of care for brokers – again, the

entity farthest removed from any accident – when selecting a motor carrier.

The statutory framework contemplates that brokers will rely on the federal agency's ratings so that brokers can focus on properly providing their core services. Extending to brokers a duty to independently evaluate carriers – a duty that requires the broker to replicate the steps taken by the agency or, more likely, go beyond those steps – adds a layer of unnecessary costs to the system. Moreover, the information to further vet carriers is difficult, if not impossible, for brokers to find.

Despite recognizing that a negligent selection claim is one that the act preempts, the Ninth Circuit held that the claim falls within the safety regulatory exception, which provides that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles[.]" 49 U.S.C. § 14501(c)(2)(A). But this narrow exception does not encompass negligent hiring claims. A negligent selection or negligent hiring claim is not a safety regulation enacted as positive law; it is a retrospective, incrementally changing standard of common law developed by the courts. This makes it challenging for DRI members and the brokers they advise and defend to know or predict the law. Moreover, even if a state law tort claim could be considered an exercise of a state's police power, a negligent selection claim against a broker is not "with respect to motor vehicles" as specified in the plain language of the safety exception. The Ninth Circuit's interpretation effectively guts the act's general rule.

ARGUMENT

I. The Ninth Circuit's Decision Will Enable Plaintiffs to Search For Remote Deep-Pocket Defendants Who Have Little or No Ability to Prevent Trucking Accidents

As DRI members well know from their experience advising and defending their broker clients, the Ninth Circuit's decision will embolden plaintiffs to reach further afield – beyond the motor carriers primarily responsible for any motor vehicle accident – in the search for deep pockets.

But motor carriers are in the best position to prevent accidents by screening potential drivers and adhering to safety standards. The broker's conduct in engaging in its core services, that is, in selecting a carrier and arranging for transportation for a customer, does not constitute a direct – and hardly an indirect – cause of any accident. A "broker" is a company "other than a motor carrier" that "arrang[es] for, transportation by motor carrier." 49 U.S.C. § 13102(2) (defining). Practically speaking, brokers "act as intermediary between shippers and carriers. Their work involves negotiating good shipping rates and quick delivery times with transportation companies." Freight Broker Training: Guide to Coordinating Commercial Transport, by A.S. Brar – 2018 by TruckFreighter.com. Other duties of a broker are:

- coordinating and planning delivery and pick-up schedules between carriers and shippers

- managing dispatch schedules

- monitoring and updating real-time shipment statuses to customers

- efficiently organize multiple deliveries

- discussing and negotiating price agreements with different carriers

Clement Harrison, Freight Broker and Trucking Business Start-Up Guide 2021-2022. Generally speaking, then, a broker is remote from the actual driver and is not involved in the hiring of drivers nor setting the driver's route. In short, a broker is the "industry's middleman," whose role is to link trucking companies and shippers. *Id.*

Indeed, Congress recognized that the motor carrier is the primarily responsible party because, under 49 U.S.C. § 13906(a)(1), a carrier may be registered with the Secretary of the Treasury, and may operate motor vehicles, only if it has liability insurance adequate to cover judgments against the carrier for bodily injury or death "resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property … or both." *See also* 49 C.F.R. § 387.7. Tellingly, there is no such liability insurance requirement for brokers; they need only demonstrate financial security. 49 U.S.C. § 13906(b). *See Creagan v. Wal-Mart Transp., LLC,* 354 F. Supp. 3d 808, 814 (N.D. Ohio 2018) (noting absence of insurance requirement for brokers and concluding that "[n]ot only does this affirmatively establish that a motor carrier may be liable for these types negligence actions, but also the omission of the same language with respect to broker evinces Congressional intent that brokers not be liable for

this conduct."); *Ying Ye v. Glob. Sunrise, Inc.,* No. 1:18-CV-01961, 2020 WL 1042047, at *4 (N.D. Ill. Mar. 4, 2020) (finding negligent selection claim preempted, but noting that plaintiffs are not without a remedy because, given the insurance requirement for motor carriers, in addition to the safety exception, "Congress intended that a motor carrier… may be liable for personal-injury negligence actions despite the FAAAA's preemption provision.")

The applicable minimum amount of liability insurance for motor carriers is $750,000, 49 C.F.R. § 387.9. While plaintiffs may not deem this amount to be enough to properly compensate them after injuries sustained in an accident, this amount is more than enough for many accidents. And if it does not suffice, the FMCSA may remedy the situation rather than for plaintiffs to ask the courts to violate the statutory framework by imposing liability on brokers simply because they have deep pockets.

II. Congress Intended to Preempt States from Imposing Additional Regulations On Brokers

Respondent's negligent selection claim is one that the FAAAA preempts and it does not otherwise fall within the act's safety regulatory exception. As several district courts have recognized, the Ninth Circuit's contrary holding results in the exception swallowing the rule, a rule intended to limit liability for motor vehicle accidents to the carrier, the entity in the best position to prevent them. The result subjects brokers to increased costs and litigation.

Through 49 U.S.C. § 14501(c)(1), Congress set forth the general rule that "[e]xcept as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any … broker … with respect to the transportation of property." As this Court has instructed, the purpose of the FAAAA is to prevent states from implementing various requirements that result in "a patchwork of state service-determining laws, rules, and regulations," because such a scenario "is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373.

The phrase "related to" in 49 U.S.C. § 14501(c)(1) "embraces state laws 'having a connection with or reference to' … 'rates, routes, or services,' whether directly or indirectly." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (quoting *Rowe*, 552 U.S. at 370). Notably, the Ninth Circuit's opinion acknowledges that a negligent selection claim against a broker is the sort of claim the FAAAA intends to preempt because the "selection of motor carriers is one of the core services of brokers." Pet. App. at 10a. A broker, as distinct from a motor carrier, "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).

Additionally, the fact that Congress has tasked the Secretary of Transportation with maintaining

safety standards for motor carriers counsels against allowing negligent selection claims and imposing a heightened standard of care for brokers – again, the entity farthest removed from any accident – when selecting a motor carrier. The Secretary registers motor carriers willing to comply with its regulations, 39 U.S.C. § 13092, and 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)(2). The Secretary must also "periodically update such safety fitness determinations"; "make such final safety fitness determinations readily available to the public"; and "prescribe by regulation penalties for violations of this section[.]" *Id.*, §§(a)(2)-(4).

These directives are implemented by the FMCSA, which administers "procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers receiving a safety rating of 'unsatisfactory' from operating a [commercial motor vehicle]." *See* 49 C.F.R. § 385.1(a). A satisfactory safety rating "is based on the degree of compliance with the safety fitness standard for motor carriers," set forth in 49 C.F.R. § 385.5. "To meet the safety fitness standard, the motor carrier must demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements" to reduce several risks, including, among others, those associated with

unqualified drivers, the use of unsafe vehicles, and failure to maintain accident records. 49 C.F.R. § 385.5.

Additionally, the FMCSA is responsible for considering several factors to determine a carrier's safety rating. 49 C.F.R. § 385.9. The factors include "[a]dequacy of safety management controls," "[f]requency and severity of driver/vehicle regulatory violations," and "[f]requency of accidents." *See* 49 C.F.R. § 385.7, 385.9. Notably, "a motor carrier rated 'unsatisfactory' is prohibited from operating a CMV." 49 C.F.R. § 385.13(a).

This statutory framework thus contemplates that brokers will rely on the federal agency's ratings so that brokers can focus on properly providing their core services of connecting businesses and arranging for transportation. Extending to brokers a duty to independently evaluate carriers –requiring the broker to replicate the steps taken by the agency or, more likely, go beyond those steps – adds a layer of unnecessary costs to the system. As the *Ying Ye* court explained, "to avoid liability for a negligent hiring claim … 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. Enforcing such a claim would have a significant economic impact on …broker services." 2020 WL 1042047, at *3. *See also Krauss v. IRIS USA, Inc.*, No. CV 17-778, 2018 WL 2063839, at *5 (E.D. Pa. May 3, 2018) (where plaintiffs alleged the broker should employ a "heightened and elaborate" process of selecting carriers, the court held that such

a process would "necessarily impact directly upon [the broker's] services and pricing."); *Volkova v. C.H. Robinson Co.*, No. 16 C 1883, 2018 WL 741441, at *3 (N.D. Ill. Feb. 7, 2018) (recognizing that the enforcement of a negligent hiring claim against a broker "would have a significant economic impact on the services [the broker] provides….").

The difficulty is exacerbated because motor carriers tend to be small businesses. According to the American Trucking Association, as of April 2020, 91.3% of motor carriers operate 6 or fewer trucks and 97.4% operate fewer than 20 trucks. See https://www.trucking.org/economics-and-industry-data. Indeed, the vast majority of trucking companies have a fleet of just one or two trucks, see https://ai.fmcsa.dot.gov/RegistrationStatistics/CustomReports.aspx. Accordingly, brokers would need to research and evaluate a large number of carriers on an ongoing basis, replicating the regulatory evaluation that already exists, but must do so without the information necessary to make a proper assessment, such as individual driver's records, disciplinary records, or drug test results.

Indeed, the district court here correctly reasoned that, to avoid liability for a claim of negligent selection, "a broker would consistently need to inspect each motor carrier's background to find any concerning 'red flags,' beyond what appears to be currently required in the marketplace. ..." Pl. App. at 35a. The regulatory effect would be "particularly economic, threatening to replace market forces, because, as a matter of commonsense, the level of service brokers provide directly impacts the amount

brokers charge for providing their service." *Id.* Increased litigation resulting from the Ninth Circuit's ruling and other district court decisions will also obviously contribute to the increase in costs.

DRI members are particularly attuned to the challenges of defending brokers where plaintiffs seek to impose a heightened standard of care. As DRI members have explained, in such negligent selection cases, plaintiffs often argue that brokers should have gone beyond the industry standards of obtaining a copy of the carrier's operating authority, its insurance certificate, and verifying the carrier's safety rating kept by the Department of Transportation and the FMCSA. Instead, plaintiffs' experts have argued that brokers should use information from the FMCSA's website "to determine a carrier's safety record independently before hiring one." Jerry J. Sallings and Courtney C. McLarty, Three Approaches The Front Line in the Defense of Broker Liability Claims, 56 No. 12 DRI For Def. 60 (2014). But, as Petitioner has also pointed out in its Ninth Circuit briefing, under the Fixing America's Surface Transportation Act, Pub. L. 114-94, 129 Stat. 1312 (2015), FMCSA was required to remove certain information from its website, and further, unless a carrier has an unsatisfactory rating, it is authorized to operate on the nation's roadways. (Pl. Brief, pgs. 9-10). Thus, the information available to the broker is less than what the regulatory agencies are able to obtain.

Once allowed to bring such claims, plaintiffs will not feel the need to confine their arguments regarding duty to the parameters of federal regulations. Allowing a jury to hold a broker to a more

stringent standard of care that requires actions beyond consulting safety ratings and other information available from the Department of Transportation and the FMCSA renders such actions ripe for use of the reptile theory and similar "community safety" arguments. As one court has explained, "[t]he term 'reptile theory' refers to a book advancing a trial tactic in which attorneys appeal to jurors' 'reptile brain,' by appealing to their fear, anger, and desire for personal safety." *Jackson v. Low Constr. Grp., LLC*, No. 2:19-CV-130-KS-MTP, 2021 WL 1030995, at *2 (S.D. Miss. Mar. 17, 2021). References to "personal safety," "community safety," "conscience of the community," "danger to the community," and other arguments are intended "to provoke the jury to render a decision based on their emotions and sense of self-preservation, rather than the evidence admitted at trial." *Id.* Some courts have acknowledged that these types of argument "serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders." *Id.* (citing *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985)). *See also Kisner v. State Farm Fire & Cas. Co.*, No. 5:19-CV-194, 2020 WL 6947902, at *1 (N.D.W. Va. Oct. 28, 2020) ("A 'reptile' argument is an appeal to emotion where a plaintiff argues a defendant's conduct is a threat to personal safety or community safety."). With the benefit of hindsight, Plaintiffs' lawyers can easily find some other step that a broker could have taken to have avoided the particular accident and can also inflame the jury with claims for punitive damages.

In sum, it is all too easy for plaintiffs now to argue that a broker should go beyond determining

whether the relevant federal agency has vetted a carrier's safety and allowed it to operate and instead be required to meet to all manner of additional requirements. If the Ninth Circuit's decision is allowed to stand, DRI members must advise their broker clients regarding 50 different common law negligence standards, any combination of which may be applicable to any given delivery route. The challenge is that what is reasonable conduct on the part of a broker in selecting a carrier in one jurisdiction could subject it to liability in another. In addition, jurors will look backward using after-the-fact knowledge about what information became available in litigation to hold brokers accountable although the information may not have been available to them at all, or only available at an enormous increased cost.

DRI urges this Court to grant certiorari and reverse the Ninth Circuit's decision so that DRI members' broker clients are not subjected to "a patchwork of state service-determining laws, rules, and regulations," in contravention of the purpose of the FAAAA. *Rowe*, 552 U.S. at 373.

III. The Narrow Exception for State Safety Regulations Does Not Encompass Negligent Hiring Claims

Despite recognizing that a negligent selection claim is one that the act preempts, the Ninth Circuit held that the claim falls within the safety regulatory exception, which provides that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles[.]" 49 U.S.C. § 14501(c)(2)(A). This Court has explained

that "Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' the preexisting and traditional state police power over safety." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002).

As Petitioner persuasively argues, "the phrase 'regulatory authority of a State' refers to positive-law enactments promulgated and enforced by state or local officials," it does not include the common law as to tort claims developed by state courts. Pet., p. 13, *and see* pgs. 13-18. Stated another way, a negligent selection or negligent hiring claim is not a safety regulation enacted as positive law; it is a retrospective, incrementally changing standard of common law developed by the courts. This makes it challenging for DRI members and the brokers they advise and defend to know or predict the law.

Moreover, as Petitioner further contends (*see* Pet., pgs. 18-19), and several district courts have held, even if a state law tort claim could be considered an exercise of a state's police power, a negligent selection claim against a broker is not "with respect to motor vehicles" as specified in the plain language of the safety exception. The Ninth Circuit's interpretation effectively guts the act's general rule.

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). In *Loyd v. Salazar*, 416 F. Supp. 3d 1290 (W.D. Okla. 2019), the district court adhered to

this rule of statutory construction when it considered the safety exception's plain language and the structure of the act. The court rejected the plaintiff's assertion that the exception should encompass a negligent brokering claim, explaining:

> In the Courts view, Plaintiff's proposal is contrary to Congress' intent in providing specific exceptions to federal preemption; such a broad reading would allow the exception to swallow the rule of preemption related to brokers' services.
>
> Congress expressly limited the exception by specifying that protected safety regulations are ones "with respect to motor vehicles." The phrase "with respect to" signals that an exempt regulation must concern motor vehicles, and narrows the scope of the exception. … "The term 'motor vehicle' means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation ...." *See* 49 U.S.C. § 13102(16). Assuming that a common law negligence claim can be considered a safety regulation with respect to motor vehicles, a negligent hiring or brokering claim – even one alleging that a broker unreasonably selected an unsafe motor carrier – only indirectly concerns the safety of the motor vehicles owned or operated by the motor carrier.

Id. at 1298-99.

The Ninth Circuit's contrary interpretation is thus "an unwarranted extension of the exception to encompass a safety regulation concerning motor carriers rather than one concerning motor vehicles." *Id.* at 300. *See also Creagan*, 354 F. Supp. at 814 (because a "negligent hiring claim seeks to impose a duty on the service of the broker rather than regulate motor vehicles" the claim "is not within the safety regulatory authority of the state and the exception does not apply"); *Ying Ye*, 2020 WL 1042047, at *3 (N.D. Ill. Mar. 4, 2020) (even if a negligent hiring claim "can be considered a safety regulation, that claim has an attenuated connection to motor vehicles. [A broker] is not alleged to directly own, operate, or maintain motor vehicles.")[2] This Court should, therefore, grant certiorari and reverse the Ninth Circuit's decision.

[2] The district court in this case also recognized that "§ 14501(c)(2)(A)'s language is silent regarding broker services. Compare § 14501(c)(1) with § 14501(c)(2)(A). This fact further counsels against reading the exception in § 14501(c)(2)(A) to extend to broker services not clearly within Nevada's 'safety regulatory authority' 'with respect to motor vehicle.'" Pet. App. at 37a.

CONCLUSION

Amicus Curiae DRI–The Voice of the Defense Bar respectfully requests this Court reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

MARY MASSARON
Counsel of Record
JOSEPHINE DELORENZO
PLUNKETT COONEY
38505 Woodward Avenue
Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com
jdelorenzo@plunkettcooney.com

EMILY COUGHLIN
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside
Plaza Suite 1870
Chicago, IL 60606
(312)795-1101
ecoughlin@coughlinbetke.com

Counsel for Amicus Curiae–DRI–
The Voice of the Defense Bar